ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that recommended medical treatment constitutes reasonable medical treatment necessary to maintain Claimant at maximum medical improvement (MMI) for his August 4, 2019 work injury? The specific treatment at issue is: 12 sessions of physical therapy with dry needling, laser, and ultrasound with cortisone; magnetic resonance imaging (MRI) of the lumbar spine; and a gym membership.

FINDINGS OF FACT

1. On August 5, 2019, Claimant suffered a work injury when he tripped and fell between the trusses of an attic, injuring his left leg. Respondents have admitted for the August 5, 2019 work injury.

2. On August 23, 2019, Claimant began treatment for his injury at Work Partners with his authorized treating provider (ATP), Erica Herrera, PA-C. At that time, PA Herrera diagnosed a left knee contusion and a left ankle sprain. On that same date, x-rays of Claimant's left knee and left ankle showed no acute abnormalities.

3. Subsequently, on January 30, 2020, Dr. Peter Scheffel performed a diagnostic arthroscopy on Claimant's left knee. In the surgical notes, Dr. Scheffel stated that he was "not convinced" that Claimant had significant pathology in his left knee. In support of this opinion, Dr. Scheffel noted that during surgery he did not find any abnormalities. Dr. Scheffel further noted that he was optimistic that Claimant could return to doing all activities in two weeks, as tolerated.

4. On May 13, 2020, Claimant was seen by Dr. Richard Knackendoffel with Western Orthopedics and Spine and Sports Medicine for a second opinion. Dr. Knackendoffel noted that based upon prior records and examination, it was possible that Claimant had complex regional pain syndrome (CRPS). Dr. Knackendoffel recommended Claimant undergo a work up for CRPS.

5. On July 21, 2020, Claimant attended an independent medical examination (IME) with Dr. John Raschbacher. In connection with the IME, Dr. Raschbacher reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. Rashbacher opined that Claimant did not have CRPS. Rather, it was Dr. Raschbacher's opinion that Claimant was malingering. In support of this opinion, Dr. Raschbacher noted that there were no objective findings to support Claimant's subjective complaints. Dr. Raschbacher further noted that on

physical examination Claimant was "grossly nonphysiologic". Dr. Raschbacher opined that Claimant had reached maximum medical improvement **(MMI)** and further treatment would not be beneficial to Claimant. Dr. Raschbacher also noted that Claimant was complaining of lower back pain. Dr. Raschbacher opined that the low back was not related to Claimant's work injury. Finally, Dr. Raschbacher did not recommend any work restrictions.

6. On December 9, 2020, Claimant was seen by Dr. Ellen Price. At that time, Dr. Price determined that Claimant had reached MMI. She recommended maintenance medical treatment that would include a thermogram, QSART, sympathetic blocks for pain relief, continued use of gabapentin, and acupuncture. Dr. Price assessed permanent impairment of 32 percent for Claimant's left lower extremity.

7. On January 11, 2021, Claimant was seen by Dr. J. Tashof Bernton with Colorado Rehabilitation and Occupational Medicine. The purpose of that visit was to perform diagnostic testing related to CRPS. Dr. Bemton performed a thermogram and found that these results met the criteria for CRPS. In the medical record of that date, Dr. Bemton stated that Claimant "has two positive tests for [CRPS]".

8. On April 6, 2021, Claimant attended a Division independent medical examination (DIME) with Dr. Anjmun Sharma. In connection with the DIME, Dr. Sharma reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his DIME report, Dr. Sharma noted that the only body part at issue was Claimant's left knee. Dr. Sharma opined that Claimant had reached MMI for his left knee injury as of the date of the DIME, April 6, 2021. Dr. Sharma assessed a permanent impairment rating of 29 percent for Claimant's left lower extremity. Dr. Sharma further opined that Claimant could return to full duty work, with no permanent restrictions. He recommended Claimant limit crawling, kneeling, squatting, and climbing. Although he was not asked to address CRPS, Dr. Sharma noted that in his opinion, Claimant did not have CRPS. Dr. Sharma also addressed maintenance medical treatment. Specifically, a 12 week work hardening program, a one year gym membership, and the use of the medication Celebrex.

9. On December 3, 2021, Claimant returned to PA Herrera. On examination, Claimant had ongoing allodynia with a light touch over the medial knee, but no significant edema or soft tissue swelling. PA Herrera noted that she planned to formally close Claimant's case, once he underwent a functional capacity evaluation (FCE).

10. On January 21, 2022, Claimant was seen by PA Herrera and Dr. Laurie Marbas. PA Herrera stated that Claimant was at MMI and assigned a number of work restrictions. Those restrictions included: lifting, pushing, and pulling a maximum of 10 pounds; no repetitive climbing, deep squats, kneeling, or crawling; fifty percent of Claimant's day must be sitting, with walking/standing during the remainder of the day, as tolerated. PA Herrera specifically noted that "he has had many months of physical therapy and never really saw much benefit and plateaued." PA Herrera also noted that Dr. Marbas confirmed the impairment rating assessed by Dr. Sharma on April 6, 2021,

and confirmed that Claimant should receive maintenance care with medications and follow-up visits as needed over the course of five years.

11. On March 7, 2022, Claimant returned to PA Herrera. At that time, Claimant asked PA Herrera to revise his work restrictions on the basis that he believed his condition had worsened. PA Herrera declined to revise the work restrictions and maintained her recommendations for home exercise and medications.

12. On April 21, 2022, Claimant was seen by PA Herrera. On that date, Claimant again asserted that his condition was worsening. PA Herrera noted that she did not see any worsening of Claimant's condition. However, Claimant continued to report a worsening of his symptoms and on June 2, 2022, PA Herrera referred Claimant back to Dr. Price.

13. On July 2 2021, Dr. Sharma authored an addendum to his DIME report. The purpose of the addendum was to address the diagnosis of CRPS. Dr. Sharma assessed an additional ten percent whole person impairment rating in light of the CRPS diagnosis.

14. On December 7, 2021, Respondents filed a Final Admission of Liability (FAL) admitting for a permanent impairment rating of 10 percent whole person, and a scheduled rating of 29 percent for Claimant's left lower extremity. The Respondents also admitted for maintenance medical treatment and referenced Dr. Shanna's July 9, 2021 DIME report.

15. On February 24, 2022, Dr. Rashbacher authored a report following his review of Claimant's medical records as well as video surveillance. Dr. Raschbacher again opined that Claimant had reached MMI. Dr. Raschbaher further opined that Claimant's subjective complaints were "unreliable" and "not a good basis upon which to pursue medical care." In support of his opinions, Dr. Raschbacher referenced his review of the video surveillance.

16. Claimant returned to Dr. Price on August 16, 2022. In the medical record of that date, Dr. Price noted that Claimant had not had much improvement since being placed at **MMI.** Claimant reported to Dr. Price that other than ice and a TENS unit, "nothing really" helped his symptoms.

17. On April 21, 2023, Claimant was seen by Dr. Price. At that time, Dr. Price stated "I really have nothing else to offer him." Dr. Price listed Claimant's lengthy treatment history that included: ketamine spray, gabapentin, Celebrex, ibuprofen, acupuncture, and physical therapy. Dr. Price specifically noted that "[n]one of these have really made a significant difference." Dr. Price recommended that Claimant wean off of his cane. Nevertheless, Dr. Price requested authorization for referrals for five to six visits of physical therapy and a one-year gym membership.

18. On May 31, 2023, Dr. Price saw Claimant. At that time, Dr. Price noted that Claimant's hip pain was not work related. Dr. Price reiterated that Claimant remained at MMI, Again, Dr. Price stated that she did not know what more she could do to help Claimant.

19. On August 11, 2023, Dr. Raschbacher reviewed additional medical records and issued a supplemental report. In that report, Dr. Raschbacher noted that he agreed with PA Herrera that there was no objective evidence of a worsening of Claimant's condition. Dr. Raschbacher again stated his opinion that Claimant did not have CRPS.

20. On August 2, 2023, Claimant returned to Dr. Price. At that time, Dr. Price stated that Claimant "[did] not really have anything that helps him. Despite her repeated indications that she had nothing more to offer, Dr. Price requested a lumbar spine MRI,

21. On August 20, 2023, Dr. Raschbacher issued another report, at the request of Respondents. Dr. Raschbaher reiterated his opinion that Claimant was malingering.

22. On October 5, 2023, and in response to Dr. Raschbacher's independent medical examination, Dr. Price provided in a letter to Respondents that she really had nothing else to offer Claimant and that she did not need to see him again, but that a gym membership would be appropriate.

23. On September 12, 2023, Claimant returned to Dr. Raschbacher for a repeat IME. In connection with this IME, Dr. Raschbacher reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. At the IME, Claimant reported that he continued to have pain in his left leg, specifically above the calf and below the knee. He also reported that he had begun to have right sided symptoms three years prior. These right sided symptoms from his right buttock down into his right foot. Dr. Raschbacher noted that Claimant had been diagnosed with CRPS. However, it continued to be Dr. Raschbacher's opinion that Claimant does not have CRPS. Dr. Raschbacher further opined that Claimant's pain complaints remained the same, and he continued to be at MMI. With regard to the request for a gym membership, Dr. Raschbacher opined that was not reasonable or necessary.

24. On November 17, 2023, Dr. Raschbacher issued another report. Dr. Raschbacher was asked to opine regarding Dr. Price's recommendations of a lumbar spine MRI and 12 visits of physical therapy (that would include dry needling, laser, and ultrasound with cortisone). Dr. Raschbacher recommended denial of these treatment modalities. With regard to the lumbar spine **MRI,** it is Dr. Raschbacher's opinion that Claimant's lumbar spine is not related to the work injury. With regard to the other modalities, Dr. Raschbacher opined that physical therapy would not improve Claimant's function, nor maintain him at **MMI.** Dr. Raschbacher noted that laser treatment is not provided for in the Colorado Medical Treatment Guidelines (the Guidelines). Finally, with regard to ultrasound with cortisone, Dr. Raschbacher opined that this passive treatment would not improve Claimant's function.

25. On November 1, 2023, Claimant was seen by Dr. Price. Again, Dr. Price listed a number of treatment modalities that Claimant had undergone, including acupuncture, nonsteroidal medications, physical therapy, and exercise. Dr. Price noted that none of these treatments helped Claimant's symptoms. Despite this statement, Dr. Price requested authorization for referrals for twelve sessions of physical therapy with dry needling, laser therapy, an ultrasound with cortisone, and a lumbar spine MRI.

26. Claimant testified that he continues to have symptoms related to CRPS. testimony. Claimant also stated that his low back and right leg are also painful. Claimant believes that these body parts are related to his work injury. Claimant further testified that he wants to undergo all treatment currently recommended by Dr. Price.

27. Dr. Raschbacher's deposition testimony was consistent with his written reports. It continues to be Dr. Raschbacher's opinion that Claimant does not have CRPS. Dr. Raschbacher further testified that it continues to be his opinion that Claimant is malingering. In support of his opinions, Dr. Rachbacher referenced his review of video surveillance[1] of Claimant and his belief that Claimant presents differently to his medical providers. Dr. Raschbacher further testified that none of the recommended medical treatment is reasonable and necessary. Specifically he noted that the lumbar spine MRI would not be related, as the lumbar spine is not a related body part in this claim.

28. As an initial matter, the ALJ recognizes that whether or not Claimant has CRPS is not at issue at this time. The DIME physician, Dr. Sharma, included a permanent impairment rating for the CRPS diagnosis. Respondents have filed an FAL admitting for both the permanent impairment related to Claimant's left lower extremity and the CRPS diagnosis.Therefore, the ALJ has not considered any of Dr. Raschbacher's opinions related to whether or not the diagnosis of CRPS is appropriate.

29. The ALJ credits the medical records and the opinions of Dr. Raschbacher and PA Herrera. The ALJ also credits Dr. Price's repeated statements that she had nothing further to offer Claimant to treat his symptoms. While Dr. Price more recently has requested a number of treatment modalities, the ALJ is not persuaded that these treatments are reasonable and necessary to maintain Claimant at MMI.

30. As noted in multiple medical records, Claimant has experienced no benefit from physical therapy. The ALJ finds that the Claimant has failed to demonstrate that it is more likely than not that the recommended physical therapy (with dry needling, laser therapy, an ultrasound with cortisone) is reasonable medical treatment necessary to maintain Claimant at MMI.

31. The ALJ credits the opinions of Dr s. Sharma and Raschbacher and finds that the lumbar spine is not a compensable body party. Therefore, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the recommended

[1] During his deposition testimony, Dr. Raschbacher made multiple references of his review of surveillance video of Claimant. No surveillance was offered into evidence at the hearing or as part of the deposition.

lumbar spine MRI is reasonable medical treatment necessary to maintain Claimant at **MMI.**

32. The ALJ credits that opinion of Dr. Raschbacher that a gym membership would not be beneficial to Claimant. Therefore, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the recommended gym membership is reasonable medical treatment necessary to maintain Claimant at **MMI.**

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

5. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

6. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. *See Jones v. T.T.C. Illinois,* Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); *see also Burchard v. Prefe"ed Machining,* W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTD); *see also Stamey v. C2 Utility Contractors et al,* W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

7. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that recommended medical treatment of 12 sessions of physical therapy with dry needling, laser, and ultrasound with cortisone; a lumbar spine MRI; and a gym membership; constitutes reasonable medical treatment necessary to maintain Claimant at MMI. As found, the medical records and specific opinions of Drs. Sharma, Price and Raschbacher and PA Herrera are credible and persuasive.

ORDER

It is therefore ordered that Claimant's request for 12 sessions of physical therapy with dry needling, laser, and ultrasound with cortisone; a lumbar spine **MRI;** and a gym membership is denied and dismissed.

Dated March 4, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

ISSUES

- Did Claimant prove Respondents should be penalized under § 8-43-304(1), commencing February 10, 2023, for "failure to provide medical care pursuant" to the Act and prior Orders?

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on October 25, 2014, while working as a maintenance technician. He was cleaning a large ice machine with a cleanser that contained phosphoric acid. The acid splashed onto his forearms above his protective gloves, causing chemical burns.

2. Shortly thereafter, Claimant developed painful blisters on his forearms. He went to an urgent care clinic and was given Silvadene cream to apply to his arms. A few days later, Claimant developed an itching, burning rash moving up from his arm to his neck and a portion of his back. He was initially diagnosed with allergic contact dermatitis. Claimant then started taking Benadryl. Initially, the rash seemed to improve. But several days later he broke out in large hives on multiple areas of his body.

3. Claimant began treating with Dr. Matthew Bowdish, an allergy specialist, on January 12, 2015. Claimant was still breaking out in hives, and Dr. Bowdish diagnosed subacute-going-on-chronic urticaria. Dr. Bowdish opined that "either the Silvadene or the Benadryl cream promoted some sort of immunologic response that is still sputtering with urticarial lesions that are not very well controlled."

4. On February 24, 2015, Dr. Bowdish noted several urticarial lesions on Claimant's hands, left arm, and chest. Dr. Bowdish diagnosed chronic idiopathic urticaria, which was resistant to multiple antihistamines, leukotriene inhibitors, and systemic steroids. He recommended omalizumab ("Xolair") therapy to hopefully modulate and suppress Claimant's immune response.

5. Respondents refused to authorize the Xolair.

6. Claimant underwent an Independent Medical Examination (IME) at Respondents' request with Dr. Tashof Bernton on June 1, 2015. Dr. Bernton opined the symptoms such as rashes, hives, swelling, and difficulty breathing represented different aspects of a "type 1" allergic reaction, which is characterized by histamine release and mediated by an IgE antibody. Dr. Bernton noted such allergic reactions are typically time-limited, particularly with treatment. But occasionally "allergic reactions such as this can go on to chronic urticarial reactions such as this patient had." Dr. Bernton noted there was no prior medical history to suggest an alternate cause of Claimant's symptoms. Therefore, Dr. Bernton concluded the condition was related to Claimant's injury.

7. Claimant was put at MMI on June 30, 2015, by Dr. Anjmun Sharma. Dr. Sharma recommended Claimant receive Xolair treatment as maintenance care.

8. Respondents still did not authorize Xolair.

9. Claimant attended a DIME with Dr. Jack Rook on November 30, 2015. Dr. Rook opined Claimant was not at MMI because he remained symptomatic had not been able to try Xolair.

10. Claimant subsequently underwent an IME with Dr. Michael Volz at Respondents' request. Dr. Volz agreed that treatment with Xolair was reasonable.

11. A hearing was held before me on February 1, 2017, regarding Claimant's request for medical benefits, including Xolair therapy. In a final Order dated March 9, 2017, I found Xolair to be reasonably needed and causally related to the work injury. Accordingly, Insurer was ordered to "authorize and pay for omalizumab [Xolair] therapy." Respondents were also ordered to cover "all reasonable and necessary medical treatment to cure and relieve the effects of Claimant's injury, including additional diagnostic testing suggested by Dr. Volz."

12. The parties subsequently agreed to designate Dr. Volz as Claimant's ATP. Thereafter, Dr. Volz's office began contacting Respondents' adjuster to obtain authorization for the Xolair therapy and diagnostic testing. However, the adjuster did not respond to the requests. After several additional failed attempts to obtain authorization, Dr. Volz notified Respondents that "everything is on hold for now until we get approval."

13. Claimant contacted Dr. Volz' office repeatedly but could not obtain a follow-up appointment without approval from Insurer. Claimant was breaking out in hives almost every day and having difficulty breathing. He was in "dire straits" and could no longer wait for Respondents to authorize Dr. Volz to start treatment. Therefore, Claimant saw Dr. Christopher Webber on his own referral. Dr. Webber initiated Xolair therapy in May 2018. The treatment was very successful and Claimant's hives and pulmonary symptoms improved dramatically in less than a month.

14. Respondents finally authorized Dr. Volz to proceed with testing and Xolair therapy on May 3, 2018.

15. Claimant sought penalties for Respondents' failure to cover the treatment and testing as previously ordered. On February 9, 2019, ALJ Richard Lamphere imposed penalties of $200 per day for 114 days for violation of the March 9, 2017 Order. Judge Lamphere concluded "Respondents violated [the March 9, 2017] order requiring payment of all reasonable and necessary medical treatment, specifically the additional diagnostic testing as requested by Dr. Volz."

16. Respondents appealed Judge Lamphere's order. The ICAO affirmed the imposition of a penalty for the unreasonable refusal to authorize treatment despite the prior Order. However, shortly after Judge Lamphere's decision was issued, the Supreme Court had announced the *Dami Hospitality* decision setting forth new standards for

determining whether a penalty was "grossly disproportionate." Therefore, the ICAO remanded the case for additional findings regarding the proportionality of the penalty in light of *Dami Hospitality*.

17. On remand, Judge Lamphere determined the $200 per day penalty was not disproportionate, considering the clear nature of the violation and the significant harm to Claimant caused by the denial of treatment. Judge Lamphere found that Claimant's condition progressively deteriorated without treatment, and "there was not a single day during the penalty period that Claimant did not suffer physical symptoms related to the injury and the delay in treatment caused by Respondents' decision to ignore the March 9, 2017 Order."[1] Judge Lamphere also noted Claimant's quick and substantial improvement once he was finally able to implement Xolair therapy.

18. Xolair is a long-term, potentially lifelong, treatment for Claimant's condition. He briefly tried stopping the medication in October 2018, but the hives and pulmonary symptoms quickly returned in full force. Claimant restarted the medication and the hives largely resolved. In mid-2020, the symptoms worsened despite monthly injections, so the injections were increased to every two weeks. After approximately six weeks, Claimant's condition stabilized, and he resumed injections at monthly intervals.

19. Dr. Volz put Claimant at MMI on July 13, 2020. He noted Claimant's excellent response to Xolair, followed by a quick regression when the medication was stopped. As a result, Dr. Volz opined Claimant would require "continual" Xolair treatment (every 4 weeks) "indefinitely." Dr. Volz assigned a 35% whole person rating.

20. Claimant had a follow up DIME with Dr. Rook on December 14, 2020. Dr. Rook agreed Claimant was at MMI with a 35% whole person impairment. Dr. Rook also opined Claimant would require monthly Xolair injections "indefinitely," and may periodically require more frequent injections if he experiences additional flares.

21. Respondents unsuccessfully challenged Dr. Rook's rating at a hearing before me on May 18, 2021. In a final Order dated July 8, 2021, I found that Respondents failed to overcome the DIME.

22. Respondents filed a Final Admission of Liability on October 26, 2021, admitting for the DIME rating and medical benefits after MMI. The adjuster who issued the FAL was [Redacted, hereinafter GB] at [Redacted, hereinafter SK].[2]

23. On September 13, 2022, Claimant requested a change of physician from Dr. Volz to Dr. Webber. Claimant requested the change because he lives in Colorado Springs and Dr. Volz's office is in Denver. A different adjuster at SK[Redacted], [Redacted, hereinafter MK], denied the request on September 26, 2022.

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[1] Judge Lamphere's Order on remand was not submitted at hearing, but the findings were discussed extensively in *Conger v. Johnson Controls, Inc*., W.C. No. 4-981-806-001 (ICAO, April 6, 2020).

[2] SK[Redacted] is the third-party administrator (TPA) for Insurer on this claim.

24. Claimant requested a hearing seeking a change of physician. The parties resolved the issue with a stipulation dated February 9, 2023. The stipulation provided,

> The parties have contacted Christopher Webber, M.D., who is located in Colorado Springs, and is familiar with Claimant, having treated for this industrial injury on prior occasions. Dr. Webber is agreeable to providing the ongoing maintenance care and Respondents agree he is authorized to do so.

25. The stipulation was approved by Judge Lamphere on February 9, 2023.

26. Also on February 9, Respondents' counsel emailed [Redacted, hereinafter AR], Dr. Webber's practice manager, about Dr. Webber taking over Claimant's maintenance care. Counsel stated, "I am unclear who the new adjuster is (GB[Redacted] has retired), but all of the claim information is attached."

27. Using the information provided by Respondents' counsel, AR[Redacted] immediately started contacting SK[Redacted] to obtain billing instructions and request authorization for Xolair therapy. AR[Redacted] called SK[Redacted] twice over the next several weeks but was not given the name or contact information for the current adjuster. AR[Redacted] could not recall the exact dates of her calls to SK[Redacted].

28. On March 8, 2023, AR[Redacted] emailed Respondents' counsel, with a copy to Claimant's counsel, and asked, "I am wondering if you know who the new adjuster is? I have been unable to get that information." Claimant's counsel emailed Respondents' counsel a few hours later and requested that he provide that information to AR[Redacted] "ASAP" so she "can contact the adjuster and get authorization." Claimant's counsel further advised that if the "lack of cooperation" with Dr. Webbers' office continues, "we're going to have to address it with an application for hearing."

29. Respondents' counsel responded to AR[Redacted] on March 14, 2023, stating, "I have emailed the supervisor again today. I will try and get this taken care of as soon as I can."

30. Respondents' counsel subsequently advised AR[Redacted] that MK[Redacted] is the current adjuster. AR[Redacted] did not document the exact date, but testified, "it took him awhile . . . [but] he finally did get that name to me."

31. AR[Redacted] relayed Mr. MK's[Redacted] contact information to a member of her staff, [Redacted, hereinafter DD], "to get that authorization for us." DD[Redacted] thereafter left three voicemails for MK[Redacted] requesting preauthorization for Xolair injections. MK[Redacted] returned none of the messages. Eventually, DD[Redacted] stopped pursuing authorization from MK[Redacted] because she obtained authorization from Claimant's private health insurance, [Redacted, hereinafter BC].

32. AR[Redacted] did not know the exact dates on which DD[Redacted] contacted MK[Redacted] for preauthorization. However, those calls probably occurred

before September 14, 2023, when AR[Redacted] followed up with DD[Redacted] about the preauthorization status.

33. In September 2023, AR[Redacted] obtained verbal authorization from an unknown person at SK[Redacted] for Claimant's office visits with Dr. Webber, but still had not received authorization for Xolair therapy. Preauthorization and prompt payment is essential to Dr. Webber's ability to provide the injections because Xolair is very expensive, and Dr. Webber's office cannot afford to dispense the medication without a commitment for timely reimbursement.

34. Shortly before her October 11, 2023 deposition, AR[Redacted] spoke to someone in SK[Redacted] medication payment department, and was told that Claimant's case was "closed." As of AR's[Redacted] deposition, Dr. Webber's office still had not received authorization for Xolair treatment.

35. Dr. Webber's office relied on other resources to allow Claimant to receive Xolair injections despite the lack of response or preauthorization from Respondents. They obtained approval from BC[Redacted] and procured the medicine from a specialty pharmacy ([Redacted, hereinafter AO]) under a program that covers the costs not paid by insurance. AO[Redacted] charges Claimant a $5 co-pay for each injection. More recently, they referred Claimant to an infusion center that has the resources to administer the high-cost injections and wait for payment, which is not feasible for Dr. Webber's practice. Because of these efforts, Claimant has been able to receive Xolair injections at regular intervals, every four weeks.

36. Respondents presented no sworn testimony from MK[Redacted] or any other individual. Accordingly, there is no persuasive evidence to explain Respondents' repeated refusal to respond to Dr. Webber's office or provide authorization for Xolair treatment.

37. Claimant proved Respondents violated the March 9, 2017 Order requiring them to authorize and pay for Xolair therapy. Respondents also violated the February 9, 2023 Order approving the stipulation that Respondents would authorize Dr. Webber to provide Xolair as maintenance care. Respondents' conduct was objectively unreasonable.

38. Claimant proved Respondents should be penalized $400 per day from March 9, 2023 through October 11, 2023.

39. The penalties shall be apportioned 50% to Claimant and 50% to the Colorado Uninsured Employer Fund.

CONCLUSIONS OF LAW

A. Penalties

Section 8-43-304(1) requires the imposition of penalties up to $1,000 per day when any insurer or its agent "fails, neglects, or refuses to obey any lawful order of the director

or panel." An order of an ALJ is equivalent to an order of the director for purposes of § 8-43-301(1). *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001).

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

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

Claimant proved Respondents violated the March 9, 2017 Order requiring Insurer to "authorize and pay for omalizumab [Xolair] therapy" by refusing to respond to Dr. Webber's repeated requests for billing information and authorization. The requirement to "authorize and pay for" Xolair necessarily includes an obligation to respond to inquiries from the provider asking how and where to send requests for authorization and billings. The failure to respond to Dr. Webber and authorize the treatment was objectively unreasonable. Claimant's entitlement to Xolair was previously adjudicated in his favor. Unlike a one-time procedure such as surgery, Xolair is an ongoing medication repeated at regular intervals, typically every four weeks. Absent a successful request to reopen or modify the issue, the March 9, 2017 Order remains in effect and Respondents remain obligated "to authorize and pay for" Xolair. *See* § 8-43-201(1). Respondents offered no persuasive evidence that shows or even suggests a reasonable basis for their inaction.

Respondents also violated the February 9, 2023 Order approving the stipulation allowing Dr. Webber to provide Xolair as maintenance care. Given the high cost of the medication, it was reasonably foreseeable that any new ATP would need prior authorization before commencing treatment. Despite this, Respondents ignored multiple requests from Dr. Webber's office. Failing to respond to requests for authorization is the functional equivalent of denying authorization. Eventually, Respondents verbally advised Dr. Webber that he was authorized to "see" Claimant, but never provided authorization for the actual treatment Dr. Webber was to provide.

Respondents' argument that they have not denied treatment because "no bills were ever submitted" is not a persuasive basis to deny a penalty. Dr. Webber's staff

initially did not know where to send billing and requests for authorization, because they had only been given specific contact information of an adjuster who had retired. Their repeated attempts to contact SK[Redacted] through more general channels were ignored. Once AR[Redacted] was finally given MK's[Redacted] name and number, they made multiple attempts to contact him directly. Those messages were also ignored. And when they were finally able to speak with someone in SK's[Redacted] medication payment department, they were erroneously told the claim was "closed." As a result, it is unsurprising that Dr. Webber's office submitted no formal billings to SK[Redacted], because they did not know where or to whom they should send the bills. That lack of knowledge was entirely the fault of Respondents. It would be nonsensical to allow a carrier to ignore repeated requests for billing instructions, and then deny penalties because the physician never submitted any bills.

B. Specificity of the penalty claim

Section 8-43-304(4) provides that any application for hearing on penalties "shall state with specificity the grounds on which the penalty is being asserted." The specificity requirement serves two functions. First, it notifies the alleged violator of the basis of the claim so it may cure the violation within the statutory timeframe. Second, it ensures the alleged violator receives notice of the legal and factual bases for the penalty claim to protect its due process rights to present evidence, confront adverse evidence, and present argument to support its position. *Jakel v. Northern Colorado Paper, Inc.*, W.C. No. 4-524-991 (ICAO, October 6, 2003).

Respondents argue they could not cure the alleged violation because Claimant failed to plead the penalty claim with sufficient specificity. This argument is unpersuasive. The purpose of the specificity requirement is not simply to advise an unfamiliar observer of the basis for a penalty claim. Rather, it is to provide adequate notice *to the violator*, and a reasonable opportunity to remedy the violation. Therefore, the adequacy of the notice must be evaluated in the context of the ongoing claim and with an eye to the knowledge already possessed by the parties. Given the lengthy history of litigation in this claim resulting in multiple orders requiring Respondents to authorize treatment and imposing penalties, coupled with the contemporaneous communications from Claimant's counsel and AR[Redacted] before the application for hearing was filed, is it highly implausible that Respondents did not understand the basis for the penalty Claimant is seeking. Moreover, no testimony was presented on behalf of Respondents, so any finding that Respondents were confused or unclear about the basis for the penalty would be speculative and unsupported by substantial evidence.

C. Duration of the violation

Section 8-43-305 provides that "every day" during which a party fails to comply with a statute or rule "constitutes a separate and distinct violation." The purpose of § 8-43-305 is to address "ongoing conduct." Thus, a party who commits a "continuing violation" is subject to a penalty for each day until the violation is remedied. *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014 (Colo. App. 2012). A continuing

violation—which typically involves a delay in acting—can be cured simply by taking the required action. *Id*.

Claimant argues the penalty period should commence on February 10, 2023, the day after the stipulation regarding the change of physician to Dr. Webber was approved. But I agree with Respondents that there was no violation of any existing order as of February 10. Rather, the violation did not begin until Dr. Webber started contacting Respondents seeking billing information and authorization for Xolair treatment. It was only then that Respondents violated the previous order to "authorize and pay for omalizumab [Xolair] therapy."

AR[Redacted] credibly testified she contacted SK[Redacted] multiple times between February 10 and March 9, 2023, and got no answer as to the identity of the current adjuster. She could not recall specific dates of those contacts. But AR's[Redacted] March 9, 2023 email gave Respondents clear notice that her contacts were being ignored. At that point, it was incumbent on Respondents to provide the necessary information to facilitate billing and authorization for Xolair treatment as previously ordered. The persuasive evidence shows the violation commenced no later than March 9, 2023.

In his post-hearing position statement, Claimant requested penalties only through October 11, 2023, the date of AR's[Redacted] deposition. Claimant reasons that Respondents may have remedied the violation after the deposition and therefore requests that any penalties after that date be reserved for future determination. Therefore, daily penalties will be imposed from March 9, 2023 through October 11, 2023, a period of 217 days.

D. The amount of the penalty

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

The preponderance of persuasive evidence shows that a substantial penalty is warranted in this case. Multiple factors inform this determination. First, it is important to note that the misconduct here involves violation of a final Order. The General Assembly considers "disregarding a tribunal's lawful order" a more "egregious" offense than violating

[3] In this context, "reprehensibility" means "worthy of censure or rebuke." *Adakai v. St. Mary Corwin Hospital*, W.C. No. 4-619-954 (ICAO, May 5, 2006).

a statutory provision or procedural rule. *Holliday v. Bestop, Inc*., 23 P.3d 700 (Colo. 2001). Allowing parties to flout final orders without significant repercussions would undermine the authority of the adjudicative process and threaten the integrity of the workers' compensation system.

Second, Respondents' behavior reflects a distressing level of indifference as to the consequences of their inaction. Although their violation caused no significant physical harm to Claimant, that is only because Dr. Webber's office marshalled other resources to continue Xolair treatment without authorization. The lack of harm is certainly not attributable to any mitigating effort on Respondents' part. Nevertheless, the *potential* harm to Claimant was substantial, and well known to Respondents based on Judge Lamphere's prior findings about the suffering caused by the previous break in treatment. Having previously established his entitlement to Xolair therapy through litigation, Claimant should not be subject to *any* risk of harm occasioned by failure to authorize the treatment in a timely manner.

Third, Respondents presented no persuasive evidence of any attempt to remedy this situation. The issues related to authorization and billing could have been resolved immediately with a simple return phone call or email from the adjuster. And yet, as of Ms. AR's[Redacted] October 11, 2023 deposition, Respondents still had not given authorization for Xolair therapy. The continued stonewalling of the ATP is baffling, particularly given the prior litigation and pending claim for penalties.

Finally, a substantial penalty is warranted because Respondents were previously penalized for very similar conduct related to Dr. Volz. Judge Lamphere characterized the previous violation as "negligence." Considering the history of this claim, and the complete lack of explanation provided by the adjuster at hearing, Respondents' recurrent behavior evidences flagrant disregard of their obligations and is grossly negligent. *E.g., Pfantz v. Kmart Corp*., 85 P.3d 564, 568 (Colo. App. 2003) (gross negligence "is more than negligent and less than intentional").

A pattern of repeated violations provides a basis for an enhanced penalty. *E.g., Associated Business Products v. Industrial Claim Appeals Office, supra*; *Gianzero v. Wal-Mart Stores, Inc*., W.C. No. 4-669-749 (ICAO, December 10, 2007); *Adakai v. St. Mary Corwin Hospital*, W.C. No. 4-619-954 (ICAO, May 5, 2006). The $200 per day penalty previously imposed by Judge Lamphere clearly failed to impress on Respondents the importance of complying with orders regarding treatment. Accordingly, an increase in the amount of the penalty is necessary to deter ongoing and future violations.

As found, a penalty of $400 per day is appropriate under the circumstances.

E. The $400 daily penalty is not constitutionally excessive

The discretion to fix the amount of the penalty is not unlimited, and the ALJ must ensure that the penalty is not "grossly disproportionate to the gravity of the offense." *Colorado Dept. of Labor & Employment v. Dami Hospitality LLC*, 442 P.3d 94, 101 (Colo. 2019). When making this determination, the ALJ must consider the violator's ability to

pay, and whether the penalty is harsher than penalties imposed for comparable offenses in this or other jurisdictions. *Id*. at 102. The proportionality analysis focuses on the amount of the daily penalty, rather than the aggregate total of penalties imposed. *Id*. at 103. The penalized party has the burden of proving the penalty is "grossly disproportionate." *Associated Business Products v. Industrial Claim Appeals Office*, *supra*, at 326.

No evidence was introduced regarding Insurer's ability to pay a penalty. But Insurer is an established provider of workers' compensation insurance that has insured Colorado employers for at least 25 years. *E.g*., *Ramirez v. Etkin Construction and Indemnity Insurance Company of North America*, W.C. No. 4-410-318 (ICAO, January 27, 2000) (DOI 01/21/1999). Employer is a publicly traded multinational corporation. Absent evidence to the contrary, one can safely assume that the daily cashflow of these Respondents dwarfs the $400 daily penalty imposed herein. Accordingly, there is no basis to conclude the daily penalty will create a financial hardship for Respondents.

Respondents presented no evidence regarding the amount of penalties levied in "comparable" cases in Colorado or other jurisdictions. But case law reveals comparable penalties imposed in other cases involving repeated misconduct. For instance, in *Associated Business Products v. Industrial Claim Appeals Office, supra*, the ALJ imposed penalties of $300[4] per day for failure to pay $107.79 in medical bills. The large penalty was justified, in part, by the fact that the respondents had previously been penalized in the same case. Similarly, in *Brown v. Manfredi Motor Transit*, W.C. No. 4-451-683 (ICAO, September 21, 2001), the Panel upheld a penalty of $350 per day for repeated violations of procedural rules governing termination of TTD benefits. And *Gianzero v. Wal-Mart Stores, Inc*., W.C. No. 4-669-749 (ICAO, December 10, 2007) upheld penalties of $400 per day for a repeated pattern of dictating medical care.

F. Apportionment

Penalties must be apportioned between the aggrieved party and the Colorado Uninsured Employer Fund (CUE Fund) at the discretion of the ALJ, with the caveat that the aggrieved party must receive at least 25% of any penalty assessed. Section 8-43-304(1). Respondents' violation negatively impacted both Claimant and the broader public interest in the effective administration of justice. Accordingly, the penalties awarded herein shall be apportioned 50% to Claimant and 50% to the CUE Fund.

ORDER

It is therefore ordered that:

1. Insurer shall pay 217 daily penalties pursuant to § 8-43-304(1), in the amount of $400 per day, from March 9, 2023 through October 11, 2023.

2. Insurer shall pay 50% of the aggregate penalties to Claimant and 50% to the Colorado Uninsured Employer Fund. Insurer may contact the Division of Workers'

[4] At the time, the statute allowed penalties of up to $500 per day. The maximum penalty was raised to $1,000 per day in August 2010. SB 10-012.

Compensation Revenue Assessment Unit for instructions on how to remit payment to the Colorado Uninsured Employer Fund.

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

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

DATED: March 4, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that his scheduled impairment rating of 27 percent for his right lower extremity should be converted to a whole person impairment rating?

2. Has Claimant demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondents pursuant to Sections 8-43-304 and 8-43-305, C.R.S. Specifically, Claimant seeks penalties for the period of February 22, 2023 to April 6, 2023, for Respondent's delay in filing a Final Admission of Liability (FAL).

3. Has Respondent demonstrated, by a preponderance of the evidence, that the alleged violation has been cured?

4. If Respondent has cured the violation, has Claimant demonstrated, by clear and convincing evidence, that Respondent reasonably knew they were in violation?

FINDINGS OF FACT

1. Claimant began working for Employer in the summer of 2016. In the summer months he is employed as a trail worker. In the winter months, Claimant is employed as a snow cat operator.

2. Claimant sustained a compensable injury on January 13, 2020 when he was skiing and collided with a coworker on a snowmobile. He sustained a comminuted and displaced right subcrochanteric femoral fracture.

3. Claimant underwent immediate surgery to repair the fracture and began treatment to rehabilitate his injury, including physical therapy. Despite treatment, Claimant continued to have ongoing pain in his leg and hip. After additional evaluations, Claimant underwent surgery to remove the majority of the hardware in his leg.

4. Following the second surgery, Claimant improved significantly, and on December 6, 2021 he was placed at maximum medical improvement **(MMI)** by Dr. Messenbaugh. At that time, Dr. Messenbaugh assigned a permanent impairment rating of 14 percent for Claimant's right lower extremity.

5. On July 29, 2022, Respondents filed a Final Admission of Liability (FAL) admitting for the MMI date and impairment rating assessed by Dr. Messenbaugh. Claimant objected to the FAL and requested a Division-sponsored independent medical examination (DIME).

6. On January 12, 2023, Claimant attended a DIME with Dr. Ellen Price. In connection with the DIME, Dr. Price reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In her January 15, 2023 DIME report, Dr. Price noted that since the work injury and related surgeries, Claimant has a two to three centimeter discrepancy in his leg lengths. Dr. Price placed Claimant at MMI as of June 9, 2022 and assigned a 27 percent impairment for the Claimant's right lower extremity. (Dr. Price's report identified that this is equivalent to an 11 percent whole person impairment rating.)

7. On February 2, 2023, the Colorado Division of Workers' Compensation (DOWC) DIME unit sent the parties a letter stating that the DIME process had concluded. The letter also stated that Respondent had 20 days to file an FAL consistent with the DIME report, or request a hearing.

8. On February 24, 2023, the DOWC Claims Management Unit sent a letter to Respondent noting that no FAL had been filed. Respondent was notified that they were to file an FAL within 10 days of that letter.

9. On March 31, 2023, the Director of the DOWC issued a show cause order in this matter. The Director noted that no FAL had been filed, and penalties could be assessed against Respondent. Respondent was ordered to show good cause within 20 days regarding why an FAL has not been filed.

10. On April 6, 2023, Respondent filed an FAL consistent with Dr. Price's DIME report.

11. On April 10, 2023, Respondent filed a response to the Director's show cause order. Respondent explained that an FAL had been prepared, but due to "clerical delays" the FAL was not filed.

12. On April 14, 2023, the Director issued an order, finding that Respondent had shown good cause as to why penalties should not be imposed.

13. On April 20, 2023, Claimant filed an Application for Hearing (AFH), endorsing the issues of conversion of the scheduled rating; and penalties for Respondent's failure to timely file the FAL.

14. Claimant testified that since his injury and related surgeries he has experienced pain in his right leg. In addition, due to the difference in his leg lengths his gait had changed. This causes pain and soreness in his hips, pelvis, and back. As a result of these pain symptoms, Claimant is unable to perform activities at the same level as he could prior to his injury. In addition, he has experienced a limitation in his flexibility. Claimant testified that he enjoys playing ice hockey. Although he is still able to skate, he can no longer do so at the same level and with the same speed as before.

15. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the scheduled impairment should be converted to a whole person impairment. The ALJ recognizes Claimant's testimony that he suffers from pain in his right leg, as well as into his low back, pelvis, and hips. However, the ALJ is not persuaded that Claimant has suffered a functional impairment as a result of his injury and related pain symptoms.

16. The ALJ finds that Claimant has failed to demonstrate that he is entitled to penalties for the late filing of the FAL. The Director considered the issue of penalties for Respondent's failure to timely respond to the DIME and found there was no good cause to impose penalties in this matter. In addition, the ALJ finds no persuasive evidence on the record that Respondent's violation (late filing of the FAL) was intentional or knowing.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-107(1) states, in pertinent part,:

> (a) When an injury results in permanent medical impairment and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section.
>
> (b)When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section.

5. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System,* 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.,* W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.,* W.C. No. 4-238-483 (ICAO February 11, 1997).

6. It is the claimant's burden of proof by a preponderance of the evidence to establish both that he suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is the claimant's burden to prove by a preponderance of the evidence the extent of the permanent impairment.

7. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that he suffers from a functional impairment.

8. Pursuant to Section 8-43-304(1), C.R.S. a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo. App. 1995). If a respondent committed a violation of the statute, rule or order, penalties can be imposed only if respondents' actions were not reasonable under an objective standard. *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo.

App. 2005); *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676 {Colo. App. 1995).

9. Section 8-43-304(4), C.R.S., the "cure provision", 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. After the date of mailing of such application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

10. In workers' compensation cases parties are presumed to know the applicable law and procedures. *Midget Gold Mining* Co. *v. Industrial Commission,* 64 Colo. 218 193 P. 493 (1920); *Boeheim v. Industrial Claim Appeals Office,* 23 P.3d 1247 (Colo. App. 2001) (claimant in unemployment insurance case presumed to know the statutory scheme governing such benefits}. The ICAO has held that ignorance of a rule of procedure is not a defense to an insurer's obligation to know and follow the rules of procedure. Hence, where the claimant proves that an insurer violated a rule of procedure, the insurer is presumed to have known that it was in violation unless it comes forward with evidence to the contrary. *Grant v. Professional Contract Services,*
W.C. No. 4-531-613 (ICAO, January 24, 2005); *Varga v. A1 Sewer Master Mountain Water,* W.C. No. 4-508-548 (ICAO July 1, 2004).

11. WCRP 5-5{F) provides "Within 20 days after the date of mailing of the Division's notice of receipt of the Division Independent Medical Examiner's report, the insurer shall either admit liability consistent with such report or file an application for hearing."

12. As found, Claimant has failed to demonstrate that penalties are appropriate in this matter. It is undisputed that the FAL was filed more than 20 days after the conclusion of the DIME process. However, the Respondent cured the penalty prior to the filing of Claimant's AFH in this matter. Therefore, Claimant's burden of proof is that of clear and convincing evidence. The ALJ found no persuasive evidence on the record that Respondent's violation (late filing of the FAL) was intentional or knowing.

ORDER

It is therefore ordered:

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

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

Dated March 5, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6^{1h} Street, Suite 414
Grand Junction, Colorado 81501

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

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

ISSUES

- Did Claimant prove that the recommended viscosupplementation injections are reasonable, necessary and related to his admitted injury to his left knee?[1]

- Did Respondents prove they were entitled to terminate TTD based on Claimant's responsibility for termination?

FINDINGS OF FACT

1. Claimant worked for employer as a kitchen aid in a school cafeteria, part time, preparing food including fruit and vegetables. He also worked on the food line and washed dishes.

2. Claimant sustained an admitted injury to his left knee on March 7, 2022.

3. The employer had a rule regarding failure to show for work without notifying the employer. Violation of the no show – no call could result in discipline. Claimant failed to call in on October 19 and October 20. A written warning was issued on October 25, 2022. The Corrective Action Form indicated that any future occurrences would result in termination. Despite this discipline, Claimant failed to show up for work on October 31, 2022 and failed to notify the Employer that he was not coming into work on that day.

4. On November 3, 2022, Claimant was provided a modified job duty offer based on Nurse Practitioner Brendon Madrid's restrictions of no pushing or pulling over 10 pounds, no squatting or kneeling. No standing or walking over 15 minutes per hour, may use cane for ambulation and position changes as needed. Claimant accepted the job offer and signed the offer letter on November 7, 2022.

5. Claimant was terminated in a letter dated December 8, 2022. The termination letter stated that Claimant last reported for work on November 10, 2022 and since then Claimant missed 13 shifts in a row and had 9 instances of "No call - no show". (Ex. H). [Redacted, hereinafter BX], Claimant's supervisor, credibly testified as to the number of days that Claimant failed to show up for work and failure to call in to let the employer know of the absence.

[1] In their proposed order, Respondents concede that the injections are reasonable and necessary, and this issue is now moot.

6. Claimant did not provide credible evidence that he called in to report that he would not be into work each day that he failed to show up for work. It does appear that Claimant attempted to call in on some of the days he missed, but not all of them.

7. Claimant testified that he did not feel well in November for several days. He claims that he would email BX[Redacted]. However, Claimant did not enter into evidence any of the emails to support his contentions. He tested positive for COVID on December 15, 2022, which was after his termination.

8. Claimant was placed at MMI on January 25, 2023 by Dr. Murray.

9. Claimant requests in his position statement that I take judicial notice of the DIME report. Since the parties likely would be denied due process with respect to that report, I decline to consider the report and the DIME opinions contained therein.

CONCLUSIONS OF LAW

A. Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

B. Temporary Total Disability

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, “In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.” A

claimant's responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

It is well established that a claimant who voluntarily resigns his job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2008); *Kiesnowski v. United Airlines*, W.C. No. 4-492-753 (May 11, 2004); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (April 24, 2002). I conclude that on based on totality of the evidence, Claimant was responsible for

his termination by failing to report for his scheduled work and failing to consistently call in for the days that he did not show up for work. The evidence shows that Claimant missed work, without calling in on October 19 and 20. The evidence also shows that Claimant was warned that any further violations would result in termination. Despite the written warning Claimant violated the rule on at least one occasion and probably more than that one occasion based on the letter of December 8, 2022.

ORDER

It is therefore ordered that:

1. Respondents sustained their burden of proof that Claimant was responsible for termination on December 8, 2022 and is not entitled to TTD as of that date.[2]

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: March 5, 2024

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

[2] The ALJ is aware that a Division Sponsored IME occurred after the hearing where the DIME doctor determined that Claimant was not at MMI. Since this evidence was not submitted at the hearing, I do not consider this evidence.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERSt COMPENSATION NO. WC 5-157-607-001

ISSUES

- Whether Respondents properly sought a 24 Month Division-sponsored Independent Medical Evaluation ("DIME") pursuant to Section 8-42-107(8)(b)(II), C.R.S. that addressed whether Claimant was at maximum medical improvement ("MMI") for her December 7, 2020 work injury?

- If Respondent did properly request a 24 Month DIME, whether Claimant has overcome the findings of the Division-sponsored Independent Medical Exam ("DIME") physician regarding maximum medical improvement by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on December 7, 2020 when she fell while skiing. Claimant testified at hearing that she was skiing on a blue run at the time of her fall and that she does not remember falling. Claimant testified that her first recollection of the injury was trying to get up and a woman nearby telling her to stay down and that ski patrol was on their way.

2. Claimant was transported by Roaring Fork Rescue Authority to Aspen Valley Hospital. Claimant reported to the emergency medical technicians ("EMT") with the ambulance that she had left hip pain that ran down both the inside and outside of her left this but did not progress past the knee. Claimant reported no loss of consciousness but could not state the reason for her fall while skiing.

3. Claimant was transported to Aspen Valley Hospital where she underwent x-rays and began a course of treatment for her left hip. Claimant was examined by Dr. Cox at Aspen Valley Hospital and reported moderate pain in the lower back and left lower extremity (hip). Dr. Cox noted that there was no blow to the dead, neck pain or loss of consciousness. Dr. Cox obtained a computed tomography of the left hip that showed a slightly comminuted nondisplaced fracture along the anteromedial acetabulum. Claimant was referred to an orthopedic surgeon.

4. Claimant was examined by Dr. Wojtkowski on December 9, 2020. Dr. Wojtkowski noted Claimant had an Acetabular Fracture involving the right ischium and right acetabulum. Dr. Wojtkowski also noted Claimant had a left pubic root fracture and inferior ramus fracture.

5. Claimant continued to treat with Dr. Wojtkowski for her left hip and low back pain. Claimant was examined by Dr. Anderson on February 2, 2021. Dr. Anderson recommended Claimant continue with physical therapy ("PT") and aqua

therapy and recommended a left sided sacroiliac ("SI") joint injection. The SI joint injection was performed on February 11, 2021.

6. Claimant returned to Dr. Wojtkowski on March 10, 2021. Dr. Wojtkowski noted that Claimant had complaints of brain fog and shakiness and was concerned about returning to work as a ski instructor. With regard to Claimant's hip, Dr. Wojtkowski recommended Claimant continue with PT and focus on strengthening of lower back muscles, Kegel exercises advancing as tolerated and gait training. Dr. Wojtkowski advised that on the next visit they would focus on hip strength and range of motion. Dr. Wojtkowski allowed Claimant to return to work without restrictions based on her x-rays, but recommended a gradual increase to allow muscle strength, conditioning and response to return to normal prior to proceeding with pre-injury work activity. Dr. Wojtkowski noted that Claimant was having other symptoms that were not related to her pelvic injury and referred Claimant to her primary care physician to address these issues and noted that Claimant should refrain from skiing or teaching until these questions are resolved.

7. Claimant testified at hearing that following her injury she had tinnitus all the time and experienced a lot of dizziness. Claimant testified finding words can be difficult and she can barely do simple math. Claimant testified she brought up these issues with her physician that was treating her pelvic injury, and was told to follow up with her primary care physician.

8. Claimant reported to her physical therapist on March 26, 2021 that although she had initially denied hitting her head, she was focused on the pain in her pelvis and as time has progressed, she has developed signs that she sustained a concussion from the fall. Claimant reported symptoms that included mild neck pain, blurred vision, balance problems, sensitivity to light/noise and drowsiness. Claimant reported additional symptoms that included headache, pressure in head, feeling slowed down, feeling like in a fog, difficulty concentrating/remembering, confusion, more emotional, irritability, sadness and nervous/anxious. Claimant also reported loud tinnitus. The physical therapist noted a history of prior traumatic brain injuries and recommended treatment for her post-concussive symptoms. Claimant then began PT to treat her traumatic brain injury ("TBI").

9. Claimant had PT sessions on March 31, 2021, April 2, 2021, April 8, 2021, April 15, 2021, April 22, 2021, and June 18, 2021.

10. Claimant eventually underwent a brain magnetic resonance image ("MRI") on October 21, 2021. The MRI showed mild chronic microangiopathic changes along with age-related brain volume loss overall with slightly more focal involvement within the parietal lobes. Following the MRI, Claimant returned for additional PT for her pelvis injury and her TBI.

11. Claimant returned to Dr. Anderson on November 17, 2021 for follow up regarding her ongoing back pain. Based on her complaints, Dr. Anderson recommended a right sided LS-S1 transforaminal epidural steroid injection ("TFESI").

12. Claimant was subsequently evaluated for her ongoing low back and pelvic complaints and her TBI by Dr. Gieszl on March 3, 2022. Claimant reported that her low back pain had improved after her TFESI, but she had gone out to shovel snow and the pain had returned. Dr. Geiszl recommended Claimant return to Dr. Anderson for consideration of a repeat injection. With regard to Claimant's complaints involving her TBI, Dr. Geiszl noted that Claimant's TBI had not ever been addressed. Dr. Geiszl noted that Claimant has never been in a concussion rehabilitation program as "this hasn't been approved by workman's comp insurance." Dr. Geiszl noted Claimant's level of function "is profoundly reduced compared to her premorbid condition." Dr. Geiszl opined that Claimant "likely had a shearing diffuse axonal injury as there wasn't a head impact." Dr. Geiszl recommended concussion rehabilitation as a necessary part of Claimant's recovery. Dr. Geiszl opined that without a concussion rehabilitation program for her TBI, Claimant would not be at MMI.

13. On April 22, 2022, Dr. Geiszl noted Claimant was reporting symptoms of vertigo and recommended vestibular rehabilitation with Kelsey Sanders 1-3 times per week.

14. Respondents obtained an independent medical examination ("IME") with Dr. Scott on June 7, 2022. Dr. Scott reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Scott noted Claimant's current complaints included chronic severe pain in the right side of her back with radiation to the side of her right this and the side of her right leg and down to the right foot. Dr. Scott also noted multiple symptoms of "brain injury".

15. Dr. Scott diagnosed Claimant with a fracture of the left pubic ramus without displacement or misalignment for which Claimant was treated and was at MMI as of Mach 10, 2021. Dr. Scott noted Claimant may have had a temporary exacerbation of a left sacroiliac joint inflammation which was resolved with steroid injection on February 11, 2021. Dr. Scott opined that there was "no supporting evidence in the medical record" that Claimant injured her head, neck or lumbar spine on December 7, 2020. Dr. Scott opined that Claimant was at MMI for her work injuries of December 7, 2020, was capable of returning to work without restrictions and required no maintenance medical treatment.

16. Claimant returned to Dr. Geiszl on July 7, 2022. Dr. Geiszl reviewed the IME report from Dr. Scott and noted that he disagreed with the opinion of Dr. Scott that Claimant did not sustain a TBI in the December 7, 2020 fall. Dr. Geiszl again recommended that Claimant continue with her concussion rehabilitation program and noted that she had been making progress in this recently. Dr. Geiszl also recommended Claimant obtain a second surgical opinion regarding her low back.

17. Claimant returned to Dr. Geiszl on August 25, 2022. Dr. Geiszl noted that Claimant seemed to be having an adjustment disorder or reaction and was anxious and depressed about what the injury has done to her body and her future. Dr. Geiszl recommended psychotherapy. Dr. Geiszl again recommended Claimant see a psychologist when Claimant returned for re-evaluation on October 7, 2022

18. Respondents arranged for another IME with Dr. Messenbaugh on January 6, 2023. Dr. Messenbaugh reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. With regard to her TBI, Claimant reported to Dr. Messenbaugh that she was wearing a helmet at the time of her fall and does not remember anything about the events of the fall. Dr. Messenbaugh noted Claimant attributed her present cognitive issues to be due to a shearing effect that Claimant believed she must have sustained at the time of her accident.

19. Dr. Messenbaugh noted in his IME report that he was not a neurologist and did not plan to opine regarding causation or the extent of Claimant's claimed head injuries and resulting cognitive issues. Dr. Messenbaugh noted that he agreed with Dr. Scott that Claimant did not have a neck injury as a result of the events of December 7, 2020. Dr. Messenbaugh further opined with regard to Claimant's left hip and low back that the medical treatment she received was a result of Claimant's December 7, 2020 work injury. Dr. Messenbaugh opined that Claimant was at MMI for her work injury as of the date of his examination, January 6, 2023. Dr. Messenbaugh opined that Claimant could return to work without restrictions and required no maintenance medical treatment.

20. Respondents forwarded Dr. Messenbaugh's IME report to Dr. Geiszl on April 11, 2023 and represented in their cover letter to Dr. Geiszl that Dr. Messenbaugh opined that Claimant was at MMI. Respondents inquired from Dr. Geiszl whether Claimant was at **MMI.** In response to the inquiry from Respondents, Dr. Geiszl opined that Claimant was not at MMI and provided handwritten notes that stated:

> "(1) Her back is painful and limits her activity and work teaching skiing. This was not a problem prior to her accident. It seems that this has generally improved over the last 4-5 months and may continue to improve.
>
> (2) She suffered a concussion in her accident. Her deficits from this - dizziness, lack of balance, tinnitus, and social anxiety also seem to be improving."

21. With regard to additional treatment, Dr. Geiszl specifically recommended psychological counseling with Julie Martin (referral placed and coverage requested 8/25/2022) to help with psychological recovery from her concussion.

22. After receiving the report from Dr. Geiszl, counsel for Respondent filed a Notice and Proposal and Application for a 24 Month Division Independent Medical Examination ("DIME") on April 21, 2023. The Application noted the specific regions to be evaluated included Region 2: Lower Extremity Left Hip and Region 4: Spine Lumbar. Notably absent from the Application was Region 3 which includes evaluation for psychological and traumatic brain injury.

23. Claimant subsequently underwent a DIME with Dr. Mack on August 7, 2023. Dr. Mack reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Mack opined that

Claimant was at MMI for her injury as of January 6, 2023 and provided Claimant with an impairment rating of 19% whole person. However, with regard to Section A involving the scope of the exam, Dr. Mack noted that this was an "Evaluation of spine injury. Determine MMI and impairment rating". With regard to Section D, "Pertinent Medical Issues", Dr. Mack stated "TBI with post-concussion symptoms, not evaluated in this report. This report is directed towards orthopedic issues only." Additionally, with regard to Section H. Psychological Evaluation If Applicable, Dr. Mack notes that "Psychological evaluation is applicable in this case, however is not done as part of this evaluation as it is strictly orthopedic."

24. Dr. Mack opined that Claimant was at MMI and provided Claimant with an impairment rating of 19% whole person related to Claimant's lumbar spine. Dr. Mack provided Claimant with work restrictions of 30 pounds and recommended ongoing medical treatment that included physical therapy and a home exercise program for regaining and maintaining her core strength and lumbar flexibility.

25. Respondents filed a final admission of liability ("FAL") based on the DIME report from Dr. Mack on September 20, 2023. Claimant filed an objection to the FAL and a Notice and Proposal to Select a DIME. Claimant's Notice and Proposal included Region 3 including psychological and TBI and Region 5 including her hearing and vestibular disorder. Additionally, with regard to Region 4, Claimant requested the evaluation to include the cervical spine and the pelvis.

26. A prehearing conference order was entered holding Claimant's Notice and Proposal to Select a DIME in abeyance pending the hearing.

27. Claimant argues in her position statement that the DIME in this case was improper as the DIME physician did not consider Claimant's TBI and psychological issues. Respondent argues in their position statement that the finding of Dr. Mack included all aspects of Claimant's work injury and Claimant is therefore required to overcome the opinions of Dr. Mack by clear and convincing evidence on the issue of MMI. The ALJ agrees with Claimant's arguments that the DIME in this case was improperly limited to orthopedic injuries despite the fact that Respondent was aware that Dr. Geiszl opined that Claimant's injury included a TBI and psychological impairment. The ALJ therefore strikes the DIME from Dr. Mack as improper in this case.

28. The ALJ finds that the plain language of Dr. Mack's DIME report indicates that he limited his evaluation to Claimant's orthopedic injuries. Dr. Mack was clear in his report that Claimant's TBI with post-concussion symptoms were not evaluated in his report. Dr. Mack also noted that a psychological evaluation was applicable in this case, but was not done because his evaluation was strictly orthopedic.

29. The report from Dr. Mack falls directly in line with the Application and Notice and Proposal for DIME filed by Respondent that limited the issues for the DIME only to left hip and lumbar spine. The ALJ finds that Respondent was aware that Claimant's TBI and psychological issues were part of the finding by Dr. Gieszl that

Claimant was not at MMI based on Dr. Gieszl's April 11, 2023 response to the IME from Dr. Messenbaugh. However, Respondent failed to include these issues in their Application for DIME.

30. Respondent's argument that the failure to mark Region 3: TBI on the Application for DIME did not preclude Dr. Mack from considering that region in his DIME evaluation is rejected by the ALJ. Dr. Mack clearly in his report limited his examination to "orthopedic issues only." Dr. Mack further finds that a psychological evaluation is appropriate, but again limits his examination and findings to orthopedic issues only.

31. The ALJ further notes that Dr. Mack's limiting nature of this DIME report is consistent with the Application for DIME completed by Respondent that clearly did not include all issues for which Claimant had been evaluated. Respondent's argument that Dr. Mack's decision not to address the TBI condition in his report and place Claimant at MMI and assign impairment for other conditions constitutes an inherent determination that the TBI was not related to the accident is rejected. At no point in the DIME report does Dr. Mack make any finding that the TBI was not a component of the industrial injury, and the ALJ declines Respondent's invitation to read this interpretation into the report, especially in light of the finding by Dr. Mack that a psychological is applicable in this case, but "not done as part of this evaluation as it is strictly orthopedic."

32. Notably, the statutory provision that allows for a 24 Month DIME to occur requires that certain criteria be met before a 24 Month DIME. Specifically, there must be at least 24 months to have passed since the date of injury, a party has requested a finding form the authorized treating physician regarding the issue of MMI and has provided the authorized treating physician with a written report from a physician who evaluated the injured worker at least 20 months after the date of injury and opines that the injured worker is at **MMI,** and the treating physician has determined that the injured worker is not at MMI or has failed to respond to the inquiry.

33. In this case, Dr. Messenbaugh's report does not comply with Section 8-42-107(8)(b)(II)(D) in that Dr. Messenbaugh refused to opine as to whether Claimant was at MMI with regard to Claimant's head injury and resultant cognitive issues. Moreover, when provided with the report from Dr. Messenbaugh, Dr. Geiszl opined that Claimant needed treatment for the specific condition for which Dr. Messenbaugh refused to provide an opinion. Instead of obtaining an opinion with regard to MMI from another provider to address this specific condition, Respondent sought a 24 Month DIME in a situation where no medical provider had expressed a valid opinion involving MMI for the TBI that would comply with the statute.

34. Moreover, after receiving Dr. Messenbaugh's IME report that specifically declined to provide an opinion regarding Claimant's MMI status for her TBI, and receiving Dr. Geiszl's report indicating that Claimant needed additional treatment for this specific condition, Respondent completed the Notice and Proposal and Application for DIME and specifically failed to include this condition as an area that the DIME physician should evaluate. Dr. Mack's DIME then specifically addresses that these issues have been raised and fails to evaluate the conditions. In fact, with regard to the psychological

component of the evaluation, Dr. Mack concedes that this should be addressed, but notes that his examination is limited to orthopedic issues only.

35. The ALJ relies on the plain language of the DIME report from Dr. Mack along with the Application for DIME completed by Respondent and finds that the limiting nature of Dr. Mack's DIME report in which he does not address the TBI and Claimant's psychological issues was a direct result of the limiting nature of the DIME application filled out Respondent. The ALJ notes that Respondent could have included additional issues in the Application for DIME that they knew were at issue based on Dr. Geiszl's April 11, 2023 response to their inquiry, but chose not to raise these issues. Whether that was intentional on the part of Respondent or not is immaterial at this point, but the ALJ will not hold it against Claimant where the language of the DIME report indicates that certain conditions were appropriate for evaluation, but the DIME physician limited his examination to orthopedic issues only, and failed to address those other medical issues that Claimant had received treatment for.

36. Notably, the IME report from Dr. Scott was performed 18 months after the date of injury and would not comply with regard to the statute to allow for a 24 month DIME to be performed, as the examination of the injured worker must at least 20 months after the date of injury pursuant to Section 8-42-107(8)(b)(ll)(D).

37. Because Respondent's Application for a 24 Month DIME is fatally flawed for failure to comply with Section 8-42-107(8)(b)(II), the DIME in this case is struck. However, even if the Application for a 24 month DIME complied with the statute, the ALJ finds that the limiting nature of the DIME application in addressing only Claimant's left hip and lumbar spine, results in the DIME being struck as it did not address the issue of the TBI and psychological issues.

38. The ALJ notes that while Claimant argued at the outset of the hearing that the relief she was seeking involved either a finding that had overcome the finding of MMI by the DIME physician or would seek to proceed to a DIME based on her Application for DIME that was filed after Respondent filed the FAL in this case, based on the finding of this court that the 24 Month DIME was improper due to the fact that the medical report from Dr. Messenbaugh that failed to address the issues of the TBI, the case is not in a position where a DIME is proper under Section 8-42-107(8)*b)(II), as no treating physician has placed Claimant at MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S., 2013 The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

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

4. Section 8-42-107(8)(b)(II) that was in effect was amended effective September 7, 2021[1] to read as follows:

> If either side disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2; except that, if an authorized treating physician has not determined that the employee has reached maximum medical improvement, the employer or insurer may only request the selection of an independent medical examiner if all of the following conditions are met:
>
> **(A) At** least twenty-four months have passed since the date of injury;
>
> **(B)** A party has requested in writing that an authorized treating physician determine whether the employee has reached maximum medical improvement and has provided the authorized treating physician with the written report required under subsection (8)(b)(II)(E) of this section;
>
> **(C)** The authorized treating physician has not determined that the employee has reached maximum medical improvement;
>
> **(D)** A physician other than the authorized treating physician has examined the employee at least twenty months after the date of the injury and determined that the employee has reached maximum medical improvement; and

[1] Pursuant to the language of HB 21-1050 signed into law, Section 4 of the bill that applies to the amendments to Section 8-42-107(8)9b)(II) would "apply to workers compensation claims pending or filed on or after the applicable effective date of this act." Because Claimant's claim was pending as of the effective date, the amended statute would apply in this case.

(E) The requesting party has provided the authorized treating physician and all other parties with a written report from the physician who has examined the employee pursuant to subsection (8)(b)(II)(D) of this section, indicating that the examining physician has determined that the employee has reached maximum medical improvement, and the authorized treating physician has responded in writing to all the parties that the employee has not reached maximum medical improvement or has failed to respond in writing to all parties within fifteen calendar days after the service of the written report.

5. "Maximum medical improvement" is defined as a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S.

6. Pursuant to the statute, in order for a 24 month DIME to occur, there must be a report from a physician based on an examination that occurred at least twenty months after the date of injury that determines the Claimant is at MMI. As defined by the statute, MMI is a point in time where *any* medically determinable physical or mental impairment as a result of the injury has become stable and no further treatment is reasonably necessary (emphasis added).

7. Dr. Messenbaugh, in his report specifically stated that he was not a neurologist and he did not plan to opine regarding causation *or the extent* of Claimant's claimed head injuries and resulting cognitive issues. Dr. Messenbaugh's report therefore fails to address the issue of MMI as it relates to Claimant's TBI and psychological issues resulting from the TBI.

8. The intention of Section 8-42-107(8)(b)(II), C.R.S. is that if a party believes that Claimant is at MMI and 24 months has passed from the date of injury, there will be a medical report that addresses the employee's status as it relates to the work injury, which includes all components of the work injury, and finds that the employee is at MMI. Once that report is forwarded to the treating physician, the treating physician can either agree with the medical report and place the employee at MMI, disagree with the medical report and find that the employee is not at MMI, or fail to respond to the inquiry. If the treating physician agrees that the employee is at MMI, the employee may get an impairment rating and the respondent may file and FAL. If the treating physician disagrees with the report, or fails to respond, the respondent may request the 24 month DIME.

9. However, this statute is predicated on the existence of a medical report that the employee is at MMI for the industrial injury. If the medical report specifically indicates in the report that there are components of the alleged injury that the report will not address, that report cannot make a finding that the employee is at a point in time when any medically determinable physical or mental impairment as a result of the injury has become stable and no further treatment is reasonably expected to improve the condition because the report specifically does not address the condition.

10. Because Dr. Messenbaugh's IME report fails to address the issue involving MMI related to Claimant's TBI, the report does not comply with Section 8 42- 107(8)(b)(II), C.R.S. for allowing for a 24 month DIME.

11. However, even if Dr. Messenbaugh's report complied with the requirements of Section 8-42-107(8)(b)(U), the ALJ finds that Respondents improperly limited the 24 month DIME in this case to Claimant's left hip and lumbar spine. As found, the DIME in this case specifically noted that the evaluation and impairment rating were limited to orthopedic issues only. The ALJ relies on the plain language of the DIME report and the Application for DIME and finds that Dr. Mack limited the evaluation in this case based on the issues addressed by Respondent in the Application for DIME.

12. As found, Respondent was aware that the treating physician had opined that Claimant was not at MMI as she needed additional treatment for her TBI and deficits related to the TBI including dizziness, tinnitus and social anxiety. The limiting nature of the application for DIME, along with the plain language of the DIME report that notes that the DIME is limited to orthopedic issues only, and does not address the issue of Claimant's TBI and psychological condition, the DIME report is therefore stricken as it limited it's evaluation regarding the finding of MMI in an inappropriate manner.

13. As found, Claimant has proven by a preponderance of the evidence that the 24 month DIME performed by Dr. Mack in this case failed to comply with the requirements of Section 8-42-107(8)(b)(II), C.R.S. and therefore, should be stricken. Likewise, the September 20, 2023 FAL that relied on the DIME from Dr. Mack is also stricken.

14. Because no treating physician has placed Claimant at MMI, Respondents are liable for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury.

ORDER

It is therefore ordered that:

1. The FAL dated September 20, 2023 is hereby struck. Respondent shall pay for the reasonable medical treatment recommended by Dr. Geiszl necessary to cure and relieve the Claimant from the effects of the industrial injury.

2. Any future requests for a 24 month DIME must comply with Section 8-42-107(8)(11)(8).

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

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

long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt @state.co.us.**

DATED: March 6, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. WC 5-173-739-003 & 5-173-742-003

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $685.42.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of employment on February 12, 2021 in case number 5-173-739.

2. Whether Claimant has proven by a preponderance of the evidence that he suffered compensable neck and left shoulder injuries during the course and scope of employment on March 27, 2021 in case number 5-173-742.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for both his February 12, 2021 and March 27, 2021 industrial injuries.

FINDINGS OF FACT

1. Claimant is 72 years of age. He has filed two separate Workers' Compensation claims based on falls while working for Employer. Claimant contends the first fall occurred on February 12, 2021 and caused injuries to his right shoulder. Claimant asserts the second fall occurred on March 27, 2021 and caused injuries to his neck and left shoulder.

2. Employer is a company that provides [Redacted, hereinafter RD] handicap bussing services. On November 20, 2020 Claimant began working for Employer as a bus detailer. His job duties involved cleaning buses, shoveling sidewalks and sweeping floors.

3. The record reflects that Claimant suffered from a number of pre-existing conditions prior to beginning work for Employer. His conditions involved neck, left shoulder and back symptoms. Claimant also suffered multiple falls over the years.

4. Lead Detailer and Supervisor [Redacted, hereinafter CB] testified that she worked closely with Claimant. She commented that Claimant was a great employee, but noticed he suffered from balance problems. CB[Redacted] remarked that Claimant disclosed a pre-existing shoulder injury that occurred when he fell cutting grass. She believed the injury involved Claimant's right shoulder, but was uncertain. Claimant also disclosed numerous falls outside of work including one that occurred in the shower.

5. Claimant testified that on February 12, 2021 he was in Employer's parking lot behind a bus when he was distracted by another bus that was backing up. He tripped over a parking block and fell on his right side. Claimant suffered right shoulder soreness and an abrasion to his right hand. He explained that, prior to the February 12, 2021 work accident, he

was not limited in performing his job duties. Following the injury, he had trouble completing overhead tasks including cleaning glass and windshields.

6. Employer's night road supervisor [Redacted, hereinafter JM] testified that he was working on February 12, 2021 and was advised Claimant had fallen. JM[Redacted] spoke with Claimant about the fall and encouraged him to visit a medical provider. However, Claimant responded that he was fine.

7. CG[Redacted] remarked that JM[Redacted] made her aware of Claimant's February 12, 2021 fall. She discussed the incident with Claimant, and encouraged him to visit a medical provider.

8. On February 15, 2021 Claimant visited Injury Care Associates for an evaluation. Claimant reported tripping on a parking block on February 12, 2021. He suffered a scrape on his right hand and pain in his right shoulder on the following day. Authorized Treating Provider (ATP) Margaret A. Irish, D.O. noted ongoing pain and limited range of motion in Claimant's right shoulder. She diagnosed Claimant with a right rotator cuff strain and a right-hand abrasion. Dr. Irish recommended over-the-counter pain medications. She determined that her objective findings were consistent with a work-related mechanism of injury. Dr. Irish reasoned the matter was "'open and shut case" and placed Claimant at Maximum Medical Improvement (MMI) with no permanent impairment or work restrictions.

9. On March 27, 2021 Claimant was wearing a 20-30-pound metal tank on his back while trying to open a stuck door. He tried to kick the door open but lost his balance and fell backwards. Claimant landed on the tank and struck his lower back, neck and left shoulder. He subsequently continued to perform his work duties despite neck, lower back and left shoulder pain.

10. CB[Redacted] testified that she did not work on March 27, 2021. When she returned to work the next day, Claimant reported he had suffered a second fall. Claimant again insisted he was fine and continued to work full duty. CB[Redacted] closely monitored Claimant based on his general physical condition and encouraged him to seek medical attention.

11. On April 12, 2021 Michael Boyrer, D.C. treated Claimant at personal medical provider Kaiser Permanente. Claimant reported right shoulder pain and lower back pain "after lifting injury holding a tank last week." Dr. Boyrer noted Claimant was having difficulty with right arm abduction. Claimant also stated he "tripped [and] fell last week on a parking curb and fell backwards." Dr. Boyrer ordered x-rays of Claimant's lower back and right shoulder. The imaging revealed mild S-shaped scoliosis, multi-level mild to moderate degenerative disc changes, a chronic Hill-Sachs deformity, and right shoulder osteoarthritic changes. The x-rats also reflected a compression fracture of indeterminate age at L2. Dr. Boyrer assessed somatic dysfunction of the cervical, thoracic, and lumbar spine. He also mentioned neck, back, and right shoulder pain.

12. On May 3, 2021 Claimant returned to Kaiser with complaints associated with his recent falls at work. He specifically noted soreness in his arms and lower back pain that extended into his legs. Providers assessed Claimant with bilateral shoulder pain from overuse

and osteoarthritis due to age. They determined Claimant's symptoms were work-related and directed him to follow-up with Workers' Compensation physicians.

13. On May 4, 2021 Claimant returned to ATP Dr. Irish. Dr. Irish noted complaints of bilateral shoulder pain, left hip pain, and numbness in the left hand. Claimant reported new issues related to a second fall at work. Dr. Irish suggested the falls may have aggravated pre-existing arthritis in his shoulders. She informed Claimant that she could not treat the left shoulder and left hip issues because he had not reported them as work-related. Dr. Irish ordered an MRI arthrogram of the right shoulder.

14. On May 4, 2021 CB[Redacted] completed an accident report documenting the formal reporting of the March 27, 2021 injury. On May 5, 2021 Claimant filed a first report of injury for the March 27, 2021 incident.

15. On May 20, 2021 Claimant underwent an MRI arthrogram and CT injection arthrogram of the right shoulder. The imaging revealed a full-thickness tear of the supraspinatus tendon, a full-thickness tear of the subscapularis tendon, and a probable tear of the long head of the biceps tendon. The MRI examination was limited because Claimant became claustrophobic.

16. On May 25, 2021 Claimant visited Dr. Irish to review the MRI results. She noted he was complaining of right shoulder, left shoulder and left hip pain. Claimant also reported numbness throughout the entire left arm and right hand. He specified that his right shoulder pain was related to the February 12, 2021 fall at work. Dr. Irish referred Claimant to orthopedist Lucas Schnell, D.O. to assess whether the supraspinatus tear was degenerative or acute. She also referred Claimant for chiropractic care.

17. On June 14, 2021 Claimant visited ATP Dr. Schnell at the Center for Spine and Orthopedics. Claimant presented with right shoulder pain and weakness. He comment4ed that he suffered an acute onset of right shoulder pain after tripping over a barrier in a parking lot at work on February 12, 2021. Claimant noted "he has had an inability to raise his arm since that point." He acknowledged "many falls" over the years, but no significant issues with his shoulder. After reviewing imaging studies, Dr. Schnell assessed full thickness tears of the superior fibers of the subscapularis, a full thickness tear of the supraspinatus with retraction to the level of the glenohumeral joint space, moderate atrophy, long head of biceps torn secondary to chronic rupture, mild glenohumeral primary osteoarthritis, and superior riding humeral head. Dr. Schnell concluded Claimant had a chronic rotator cuff tear based on muscle atrophy and recommended exhausting conservative treatment. He administered a lidocaine injection.

18. On June 22, 2021 Claimant visited Dr. Irish for the final time. Because a claim had been opened for the March 27, 2021 accident, she assessed Claimant concurrently for both dates of injury. Dr. Irish noted Claimant's Kaiser records documented "multiple areas of degenerative changes." Some of the changes predated Claimant's reported work falls. Dr. Irish determined that "because of the evidence of preexisting degenerative changes that the workers' compensation claims [would] now be closed and [Claimant] may follow-up with his doctors at Kaiser." Dr. Irish placed Claimant at MMI for both claims with no permanent impairment, work restrictions or maintenance care.

19. On June 29, 2021 Dr. Irish issued an addendum report because she forgot to dictate the results of the left shoulder and lumbar MRIs. The left shoulder MRI findings were nearly identical to the right shoulder study, and the lumbar MRI identified degenerative findings. She reasoned that the left shoulder findings were most likely degenerative and age-related. They were similar to the right rotator cuff changes documented by Dr. Schnell.

20. After his discharge by Dr. Irish, Claimant continued his care at Kaiser. He ultimately underwent cervical and left shoulder surgeries.

21. On September 25, 2023 John J. Aschberger, M.D. performed an Independent Medical Examination (IME) of Claimant to evaluate both the February 12, 2021 and March 27, 2021 injuries. He reviewed Claimant's medical records, considered the history of each accident and conducted a physical examination. Dr. Aschberger diagnosed Claimant with the following: (1) cervical myelopathy; (2) bilateral rotator cuff tears; and (3) a lumbar disc protrusion. Dr. Aschberger reasoned that the cervical spine issues were likely related to his March 2021 work activities. He explained that Claimant subsequently presented with bilateral upper extremity symptoms, including hand numbness, that was consistent with a myelopathy that had not been identified in previous evaluations. Surgical intervention was warranted based on MRI changes and neurological issues.

22. Dr. Aschberger commented that Claimant exhibited findings of rotator cuff tears bilaterally with muscular atrophy. The tears likely constituted pre-existing conditions, but Claimant had good functional use of the shoulders prior to his February 12, 2021 and March 27, 2021 work accidents. Dr. Aschberger explained that Claimant's left shoulder surgical intervention occurred as a result of the deterioration of his condition and limited use of the shoulder. He reasoned that the March 27, 2021 work accident caused the need for Claimant's left shoulder arthroplasty because his condition deteriorated following the event. Dr. Aschberger acknowledged that, while Claimant's left shoulder tears were likely pre-existing, he had good function prior to his work-related injury. He determined that a causal connection between Claimant's right shoulder and the February 12, 2021 work accident was less clear. Although Claimant suffered a specific injury to his right shoulder when he fell at work on February 12, 2021, he reported subsequent improvement with good range of motion. However, additional notes reflected deterioration in the right shoulder.

23. Dr. Aschberger provided a 9% impairment rating pursuant to Table 53 of the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*) for the cervical spine and 7% for range of motion restrictions. He assigned an additional 5% for persistent neurological issues affecting both upper extremities pursuant to Table 1. Combining the ratings, Dr. Aschberger assigned a 19% whole person impairment for Claimant's cervical spine. For the left shoulder, Dr. Aschberger assigned a 30% upper extremity impairment for the arthroplasty pursuant to Table 19, Chapter 3 of the *AMA Guides*. He also assigned an additional 13% rating for range of motion deficits. The combined upper extremity rating totaled 39% that converted to 23% whole person impairment. Finally, Dr. Aschberger assigned a 9% right upper extremity rating or 5% whole person impairment based on range of motion loss. He thus issued a 41% total whole person impairment for Claimant's work injuries.

24. On October 5, 2023 Claimant underwent an IME with John J. Raschbacher, M.D. Claimant reported that his February 12, 2021 fall at work caused right shoulder pain. The March 27, 2021 fall caused upper and lower extremity numbness, left shoulder pain, and neck pain. Dr. Raschbacher reasoned that, based on Claimant's history, a physical examination, and a review of the records, Workers' Compensation liability should be denied for both of Claimant's work accidents. He explained that Claimant's medical records revealed "a long history of chronic pain" and noted numerous falls. Dr. Raschbacher also remarked that Claimant must have had significant back trauma in the past, and noted May 3, 2021 x-rays revealing a compression fracture. He attributed Claimant's significant complaints to pre-existing, degenerative problems.

25. Dr. Raschbacher also testified at the hearing in this matter. He explained that Claimant had degenerative changes in his spine and Kaiser records reflected prior treatment. Dr. Raschbacher determined there was no objective evidence of a neck or lower back injury. Instead, there were only subjective complaints of worsening. He commented that, if Claimant's fall at work worsened a pre-existing neck condition, Claimant would have experienced numbness within a few days. Dr. Raschbacher reiterated that the rotator cuff tears in both of Claimant's shoulders constituted pre-existing conditions unrelated to falls at work. He noted that rotator cuff tears are common in people of Claimant's age.

26. Dr. Raschbacher did not question whether Claimant fell on February 12, 2021 and again on March 27, 2021. Rather, Dr. Raschbacher reasoned that the medical treatment Claimant received was not related to his falls at work. However, contrary to Dr. Raschbacher's report, he testified that the initial treatment following both work falls was reasonable. He also remarked that the recommended MRIs were also reasonable. Further, all of the medical care Claimant received between March 27, 2021 and his June 22, 2021 date of MMI was reasonable and related to his work activities. Dr. Raschbacher also acknowledged that Claimant's pre-existing conditions rendered him more susceptible to an aggravation of symptoms. He clarified that Dr. Irish's treatment was reasonable, but none of Claimant's continuing issues were causally related to his work activities for Employer.

27. Claimant has established it is more probably true than not that he suffered a compensable right shoulder injury during the course and scope of employment on February 12, 2021. Initially, Claimant testified that he tripped over a parking block when distracted by a moving bus. He suffered right shoulder soreness and an abrasion to his right hand. Claimant timely reported the injury to JM[Redacted] and CB[Redacted]. They corroborated his testimony and encouraged him to seek medical care. On February 15, 2021 Claimant visited Injury Care Associates and maintained that he tripped on a parking block on February 12, 2021. He suffered a scrape on his right hand and pain in his right shoulder on the following day. While Claimant reported feeling better, ATP Dr. Irish noted ongoing pain and limited range of motion in the right shoulder. Dr. Irish diagnosed Claimant with a right rotator cuff strain and a right-hand abrasion. She determined that her objective findings were consistent with a work-related mechanism of injury. Dr. Irish concluded that Claimant had reached MMI with no permanent impairment or work restrictions.

28. The record contains evidence that Claimant suffered from a pre-existing right

shoulder condition. However, Claimant testified that prior to the February 12, 2021 accident, he was not limited in performing his job duties. Following the injury, he testified that he had trouble with overhead work including cleaning glass windshields. CB[Redacted] corroborated Claimant's testimony regarding his diminished abilities. Furthermore, the medical records demonstrate consistent and ongoing right shoulder symptoms following the February 12, 2021 incident. Notably, on June 14, 2021 Claimant presented to ATP Dr. Schnell with right shoulder pain and weakness. He commented that he suffered an acute onset of right shoulder pain after he tripped over a barrier in a parking lot at work on February 12, 2021. Moreover, Dr. Aschberger commented that Claimant exhibited rotator cuff tears bilaterally with muscular atrophy. The tears likely constituted pre-existing conditions, but Claimant had good functional use of his shoulders prior to February 12, 2021. Finally, Dr. Aschberger assigned a 9% right upper extremity rating or 5% whole person impairment based on range of motion loss.

29. Respondents essentially argue that on February 12, 2021 Claimant fell at work but did not suffer any injuries. However, Respondents' argument is not consistent with the medical records from treating providers and witness testimony. Moreover, Dr. Raschbacher did not question whether Claimant fell on February 12, 2021 but reasoned that the medical treatment he received was not related to his fall. The persuasive evidence supports a conclusion that Claimant suffered an injury that necessitated evaluation and medical care when he tripped over the parking block on February 12, 2021 while in the course and scope of employment. Although Claimant suffered pre-existing right shoulder symptoms, his February 12, 2021 work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable right shoulder injury while performing his job duties on February 12, 2021.

30. Claimant has proven it is more probably true than not that he suffered compensable neck and left shoulder injuries during the course and scope of employment on March 27, 2021. Initially, Claimant commented that on March 27, 2021 he was wearing a 20-30-pound metal tank on his back while trying to open a stuck door. He tried to kick the door open but lost his balance and fell backwards. Claimant fell onto the tank and struck his lower back, neck and left shoulder. Although Claimant had difficulties describing the details of the incident, CB[Redacted] closely corroborated his account and testified that he reported this injury on the following day.

31. Claimant testified that, although he had pre-existing symptoms, his condition steadily worsened following the March 27, 2021 fall. CB[Redacted] agreed that Claimant's condition generally deteriorated following the March 27, 2021 accident. She believed the fall aggravated Claimant's condition to the extent he was unable to continue detailing buses. Specifically, she testified that Claimant had significant difficulty lifting his left arm after the March 27, 2021 fall. Moreover, the medical records reflect that Claimant suffered work injuries on March 27, 2021. On May 4, 2021 Claimant returned to ATP Dr. Irish and noted complaints of bilateral shoulder pain, left hip pain, and numbness in the left hand related to a second fall at work on March 27, 2021. Dr. Irish suggested the falls may have aggravated pre-existing arthritis in his shoulders. On May 25, 2021 Claimant specifically reported left shoulder pain and dysfunction to Dr. Irish. Claimant noted the symptoms constituted "new issues" that were related to his recent fall. Dr. Irish again surmised that Claimant may have aggravated pre-existing conditions.

32. Dr. Aschberger explained that Claimant's left shoulder surgical intervention occurred as a result of the deterioration of his condition and limited use of the shoulder. He reasoned that the March 27, 2021 work accident caused the need for Claimant's left shoulder arthroplasty because his condition deteriorated following the event. Dr. Aschberger acknowledged that, while the left shoulder tears were likely pre-existing, Claimant had good function prior to his work-related injury. He assigned a 19% whole person rating for Claimant's cervical spine impairment. Dr. Aschberger also assigned a 30% upper extremity impairment for the left shoulder arthroplasty. After assigning an additional 13% rating for range of motion impairment, the combined upper extremity rating totaled 39% that converted to a 23% whole person impairment.

33. Even Respondent's expert Dr. Raschbacher did not question whether Claimant fell on March 27, 2021. Instead, Dr. Raschbacher reasoned that the medical treatment Claimant received was not related to his falls at work. Moreover, Dr. Raschbacher testified that all of the treatment Claimant received between March 27, 2021 and his June 22, 2021 date of MMI was reasonable and related to his work activities. He also acknowledged that Claimant's pre-existing conditions rendered him more susceptible to an aggravation of his pre-existing conditions. The persuasive evidence thus supports a conclusion that Claimant suffered an injury that necessitated evaluation and medical care when he fell when wearing a tank on March 27, 2021 during the course and scope of employment. Claimant's March 27, 2021 work activities thus aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. He thus suffered compensable neck and left shoulder injuries while performing his job duties on March 27, 2021.

34. Claimant has demonstrated it is more probably true than not that he is entitled to receive reasonable, necessary and causally related medical benefits for both his February 12, 2021 and March 27, 2021 industrial injuries. Initially, on February 15, 2021 Claimant visited Injury Care Associates for an evaluation. Claimant reported tripping on a parking block on February 12, 2021. ATP Dr. Irish diagnosed Claimant with a right rotator cuff strain and a right-hand abrasion. She determined that her objective findings were consistent with a work-related mechanism of injury. Dr. Irish reasoned the matter was an "'open and shut case" and placed Claimant at MMI with no permanent impairment or work restrictions. The medical care Claimant received from Injury Care Associates on February 15, 2021 with Dr. Irish was thus reasonable, necessary and related to his February 12, 2021 work related injury.

35. Respondents are also responsible for the medical care Claimant received at Injury Care Associates and their referrals following the March 27, 2021 injury. The medical records reveal that Claimant's treatment and diagnostic testing was reasonable, necessary and related to his March 27, 2021 fall at work. After Claimant filed a First Report of Injury, Dr. Irish performed an evaluation, ordered diagnostic testing, recommended chiropractic treatment and referred him to orthopedist Dr. Schnell. Dr. Schnell evaluated Claimant and Dr. Irish placed Claimant at MMI on June 22, 2021 for his work injuries.

36. The preceding chronology reflects that Claimant received reasonable, necessary and causally related medical care for both of his work falls until he reached MMI on June 22, 2021. Furthermore, Respondents' IME expert Dr. Raschbacher acknowledged that all of the

medical care Claimant received between March 27, 2021 and his June 22, 2021 date of MMI was reasonable and related to his work duties. Claimant's work activities on February 12, 2021 and March 27, 2021 thus aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Respondents are financially responsible for all of Claimant's authorized medical care as a result of his February 12, 2021 and March 27, 2021 work 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. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

Compensability

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

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

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

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

February 12, 2021 Injury

8. As found, Claimant has established by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of employment on February 12, 2021. Initially, Claimant testified that he tripped over a parking block when distracted by a moving bus. He suffered right shoulder soreness and an abrasion to his right hand. Claimant timely reported the injury to JM[Redacted] and CB[Redacted]. They corroborated his testimony and encouraged him to seek medical care. On February 15, 2021 Claimant visited Injury Care Associates and maintained that he tripped on a parking block on February 12, 2021. He suffered a scrape on his right hand and pain in his right shoulder on the following day. While Claimant reported feeling better, ATP Dr. Irish noted ongoing pain and limited range of motion in the right shoulder. Dr. Irish diagnosed Claimant with a right rotator cuff strain and a right-hand abrasion. She determined that her objective findings were consistent with a work-related mechanism of injury. Dr. Irish concluded that Claimant had reached MMI with no permanent impairment or work restrictions.

9. As found, the record contains evidence that Claimant suffered from a pre-existing

right shoulder condition. However, Claimant testified that prior to the February 12, 2021 accident, he was not limited in performing his job duties. Following the injury, he testified that he had trouble with overhead work including cleaning glass windshields. CB[Redacted] corroborated Claimant's testimony regarding his diminished abilities. Furthermore, the medical records demonstrate consistent and ongoing right shoulder symptoms following the February 12, 2021 incident. Notably, on June 14, 2021 Claimant presented to ATP Dr. Schnell with right shoulder pain and weakness. He comment4ed that he suffered an acute onset of right shoulder pain after he tripped over a barrier in a parking lot at work on February 12, 2021. Moreover, Dr. Aschberger commented that Claimant exhibited rotator cuff tears bilaterally with muscular atrophy. The tears likely constituted pre-existing conditions, but Claimant had good functional use of his shoulders prior to February 12, 2021. Finally, Dr. Aschberger assigned a 9% right upper extremity rating or 5% whole person impairment based on range of motion loss.

10. As found, Respondents essentially argue that on February 12, 2021 Claimant fell at work but did not suffer any injuries. However, Respondents' argument is not consistent with the medical records from treating providers and witness testimony. Moreover, Dr. Raschbacher did not question whether Claimant fell on February 12, 2021 but reasoned that the medical treatment he received was not related to his fall. The persuasive evidence supports a conclusion that Claimant suffered an injury that necessitated evaluation and medical care when he tripped over the parking block on February 12, 2021 while in the course and scope of employment. Although Claimant suffered pre-existing right shoulder symptoms, his February 12, 2021 work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable right shoulder injury while performing his job duties on February 12, 2021.

March 27, 2021 Injury

11. As found, Claimant has proven by a preponderance of the evidence that he suffered compensable neck and left shoulder injuries during the course and scope of employment on March 27, 2021. Initially, Claimant commented that on March 27, 2021 he was wearing a 20-30-pound metal tank on his back while trying to open a stuck door. He tried to kick the door open but lost his balance and fell backwards. Claimant fell onto the tank and struck his lower back, neck and left shoulder. Although Claimant had difficulties describing the details of the incident, CB[Redacted] closely corroborated his account and testified that he reported this injury on the following day.

12. As found, Claimant testified that, although he had pre-existing symptoms, his condition steadily worsened following the March 27, 2021 fall. CB[Redacted] agreed that Claimant's condition generally deteriorated following the March 27, 2021 accident. She believed the fall aggravated Claimant's condition to the extent he was unable to continue detailing buses. Specifically, she testified that Claimant had significant difficulty lifting his left arm after the March 27, 2021 fall. Moreover, the medical records reflect that Claimant suffered work injuries on March 27, 2021. On May 4, 2021 Claimant returned to ATP Dr. Irish and noted complaints of bilateral shoulder pain, left hip pain, and numbness in the left hand related to a second fall at work on March 27, 2021. Dr. Irish suggested the falls may have aggravated pre-existing arthritis in his shoulders. On May 25, 2021 Claimant specifically reported left shoulder pain and dysfunction to Dr. Irish. Claimant noted the symptoms constituted "new issues" that were related to his recent

fall. Dr. Irish again surmised that Claimant may have aggravated pre-existing conditions.

13. As found, Dr. Aschberger explained that Claimant's left shoulder surgical intervention occurred as a result of the deterioration of his condition and limited use of the shoulder. He reasoned that the March 27, 2021 work accident caused the need for Claimant's left shoulder arthroplasty because his condition deteriorated following the event. Dr. Aschberger acknowledged that, while the left shoulder tears were likely pre-existing, Claimant had good function prior to his work-related injury. He assigned a 19% whole person rating for Claimant's cervical spine impairment. Dr. Aschberger also assigned a 30% upper extremity impairment for the left shoulder arthroplasty. After assigning an additional 13% rating for range of motion impairment, the combined upper extremity rating totaled 39% that converted to a 23% whole person impairment.

14. As found, even Respondent's expert Dr. Raschbacher did not question whether Claimant fell on March 27, 2021. Instead, Dr. Raschbacher reasoned that the medical treatment Claimant received was not related to his falls at work. Moreover, Dr. Raschbacher testified that all of the treatment Claimant received between March 27, 2021 and his June 22, 2021 date of MMI was reasonable and related to his work activities. He also acknowledged that Claimant's pre-existing conditions rendered him more susceptible to an aggravation of his pre-existing conditions. The persuasive evidence thus supports a conclusion that Claimant suffered an injury that necessitated evaluation and medical care when he fell when wearing a tank on March 27, 2021 during the course and scope of employment. Claimant's March 27, 2021 work activities thus aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. He thus suffered compensable neck and left shoulder injuries while performing his job duties on March 27, 2021.

Medical Benefits

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

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

2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

17. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for both his February 12, 2021 and March 27, 2021 industrial injuries. Initially, on February 15, 2021 Claimant visited Injury Care Associates for an evaluation. Claimant reported tripping on a parking block on February 12, 2021. ATP Dr. Irish diagnosed Claimant with a right rotator cuff strain and a right-hand abrasion. She determined that her objective findings were consistent with a work-related mechanism of injury. Dr. Irish reasoned the matter was an "'open and shut case" and placed Claimant at MMI with no permanent impairment or work restrictions. The medical care Claimant received from Injury Care Associates on February 15, 2021 with Dr. Irish was thus reasonable, necessary and related to his February 12, 2021 work related injury.

18. As found, Respondents are also responsible for the medical care Claimant received at Injury Care Associates and their referrals following the March 27, 2021 injury. The medical records reveal that Claimant's treatment and diagnostic testing was reasonable, necessary and related to his March 27, 2021 fall at work. After Claimant filed a First Report of Injury, Dr. Irish performed an evaluation, ordered diagnostic testing, recommended chiropractic treatment and referred him to orthopedist Dr. Schnell. Dr. Schnell evaluated Claimant and Dr. Irish placed Claimant at MMI on June 22, 2021 for his work injuries.

19. As found, the preceding chronology reflects that Claimant received reasonable, necessary and causally related medical care for both of his work falls until he reached MMI on June 22, 2021. Furthermore, Respondents' IME expert Dr. Raschbacher acknowledged that all of the medical care Claimant received between March 27, 2021 and his June 22, 2021 date of MMI was reasonable and related to his work duties. Claimant's work activities on February 12, 2021 and March 27, 2021 thus aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Respondents are financially responsible for all of Claimant's authorized medical care as a result of his February 12, 2021 and March 27, 2021 work injuries.

ORDER

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

1. Claimant suffered a compensable right shoulder injury while performing his job duties on February 12, 2021.

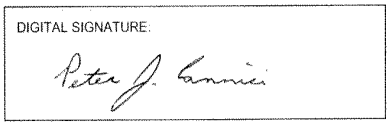
2. Claimant suffered compensable neck and left shoulder injuries while performing his job duties on March 27, 2021.

3. Respondents are financially responsible for all of Claimant's authorized medical care as a result of his February 12, 2021 and March 27, 2021 work injuries.

4. Claimant earned an AWW of $685.42.

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: March 6, 2024.



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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that her average weekly wage ("AWW") should be increased to $1,478.19 based on Claimant receiving a raise from Employer post injury?

- Whether Claimant has proven by a preponderance of the evidence that she sustained an injury that is not contained on the schedule of impairments set forth at Section 8-42-107(2), C.R.S.?

- The parties agreed prior to the hearing that if Claimant successfully converted her scheduled impairment rating to a whole person award, Claimant's permanent partial disability ("PPD") award would increase from 14% whole person to 17% whole person.

- Whether Claimant has proven by a preponderance of the evidence that Respondent violated W.C.R.P. 11-4(a)(2) by failing to file a Notice of Failed IME negotiations within 30 days of Claimant filing her Notice and Proposal to Select a Division-sponsored Independent Medical Examination ("DIME") Physician which would allow for a penalty to be assessed under Section 8-43-304(1), C.R.S.?

- Whether Claimant has proven by a preponderance of the evidence that she is entitled to an award for maintenance medical treatment?

- The parties stipulated that Claimant would be entitled to an award of $1,000 for disfigurement pursuant to Section 8-42-108, C.R.S. prior to the hearing.

FINDINGS OF FACT

1. Claimant was employed with Employer as Healthcare Technician I. Claimant testified she began her employment with Employer in July 2013. Claimant's job as a Healthcare Technician I involved general floor staff. Claimant testified that in July 2022 she was promoted to a Healthcare Technician IV and her job duties now involve overseeing a group home. Claimant testified that this promotion resulted in a raise to $26.70 per hour. The wage records entered into evidence at hearing establish that following Claimant's promotion in July 2022, Claimant earned $59,127.66 over the next 40 weeks, which would equate to weekly earnings of $1,478.19.

2. Claimant testified that she sustained an injury at work on June 18, 2021 when she responded to an emergency call at a different home and was required to perform a physical intervention. Claimant testified that while performing the physical intervention on the client, the client grabbed Claimant's hair and violently jerked

Claimant's head around. Claimant testified that as a result of this incident, she injured her shoulder, neck, back, trapezius, and bicep.

3. Claimant was referred for medical treatment with St. Mary's Occupational Health. Claimant was initially evaluated on June 22, 2021 and provided a consistent accident history to Dr. Stagg and noted that after taking it easy over the weekend, she returned to work but had increasing symptoms including a headache, burning sensations in her neck, shoulder and the middle of her back with intermittent numbness into her left arm and left lower extremity. Dr.Stagg took Claimant off of work and referred Claimant for x-rays of the cervical and lumbar spine.

4. Claimant returned to work in a limited capacity following an examination by Dr. Stagg on July 27, 2021 at which time he provided Claimant with work restrictions of no lifting over 10 pounds with no repetitive lifting over 5 pounds.

5. Claimant returned to St. Mary's Occupational Medicine on August 10, 2021 and was evaluated by nurse practitioner ("NP") Harkreader. NP Harkreader noted Claimant reported improving overall, but continued to have the biggest issue with her left shoulder. NP Harkreader recommended Claimant obtain a magnetic resonance image ("MRI") of her left shoulder and referred Claimant to Dr. Vance for a surgical consulation.

6. PA Ousley with Dr. Vance's office examined Claimant on September 2, 2021 and recommended the MRI of the left shoulder. The MRI ultimately showed a torn rotator cuff in the left shoulder and Claimant subsequently underwent surgery under the auspices of Dr. Vance on September 29, 2021. The surgery consisted of a diagnostic operative arthroscopy of the left shoulder with extensive intra-articular debridement; subacromial decompression including acromioplasty, open subpectoral biceps tenodesis and arthroscopic rotator cuff repair.

7. Following Claimant's surgery, Claimant was taken off of work completely but continued to follow up with NP Harkreader and Dr. Vance. Claimant reported to Dr. Olson on January 10, 2022 that she had tightness in her anterior biceps area with some pain over her A1 pulley area of her flexor aspect of her left middle finger. Claimant also reported experiencing muscle tightness in her upper trap area along with some of the pectoral muscles.

8. Claimant eventually returned to work on or about April 20, 2022. Claimant was provided temporary partial disability benefits for the period of May 4, 2022 through July 17, 2022, which terminated when Claimant was put into her new position as a Health Care Technician IV.

9. Claimant was placed at MMI on August 11, 2022 by Dr. Olson and provided with an impairment rating of 7% of the upper extremity. Claimant was released to return to work without restrictions and provided with maintenance medical treatment that would include repeat office visits to either the Occupational Medicine

Clinic or orthopedic surgeon's office along with physical therapy visits and a possible further procedure as deemed necessary.

10. Respondents filed a Final Admission of Liability ("FAL") on October 4, 2022, admitting to the 7% rating and maintenance care. The FAL admitted to an average weekly wage ("AWW") of $1,044.47. Claimant subsequently filed a timely Objection to the FAL along with an Application for a Division-Sponsored Division Independent Medical Examination ("DIME") on October 21, 2022.

11. Claimant testified that after she filed the Application for DIME on October 21, 2022, Respondent did not file a Notice of Failed IME Negotiations until March 16, 2023. Claimant testified that during this time, she was experiencing stress and anxiety about her need for additional medical treatment. Claimant testified that she had to hire an attorney because she was unable to move her case forward on her own.

12. Claimant's testimony regarding the stress and anxiety she experienced during the delay after her Notice and Proposal to Select the DIME was filed is found by the ALJ to be credible and persuasive. Claimant's testimony that she was harmed by having to hire an attorney is given less weight, as Claimant was able to navigate the DIME process after hiring the attorney and ultimately completed the DIME process with the help of her attorney and received a higher impairment rating.

13. Claimant entered into evidence a series of emails between herself and the adjuster assigned to the case that her efforts to obtain information regarding her claim in September and October 2022. But it is unclear from the communication that the emails pertain to the issues involving the Notice of Failed DIME Negotiations. However, the emails do establish that Claimant failed to receive responses to her inquiries from the third party administrator with regard to her questions regarding her permanent impairment and the FAL.

14. Claimant testified at hearing that after she filed the Notice and Proposal for the DIME application, she received an email from the Division of Workers' Compensation that indicated they had deleted her initial DIME application. Claimant testified she emailed the Division of Workers' Compensation on November 19 and asked when she could receive a response regarding her DIME application. Claimant testified she did not recall receiving a response from the Division of Workers' Compensation and did not contact the third party administrator handling her claim regarding the status of the Failed IME Negotiations form.

15. Claimant eventually underwent the DIME with Dr. Elfenbein on May 26, 2023. Dr. Elfenbein reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Elfenbein noted Claimant's history of a prior workers' compensation claim and considered that information in providing his final impairment rating. Dr. Elfenbein noted Claimant complained of generalized pain of the left arm with weakness. Claimant reported the left shoulder pain was 7/10 at its worst and 3/10 at its best with a routine or average pain of

4/10. Claimant also reported upper back pain at 4/10 at is worst provided and 0/10 at its best with a routine or average pain of 0/10. Claimant reported low back pain of 5/10 at its worst, 3/10 at its best, with a routine or average pain of 3/10. Claimant also reported left elbow pain of 6/10 at its works, 2/10 at its best and routine or average pain of 2/10.

16. Dr. Elfenbein provided Claimant with a 28% whole person rating for the combined cervical, thoracic and lumbar spine. Dr. Elfenbein apportioned out the entire thoracic spine rating and all but 1% of the lumbar spine rating to Claimant's prior workers compensation injury. Dr. Elfenbein provided Claimant with a final impairment rating related to her June 18, 2021 injury of 14% whole person combined for her cervical and lumbar spine. Dr. Elfenbein also provided Claimant with a 6% scheduled upper extremity rating which converted to a 4% whole person rating. The parties agreed at hearing that if converted, the shoulder rating would combine with Claimant's 14% whole person rating for her cervical and lumbar spine for a 17% whole person rating.

17. Dr. Elfenbein noted upper, low back and neck pain that Claimant related back to the injury. Dr. Elfenbein further noted that his examination of the spine revealed left sided trapezial tenderness and paralumbar tenderness, with left sided paracervical tenderness and trapezial tenderness. Dr. Elfenbein noted left posterior shoulder discomfort on cervical compression test. Dr. Elfenbein agreed with Claimant could be returned to work with no specific work restrictions being necessary. With regard to maintenance medical benefits, Dr. Elfenbein stated that he disagreed with Dr. Olson and did not feel is was appropriate for any maintenance care at this time. Dr. Elfenbein provided Claimant with an MMI date of May 26, 2023.

18. Respondents filed an FAL on August 18, 2023 admitting for the 14% whole person rating and 6% scheduled rating. However, the August 18, 2022 FAL admitted for an AWW of $100, despite the fact that Respondents had already admitted for an AWW of $1,044.47 on the prior FAL. Respondents subsequently filed an amended FAL on August 23, 2022 that admitted for an AWW of $1,044.47. These FAL's denied the need of maintenance medical treatment based on Dr. Elfenbein's DIME report.

19. Claimant testified at hearing that when Dr. Olson placed her at MMI, she was still having difficulty with lifting overhead and towards her body with these actions causing burning in her scapula area and pain in her trapezius area. Claimant testified she had moved her dishes to the lowest shelf to avoid lifting overhead. Claimant testified she has manipulated how she performs her job and will call in co-workers if she has to lift overhead.

20. Claimant objected to the August 23, 2023 FAL and filed an Application for Hearing on September 14, 2023 endorsing the issues of AWW, permanent partial disability ("PPD"), penalties and disfigurement. The parties resolved the issue of

disfigurement prior to the hearing for a lump sum payment of $1,000 which was recited by the parties on the record.

21. Claimant argued at hearing that her AWW should properly be calculated as $1,478.19 based on the promotion and raise she received in July 2022. Claimant argues that following her raise, Claimant earned $59,127.66 in the 40 week period after her raise and prior to the finding of MMI by Dr. Elfenbein. Claimant maintains that based on an argument pursuant to *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001), the ALJ should use his discretion to recalculate the AWW as allowed by Section 8-42-102(3) to use the higher earnings as this would more accurately reflect Claimant's loss of earning capacity in the future as a result of her injury.

22. Respondents argue that by using the discretionary exception to increase Claimant's AWW, this would result in a manifestly unjust result and provide Claimant with a windfall at Respondent's expense. While the ALJ does not agree that utilizing the discretionary exception in this case would be manifestly unjust, the ALJ finds that the Claimant has failed to establish by a preponderance of the evidence that the facts in this case involve a situation where the ALJ should use the discretionary exception to increase the AWW.

23. Section 8-42-102(2) provides that the ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. While Section 8-42-102(3) provides that the ALJ may use discretion to utilize discretion to recalculate the Claimant's AWW if none of the subsections in Section 8-42-102(2) apply, the ALJ determines that this is not a case where the discretionary calculation should be used.

24. Notably, in this case, Claimant was employed by Employer for a fairly lengthy period of time prior to her injury, having started her employment with Employer in July 2013. Claimant had worked her way into position to be able to achieve a promotion and raise from Employer. The mere fact that the raise occurred after Claimant's injury should not result in Claimant necessarily being allowed to increase her AWW based on the promotion and raise.

25. Based on this analysis, it is the ALJ's finding that Claimant has failed to establish that it is more likely than not that she should have an increase in her AWW based on the post-injury promotion Claimant received.

26. Claimant also argues that her shoulder impairment rating should be converted to a whole person impairment rating and combined with her Table 53 rating for an impairment rating of 17% whole person. The ALJ agrees.

27. Following Claimant's injury, Claimant consistently reported to her treating physicians that she had pain in her left shoulder and into her neck and thoracic areas.

For instance, examination with NP Harkreader on August 10, 2021 demonstrated tenderness in the medial periscapular region. Likewise, during the DIME examination, Dr. Elfenbein noted left sided trapezial tenderness with left sided paracervical tenderness. Additionally, the ALJ credits Claimant's testimony that overhead lifting causes burning in the scapula area along with pain in the trapezius area and finds that Claimant has proven that it is more likely than not that Claimant sustained an impairment that is not contained on the schedule of injuries established at Section 8-42-107(2), C.R.S.

28. When placed at MMI by Dr. Olson, it was recommended that Claimant be allowed to return to her Occupational Medicine Clinic or orthopedic surgeon's office along with physical therapy visits and possible further procedure as deemed necessary. Dr. Elfenbein, in connection with his DIME, disagreed with Dr. Olson and opined that no maintenance care was necessary. Dr. Elfenbein did not elaborate on this opinion.

29. Claimant testified at hearing that she continues to have ongoing symptoms and expressed an interest in returning to her orthopedic surgeon if given the opportunity. The ALJ credits Claimant's testimony at hearing regarding her ongoing symptoms and her desire to seek additional care if necessary, and finds that Claimant has established by a preponderance of the evidence that she is entitled to an award of maintenance medical benefits.

30. The ALJ credits the medical records from Dr. Olsen, Dr. Vance and NP Harkreader along with the testimony of Claimant at hearing and finds that Claimant has established that it is more likely than not that Claimant is in need of medical treatment necessary to maintain Claimant at MMI and prevent deterioration of her condition.

31. Claimant argues that she is entitled to an award of penalties for Respondents' failure to file a Notice of Failed DIME Negotiations. Claimant argues that Respondents were required to file the Notice of Failed Dime Negotiations within 30 days of the October 21, 2022 Objection to the FAL and Application for DIME pursuant to WCRP 11-4(2). Claimant argues that because the Notice of Failed DIME Negotiations was not filed until March 16, 2023, a period of 115 days of penalties is appropriate (November 20, 2022 through March 16, 2023 represents 115 days).

32. Respondent argue in their post hearing briefs that because the Notice of DIME Negotiations was filed on March 16, 2023 and the Application for Hearing was filed on September 14, 2023, Respondent cured the penalty as allowed under Section 8-43-304(4), C.R.S. and Claimant must prove, pursuant to the statute, by clear and convincing evidence, that the alleged violator, identified as [Redacted, hereinafter CL] by Respondent, knew or reasonably should have known that they were in violation or no penalty may be assessed.

33. While Respondent is correct that Section 8-43-304(4) provides a heightened burden of proof with regard to the assessment of penalties when the violation has been cured within 20 days after the filing of the Application for Hearing,

this statutory provision is an affirmative defense for Respondent that was not properly raised in this case. The ALJ notes that the issue of "cure" was specifically pled on the Response to Application for Hearing. However, at the commencement of the hearing, the ALJ requested both parties identify the issues to be addressed at hearing. After Claimant laid forth the multiple issues that Claimant wished to have addressed at hearing, the ALJ inquired with Respondent whether they agreed that those issues were properly before the court. After Counsel for Respondent answered in the affirmative, the ALJ inquired as to whether there were any affirmative defenses raised by Respondent. Counsel for Respondent answered in the negative to the ALJs inquiry. Based upon the representation by Respondent at hearing, the ALJ finds that Respondent waived the affirmative defense of a cure of the violation as allowed under Section 8-43-304(4), C.R.S.

34. The ALJ credits Claimant's testimony at hearing along with the records entered into evidence and finds that Claimant has established that it is more probable than not that Respondent failed to timely file the Notice of Failed IME Negotiations and was in violation of WCRP 11-4. Section 8-43-304(1) allows for a penalty of up to $1,000 to be assessed for any violation of the Act or failure to perform any duty lawfully enjoined within the time prescribed by the director or panel. Respondent's failure to timely file the Notice of Failed DIME Negotiations subjects Respondent's to penalties under this section of the Colorado Workers' Compensation Act.

35. While testimony was elicited at hearing that there was an issue with regard to the Division of Workers' Compensation "deleting" the Application for DIME, it was unclear from the record how this would effect the third party administrator from filing the required Notice of Failed IME Negotiations. Moreover, there was no credible evidence presented at the hearing that there was some reasonable explanation as to why the third party administrator failed to file the Notice of Failed IME Negotiations in a timely manner as required by the W.C.R.P. 11-4. Therefore, the ALJ finds that Claimant has established that it is more probable than not that the failure of the third party administrator to file the Notice of Failed IME Negotiations in a timely manner was not reasonable.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2013 The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(1) states in pertinent part:

(a) When an injury results in permanent medical impairment and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section.

(b) When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section.

4. It is the claimant's burden of proof by a preponderance of the evidence to establish both that she suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is the claimant's burden to prove by a preponderance of the evidence the extent of the permanent impairment.

5. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

6. As found, Claimant has proven by a preponderance of the evidence that she suffered a "functional impairment" to a part of the body that is not contained on the schedule. Therefore, Claimant is entitled to a whole person impairment award pursuant to Section 8-42-107(8), C.R.S. As found, Claimant's testimony with regard to the situs of the impairment and the corresponding medical records that are consistent with Claimant's testimony are credible and persuasive on this issue. As found, Claimant is entitled to an award of PPD benefits of 17% whole person based upon the conversion of the upper extremity impairment rating to a whole person award.

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

8. Section 8-42-102(3), C.R.S. states in pertinent part:

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

9. The Court of Appeals has allowed for the discretionary provision for calculating the AWW set forth in Section 8-42-102(3), C.R.S. to be used to increase the AWW for an injured worker who obtained an increase in the worker's AWW post injury. *See Pizza Hut v. Industrial Claim Appeals Office, supra.p* However, the ALJ in this case has found that the discretionary provision should not be applied to Claimant's injury in this case. As found, the circumstances of Claimant's employment with Employer do not raise a situation where Claimant's post-injury promotion and raise should be used in calculating the AWW. Therefore, Claimant's request to increase her AWW is denied.

10. Section 8-43-304(1), C.R.S. provides that penalties of up to $1,000 per day may be ordered if a party "violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel.

36. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If respondents committed a violation of the statute, rule or order, penalties can be imposed only if respondents actions were not reasonable under an objective standard. *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

37. W.C.R.P. 11-4(A)(2) states in pertinent part:

> The parties must attempt to negotiate the selection of a physician to conduct the DIME. The requesting party shall propose one or more candidates qualified under section 11-1 on the Notice and Proposal and Application for a DIME form. The Notice of DIME Negotiations form shall be filed within thirty (30) days of the filing of the Notice and Proposal and Application for DIME.

38. As found, Claimant has established by a preponderance of the evidence that Respondent violated W.C.R.P. 11-4 by failing to file the Notice of Failed IME Negotiations within 30 days of Claimant filing the Notice of the filing of the Notice and Proposal to Select a DIME Physician. As found, the Notice of Failed IME Negotiations should have been filed by November 20, 2022 and was not filed until March 16, 2023 for a period of 115 days. As found, no credible evidence was presented at hearing that would establish a reasonable basis for the failure tom timely file the Notice of Failed IME Negotiations and the ALJ finds that the failure to file the Notice of Failed IME Negotiations until March 16, 2023 was unreasonable.

39. Section 8-43-305, C.R.S. states in pertinent part:

> Each day during which any employer or insurer or officer or agent of either, or any employee or any other person fails to comply with any lawful order of an administrative law judge, the director, or the panel or fails to perform any duty imposed by articles 40 to 47 of this title shall constitute a separate and distinct violation thereof. In any action brought to enforce the same or to enforce any penalty provided for in said articles, such violation shall be considered cumulative and may be joined in such action.

40. As found, the penalty period in this case occurred from November 20, 2022 until March 16, 2023. As found, this constitutes a period of 115 days.

41. Claimant argues that a penalty of $250 per day is appropriate under the facts of this case. While the ALJ agrees that a penalty is appropriate, the ALJ does not find that the delay of undergoing the DIME warrants a penalty of $250 per day. In this case, Claimant was delayed in undergoing the DIME, which resulted in increased stress and anxiety.

42. As found, Claimant's testimony that she had increased stress and anxiety is found to be credible and persuasive and is taken into consideration in determining the amount of the penalty to be awarded in this case.

43. The ALJ determines that a penalty of $30 per day is appropriate in this case, which results in a penalty of $3,450 ($30 x $115 = $3,450) for the late filing of the Notice of Failed DIME Negotiations. The finding of a penalty of $30 per day is

appropriate is supported by the facts of this case, including the delay in having Claimant undergo the DIME examination and bring resolution to her claim.

11. The ALJ notes that pursuant to Section 8-43-304(1), the penalty in this case is to be apportioned between the aggrieved party and the uninsured employer fund created in Section 8-67-105, C.R.S. The ALJ determines that the penalty is to be apportioned 50% to the aggrieved party and 50% to the uninsured employer fund. The check to the uninsured employment fund should be mailed to the CDLE Revenue Assessment Unit at 633 17th Street, Suite 400, Denver, Colorado 80202.

12. Section 8-43-304(4) provides that any party alleged to have committed a violation of the Act subject to penalties shall have twenty days to cure the violation from the date of mailing of the application for hearing in which penalties were alleged. Section 8-43-304(4) provides that if the violation cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. Section 8-43-304(4) further states that the curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

13. Respondents argued post-hearing that they had cured the penalty in this case. Notably, the cure provision was listed on Respondent's Response to Application for Hearing. However, this issues was not raised at the commencement of the hearing as an affirmative defense to the penalty violation.

14. O.A.C.R.P. 12-B states in pertinent part:

> At the commencement of the hearing, the parties shall confirm the issues to be determined, including affirmative defenses.

15. The ALJ finds that where a party fails to raise an affirmative defense at the commencement of the hearing, that issue is waived for the hearing.

16. It is well established that the need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, *supra*. An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

17. As found, Claimant has established by a preponderance of the evidence that she is entitled to an award of maintenance medical benefits to prevent further

deterioration of her physical condition. As found, Claimant's testimony as to her ongoing symptoms and intention of returning to her orthopedic surgeon are found to be credible and persuasive with regard to this issue.

ORDER

It is therefore ordered that:

1. Respondent shall admit for PPD benefits of 17% whole person based on Claimant's conversion of her scheduled impairment rating.

2. Respondent shall pay penalties to Claimant in the amount of $30 per day for the period of November 20, 2022 through March 16, 2023 for a period of 115 days. 50% of this penalty shall be paid to the uninsured employment fund.

3. Respondents shall admit for an award of maintenance medical benefits.

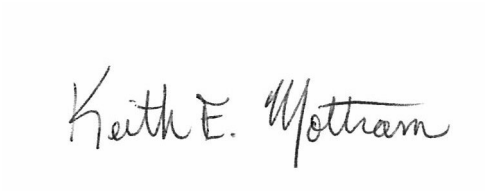
4. Respondents shall pay Claimant disfigurement benefits pursuant to 8-42-108, C.R.S. pursuant to the stipulation presented prior to hearing.

5. Claimant's claim for an increased AWW is denied and dismissed.

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

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

DATED: March 7, 2024



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

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment?

STIPULATIONS

- The parties stipulated that the transportation from the scene of the accident by ambulance to Memorial Hospital is reasonable and necessary if the Claim is found to be compensable.

FINDINGS OF FACT

1. Claimant was involved in a serious single car accident on April 25, 2023 while driving from his Employer's work yard in North Denver to his home in Pueblo.

2. According to the State of Colorado Traffic Crash Report, Claimant was driving a vehicle southbound on I-25 near milepost 157, just north of Colorado Springs, when it traveled off the roadway, into the median, and back onto the roadway to the other side when it went airborne. When the car hit the ground, it rolled multiple times before coming to a rest. Both Claimant and the rear passenger, [Redacted, hereinafter MW], were ejected during the rollover sequence. The traffic accident report does not indicate if Claimant was wearing a seatbelt. (Claimant's Submissions – Bate #002-005)

3. At the time the accident occurred, Claimant had been employed by Employer as a laborer for approximately two months. (Hrg. Tr. P. 54, l.20 – P. 55, l.11)

4. As a result of the accident Claimant sustained significant injuries to include a left frontal intraparenchymal contusion, brain edema, nasal fractures and bilateral pneumothoraxes. Claimant continues to struggle with memory and recall, among other sequelae of a brain injury. As a result, Claimant's memory of the event of the accident and the day before the accident is essentially non-existent. (Claimant's Submissions – Bate #027, Hrg. Tr. P. 54 ll.2-19)

5. [Redacted, hereinafter JB], Claimant's co-worker, was a passenger in the vehicle when the accident occurred. According to JB[Redacted], he,

another co-worker, MW[Redacted], and Claimant left Employer's work yard in North Denver at approximately 4:30 a.m. to head back to Pueblo. JB[Redacted] said he was awake from the time he left the work yard until the time of the accident. JB[Redacted] said he was not aware Claimant fell asleep until the car went off the road. (Hrg. Tr. P.46,ll. 3-9; P.48,ll. 4-12)

6. The day prior to the accident, Claimant, along with JB[Redacted] and MW[Redacted] started their workday around 4:30 a.m. in Pueblo. According to JB[Redacted], the first stop after leaving Pueblo was up to a job site in Colorado Springs to pick up some work items. MW[Redacted] was using his personal vehicle to transport them all up to the job site in Greeley. After stopping in Colorado Springs, MW[Redacted] drove Claimant and JB[Redacted] to Employer's work yard in North Denver off of Lowell Boulevard. (Hrg. Tr. P. 17, ll.22-24; P.17, l.25 – P. 18 l.22; P.20, l.15 – P.21, l.5)

7. Once at Employer's work yard in Denver, JB[Redacted] and Claimant loaded up some equipment into Employer's work trucks and went up to Greeley. MW[Redacted], JB[Redacted] and Claimant, drove to Greeley in MW[Redacted] vehicle. According to JB[Redacted], they arrived in Greeley around 8:30 a.m. (Hrg. Tr. P.21, l.6 – P.22, l.17)

8. The job at Greeley involved asphalt work along with seal coating a parking lot at a [Redacted, hereinafter KC]. The first task performed for the job consisted of milling and paving the drive through. After the asphalt work on the drive through was completed, at approximately 5:00 P.M., it was necessary to wait for KC[Redacted] to close before starting the seal coating. (Hrg. Tr. P.23, l.16 – P.24, l.25)

9. According to JB[Redacted], the KC[Redacted] was going to close around 8:00 p.m. at which time he, Claimant and the rest of the crew could start seal coating. Between 5:00 p.m. and 8:00 p.m., JB[Redacted] testified that he and a co-worker went to Employer's work yard in North Denver to get the seal coating machine. According to JB[Redacted], he and the co-worker used Employer's work truck to get to and from Employer's work yard. (Hrg. Tr. P.25, l.5 – P.26, l.9)

10. From approximately 8:30 p.m. to around 4:00 a.m. the next morning, JB[Redacted] and others finished seal coating the rest of the KC[Redacted] parking lot. According to JB[Redacted], Claimant worked somewhere between an hour or two seal coating but spent the remainder of his time either sleeping or doing other things. (Hrg. Tr. P.28, l.6 – P.29, l.2)

11. After the KC[Redacted] parking lot was completed, Claimant, JB[Redacted]. Employer's owner [Redacted, hereinafter PJ] and others loaded some work equipment on one of the Employer's trucks. JB[Redacted] drove the truck with the equipment back to Employer's work yard in Denver while

MW[Redacted] drove the other work truck. JB[Redacted] drove Claimant and himself in MW[Redacted] car back to the Denver work yard. (Hrg. Tr. P.29, l.2 – P.30, l.11)

12. Once JB[Redacted], Claimant, MW[Redacted], and PJ[Redacted]arrived at the work yard in North Denver, PJ[Redacted] told JB[Redacted] and his co-workers not to worry about unloading the equipment but to get back home. According to JB[Redacted], his mother and father-in-law were wanting him, MW[Redacted], and Claimant to get a hotel room but turned the offer down because they wanted to get home. Furthermore, JB[Redacted] thought it would be okay for Claimant to drive to Pueblo because he had already had some sleep. (Hrg. Tr. P.30, l.18 – P.31, l.11)

13. JB[Redacted] testified that he was unaware of any conversation between PJ[Redacted], MW[Redacted], Claimant or anyone else concerning an offer of getting a hotel room. JB[Redacted] denied any offers from PJ[Redacted] concerning getting a hotel room prior to going back to Pueblo. (Hrg. Tr. P.31, ll.12 – 23)

14. JB[Redacted] testified that prior to leaving from Denver to Pueblo, Claimant did not appear to be tired and Claimant told JB[Redacted] he was okay to drive. (Hrg. Tr. P.32, ll.6 – 12)

15. JB[Redacted] was hired by Employer approximately six months prior to the April 25, 2023 accident. According to JB[Redacted], he was hired for a job in Colorado Springs. However, JB[Redacted] also worked at other job sites in Northern Colorado to include Greeley and Fort Collins. JB[Redacted] used one of Employer's work trucks to get back and forth to the job in the Fort Collins region otherwise MW[Redacted]would drive him. (Hrg. Tr. P.33, l.2 – P.34, l.88; P.37, ll.12 – 19)

16. According to JB[Redacted], PJ[Redacted] would pay him, Claimant, and MW[Redacted] for driving to those job sites that were beyond the Colorado Springs area. According to JB[Redacted], PJ[Redacted] would sometimes pay him and other employees for time driving to and from work based on how long the drive was. (Hrg. Tr. P.37, ll.12 – 23)

17. JB[Redacted] testified that he was never given any rules, verbal or written, requiring employees wear a safety belt while driving a vehicle on the job. In addition, JB[Redacted] does not remember if Claimant was wearing a safety belt at the time of the accident. (Hrg. Tr. P.34, ll.11 – 17; P.49. ll.5 – 11)

18. According to JB[Redacted], there were times when Employer would have him use his personal vehicle to perform work at multiple job sites. (Hrg. Tr. P.50, ll.7 – 10)

19. Claimant testified that as the result of the April 25, 2023 accident he

sustained significant injuries to include a brain injury. He has seizures and issues with his memory, especially his short-term memory, and therefore does not remember anything concerning the accident or the day prior to the accident. However, Claimant remembers being hired by Employer shortly after he turned 18 years old and working at an apartment complex in Colorado Springs which, according to Claimant, required him to work from 5:00 or 6:00 a.m. until it got dark outside. (Hrg. Tr. P.l.54 – P.56, l.10)

20. Claimant testified on cross examination that there were times he was paid wages for drive time but unsure of when. Claimant was unsure of exactly what he was paid as he was paid through a "cash app" which did not have a breakdown of hours worked, drive time, overtime, etc. (Hrg. Tr. P.62 ll.19 – 23)

21. PJ[Redacted] owner of Employer, testified that the majority of his work is conducted in the Denver Metro area and when he obtained a contract for work in Colorado Springs, he hired a new crew consisting, in part, of MW[Redacted], JB[Redacted] and Claimant who were hired specifically to work the Colorado Springs Project. The job in Colorado Springs started in September, 2022 and was to finish in July 2023. (Hrg. Tr. P.73, ll.18 – 19)

22. PJ[Redacted] further testified that 99 percent of the time Claimant, JB[Redacted], and the rest of the Colorado Springs crew worked in Colorado Springs but they also worked at four jobs site which were in the Denver Metro area or Northern Colorado. Furthermore, PJ[Redacted] said that he did not pay Claimant or any of the Colorado Springs crew for travel from Pueblo to the Colorado Springs job site. However, for jobs beyond Colorado Springs, PJ[Redacted] would pay the crew for travel times going to the work site but not coming from the work site. PJ[Redacted] specifically mentioned that Claimant was paid drive time for the KC[Redacted] project in Greeley, a concrete job in Lakewood, and a job in Fort Collins. (Hrg. Tr. P.73, l.12 – P.74, l.20; P.75, l.23 – P.77, l.8)

23. PJ[Redacted] testified that just prior to starting the second part of the KC[Redacted] job at around 8:00 P.M. he gathered the crew together and offered to let them go home since they looked tired. PJ[Redacted] denied he told Claimant, JB[Redacted] or anyone else they had to stay until the KC[Redacted] job was finished. (Hrg. Tr. P.82, l.6 – P.83, l.12)

24. PJ[Redacted] testified that there were some jobs he worked on which had deadlines. In these situations, he personally would stay late and ask his crew if they wanted to work extra hours so as to finish the job on time. (Hrg. Tr. P.83, l.25 – P.84, l.11)

25. PJ[Redacted] testified, similar to JB[Redacted], that after the KC[Redacted] job was finished, he and the crew went to the work yard in Denver. After arrival at the work yard, PJ[Redacted] went on to say that he told the guys

"[i]ts late, you guys haven't slept. Let me get you a hotel." PJ[Redacted] testified he offered to pay for the hotel. According to PJ[Redacted], Claimant was not present when he offered the rest of the Colorado Springs crew to pay for a hotel room. MW[Redacted] said he offered the Colorado Springs crew a hotel room at least three times. PJ[Redacted] admitted he never spoke to Claimant regarding procuring a hotel room. (Hrg. Tr. P.89, l.4 – P.90, l.6; P.114, ll.7 – 9)

26. According to PJ[Redacted], Claimant's paycheck dated May 5, 2023 included drive time for travel to the KC[Redacted] job site and another job site. (Hrg. Tr. P.116, l.13 – P.117, l.16; Claimant's Submissions Bate #248)

27. According to PJ[Redacted], he had Claimant and his co-workers from Pueblo come to Greeley so as to train them in doing asphalt work and seal coating. (Hrg.Tr.P.73,ll.6-11)

28. PJ[Redacted] conceded that he had no safety rules, written or otherwise, concerning the use of a safety belt while driving a vehicle on Employer business. (Hrg. Tr. P.114, l.11-P.115, l.5).

29. By agreement of the parties the transport of Claimant to the hospital by ambulance is reasonable, necessary and authorized.

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), *Sections 8-40-101, C. R. S. 2007, et seq.,* 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.* In general, the Claimant 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 probably true than not, *Page V. Clark, 17 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 the Respondents. *Section 8-43-201, C.R.S.*

B.) In Accordance with *8-43-215 C.R.S.*, this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible Inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the

record; instead, incredible, or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000)*.

C.) 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 inference from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); Bodensieck v. Industrial Claim Appeals Office, 183 P.3d 684(Colo. App. 2008); Kroupa v. Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002)*

Compensability

D.) To sustain his burden of proof concerning Compensability, Clamant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment, *Loofbourrow v. Industrial Claim Appeals Office, 321 P.3d 548 (Colo. App. 2001)*, aff'd *Harman-Bergstedt, Inc. v. Loofbourrow, 320 P.3d 327(Colo. 214); Section 8-45-301(1)(b), C.R.S.*

E.) 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 1720 (Colo. 1988).* The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando, 811 P.2d 379, 381 (Colo. 1991).* An injury occurs in the course of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In Re Question Submitted by the U.S. Court of Appeals, Supra; Deterk v. Times Publishing Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).*

F.) Generally, an injury sustained while traveling to or from work is not considered to have occurred within the scope of employment. *Varsity Contractors v. Baca 709 P.2d 55 (Colo. App. 1985); Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2 (1967).* However, there is an exception when "special circumstances" create a causal relationship between the employment and the travel beyond the sole fact of the employee's arrival at work. *Madden v. Mountain West Fabricators, 977 P.24 861, 863 (Colo. 1992); Staff Administrators, Inc. v. Reynolds, 977 P.2d 866 (Colo. 1999).*

G.) In *Madden v. Mountain West Fabricators, Inc.*, supra. The Supreme Court set forth four categories of evidence that *may* establish a travel injury to be an exception to the

coming and going exclusion:

1.) Whether travel occurred during working hours,

2.) Whether the travel occurred on or off the employer's premises,

3.) Whether the travel was *contemplated by the employment contract*, and

4.) Whether the obligations or conditions of the employment created a "zone of special danger" out of which the injury arose.

Claimant's accident did not occur while on Employer's premises or during normal work hours. Principally, the questions to be determined are whether or not travel was contemplated by the employment contract and/or whether or not the obligations or conditions of the employment created a "zone of special danger" out of which the injury arose.

H.) The *Madden* opinion listed three categories of cases generally recognized as exceptions to the coming and going rule because travel is contemplated by the contract one of which is whether the travel was at the express or implied request of the employer and conferred a benefit beyond the employee's arrival. The essence of this exception is that when the employer requires the employee to travel beyond a fixed location established for the performance of the job duties, the risks of such travel becomes the risks of the employment. See *Tatum-Reese Development Corp. v. Industrial Commission, 30 Colo. App 149, 490 P.2d 94 (1971); Benson v. Colorado Compensation Insurance Authority, 870 P.2d 624 (Colo. App. 1994).*

I.) In this matter, Claimant and his fellow co-workers from Pueblo were hired by employer to perform work at a job site in Colorado Springs. PJ[Redacted] testified that 99 percent of the work performed by Claimant and his co-workers was done at the Colorado Springs job site. Claimant and his co-workers from Pueblo were not paid mileage or travel time for driving to and from Colorado Springs. However, for those remote job sites which were in the Denver Metro area and Northern Colorado, including the KC[Redacted] job in Greeley, Claimant and his Pueblo co-workers were paid travel time. It is recognized that Employer did not pay any wages for travel time from any of the remote job sites back to Colorado Springs or Pueblo. However, the exception to the coming and going rule cannot be split into two separate segments for purposes of compensability. In other words, the employment relationship continues for both going to work and coming back from work. See *Colorado Civil Air Patrol v. Hagans, 662 P.2d 194, 196 (Colo. App. 1983)*. Thus the fact that Claimant was going from the job site to home is inconsequential in determining if there is an exception to the coming and going rule.

J.) By having Claimant and his other co-workers go to Greeley to be trained in asphalt work and seal coating, conferred a benefit on the Employer. By providing the training, the Employer would have a greater number of employees who can do this type of work. Implicitly, this would allow Employer to seek more and larger asphalt and seal coating jobs. Increasing the skill of ones employees increases the overall well-being of the

Employer. In addition, by bringing Claimant and his co-worker to Greeley, Employer had a crew with whom he had worked before and liked. This likely made the job more efficient and easier to complete.

K.) In this claim, a "zone of special danger" was created by the Employer in having Claimant, JB[Redacted], and MW[Redacted], start their day in Pueblo at approximately 4:30 A.M. and then finishing the job in Greeley at approximately 4:00 A.M. the next day which is almost a 24 hour time period. It is acknowledged that PJ[Redacted] never forced Claimant or anyone else to stay past normal work hours to finish the KC[Redacted] job. However, the fact is that all of them were in Greeley until 4:00 A.M. working. The evidence reveals that Claimant did not work the entire time he was in Greeley at the KC[Redacted]. There was some testimony about him sleeping for some time. However, it is not clear how much Claimant slept or if he got any restful sleep at all. In addition, PJ[Redacted]testified he also was very tired by the time everyone returned back to the work yard in Denver. Because he had been away from his home working off and on for almost 24 hours, it is likely that Claimant was tired, fell asleep at the wheel and went off the road. It is concluded that there was a "zone of special danger" that led to Claimant's injuries.

L.) The ALJ finds and concludes that this accident occurred within the course and scope of his employment. Therefore, Claimant's claim is found to be compensable.

M.) Workers' Compensation benefits shall be reduced by fifty percent where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee. Section 8-42-112(1)(b) C.R.S. The burden of proof is on the Respondents to prove by a preponderance of the evidence every element, justifying a reduction for a willful failure to obey a safety rule or use a safety device. Therefore, in order to prove a safety rule violation, Respondents must prove that 1) there was a known safety rule, 2) the Claimant "willfully" violated the enforced safety rule, and 3) the claimant's injury was proximately caused by a willful violation of a safety rule. *See, Bennett Properties Co. v. Indus. Comm'n*, 165 Colo. 135, 143 (1969), *Johnson v. Denver Tramway Corp.,* 115 Colo. 214 (1946); *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). A violation is "willful" if the claimant knows of the rule and deliberately performs the forbidden conduct. *Triplett v. Evergreen Builders, Inc. W.C. No. 4-756-463 (May 11, 2004)*

N.) In this case, JB[Redacted] and PJ[Redacted] testified that there was no safety rule in place which required Claimant or other employees to wear a safety belt while in a vehicle performing work for Employer. There was no persuasive evidence that a safety rule, oral, written, or otherwise was imparted to Claimant concerning the use of a safety belt.

It is therefore concluded that Respondents failed to meet their burden of proof that Claimant willfully violated a safety rule.

ORDER

It is therefore ordered that:

1.) Claimant's claim for Workers' Compensation benefits is compensable.

2.) Pursuant to the stipulation of the parties, Respondent-Insurer shall pay for ambulance transport from the scene of the accident to Memorial Hospital.

3.) Respondents' request for fifty percent reduction for willfully violating a safety rule is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated by the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file a 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. In addition, please send a courtesy copy of your Petition to Review to the Colorado Springs OAC office via email at oac-csp@state.co.us

Dated: March 7, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-204-494-001

ISSUES

1. Whether the right shoulder arthroscopic distal clavicle resection recommended by Dr. Ferrari is reasonably necessary to cure and relieve Claimant of the effects of his April 22, 2022 injury.

FINDINGS OF FACT

1. Claimant worked as a fuel transporter for Employer driving semi-trucks and delivering fuel from refineries. On April 22, 2022, he observed another driver pulling away with the fuel trailer's brakes locked. Claimant ran to the truck to hit the rear bumper to get the driver's attention, but Claimant fell and injured his left leg and right shoulder.

2. Claimant saw Dr. Nancy Strain at Concentra on April 27, 2022. Claimant reported that his right shoulder was bruised and causing him difficulty getting in and out of his truck. Dr. Strain ordered a right-shoulder MRI, which Claimant underwent the following day. The MRI showed a tear of the anterior-superior labrum, some tendinosis of the supraspinatus and subscapularis, a subchondral cyst in the anterior superior labrum, and a subcortical cyst in the anterior superior glenoid. Regarding the acromioclavicular joint, the radiologist noted no acromioclavicular joint separation, some mild acromioclavicular joint arthrosis, small joint effusion, mildly concave undersurface of the acromion, and mild subacromial-subdeltoid bursitis.

3. Claimant was referred to orthopedist Dr. Mark Failinger. Dr. Failinger conducted an extensive physical examination of Claimant's right shoulder and reviewed Claimant's right shoulder MRI results. He assessed Claimant with a right shoulder type-two SLAP lesion, a pathology of the glenohumeral joint. Dr. Failinger recommended physical therapy and to review the potential for shoulder surgery if the therapy were to be unsuccessful.

4. Claimant returned to Dr. Failinger on August 15, 2022. Dr. Failinger performed an acromioclavicular cross-body adduction test, which was negative. He noted that Claimant wished to proceed with right shoulder surgery once he recovered from his hamstring repair.

5. On December 9, 2022, Claimant saw Dr. Failinger again and Dr. Failinger noted that Claimant had positive O'Brien's and Speeds tests and that he recommended arthroscopic surgery, including a subacromial decompression.

6. On January 10, 2023, Claimant underwent arthroscopic right shoulder surgery with Dr. Failinger. Among the procedures listed for the operation were "extensive debridement of synovium, labrum with chondroplasty of glenoid and humeral head" and "subacromial decompression." In the description of the procedure, he indicated that he performed an acromioplasty, flattening out Claimant's type-II acromion.

7. On April 17, 2023, Dr. Failinger noted that Claimant had improved strength in the right shoulder but still suffered from pain and discomfort, specifically in the acromioclavicular joint.

8. On August 7, 2023, Claimant saw Dr. James Ferrari, as Dr. Failinger had left the practice. On examination, Dr. Ferrari noted that Claimant's acromioclavicular joint was significantly tender to palpitation and that Claimant had positive cross-body adduction. Dr. Ferrari opined that the main issue giving Claimant pain and troubles was likely the acromioclavicular joint. He recommended an arthroscopic distal clavicle resection with a possible biceps debridement and relief.

9. Several weeks later, on August 24, 2024, Dr. Ferrari submitted a request for prior authorization to perform an "arthroscopic distal clavicle resection and debridement of biceps."

10. Respondents denied the request for prior authorization based on a September 8, 2023 independent medical examination report authored by Dr. Qing-Min Chen.

11. In his report, Dr. Chen opined:

> "Additional right shoulder surgery is not reasonable or necessary. The claimant essentially has osteoarthritic changes in the right shoulder. This is based on the operative report from Dr. Failinger. If there is some need for distal clavicle excision, it would be due to pre-existing conditions of the AC joint osteoarthritis. There is no evidence that this work injury permanently aggravated the claimant's pre-existing AC joint condition."

12. On September 20, 2023, Dr. Ferrari, in response to the denial of his request for prior authorization for the right shoulder arthroscopic distal clavicle resection surgery, issued an appeal letter in which he opined, "I felt that his work-related injury caused his AC joint to become symptomatic and he has had persistent pain because this was not addressed at the time of surgery."

13. Claimant requested a hearing to challenge Respondents' denial of the request for prior authorization for the right shoulder surgery recommended by Dr. Ferrari.

14. Dr. Chen testified by deposition on January 4, 2024. Dr. Chen testified that Claimant's acromioclavicular joint issues were not the source of Claimant's pain. Dr. Chen pointed to the fact that the acromioclavicular joint injection did not provide

Claimant with a lot of relief and the fact that the acromioclavicular joint cross-body adduction test was negative. He also pointed out that Dr. Failinger had already conducted a surgery addressing the labral tear in the glenohumeral joint and had specifically chosen not to perform a distal clavicle resection, suggesting that he did not believe the acromioclavicular joint was the source of the problem. Dr. Chen also testified that a delayed onset of acromioclavicular joint symptoms for several months up until Claimant saw Dr. Ferrari creates doubt as to the causal relationship between the symptoms and the traumatic injury.

15. The Court finds Dr. Chen's testimony credible. However, the Court is unpersuaded by the opinions presented by Dr. Chen.

16. Dr. Ferrari also testified by deposition on January 8, 2024. He testified that he began treating Claimant when Dr. Failinger, his former partner, left the practice while Claimant was still experiencing shoulder issues post-surgery. Dr. Ferrari testified that he felt that the symptoms were primarily related to arthritis at the acromioclavicular joint. He recommended an arthroscopic distal clavicle resection.

17. Dr. Ferrari testified that he believed the surgery was reasonable because the first surgery did not address Claimant's acromioclavicular joint issues. When asked about the causation of the acromioclavicular joint's symptoms, Dr. Ferrari stated that the symptoms could be caused by Claimant's work injury and age-related arthritis. He also testified that he believed that Claimant's acromioclavicular joint pain had been present throughout the course of the claim.

18. Dr. Ferrari was also asked about Dr. Failinger's prior surgery and why the acromioclavicular problem was not addressed during that surgery. Dr. Ferrari acknowledged that Dr. Failinger could have addressed the acromioclavicular problem but chose not to.

19. The Court finds Dr. Ferrari's testimony credible and his opinions persuasive.

20. The matter proceeded to hearing on January 11, 2024. At the hearing, Claimant testified on his own behalf. Claimant testified that his job consisted of twelve-hour shifts that involved heavy lifting of fuel hoses weighing as much as seventy-five pounds. He testified that he had no problem doing his job prior to his work injury and that he had no prior right shoulder pain, limitations, diagnoses, or treatment. Claimant testified that even after his January 2023 surgery with Dr. Failinger, he continued to have difficulty using his right arm.

21. The Court finds Claimant's testimony credible.

22. Claimant now argues that because he developed right shoulder pain and dysfunction only after the date of injury, there exists a causal relationship between the work injury and his acromioclavicular joint symptoms. Respondents, in turn, argue that Claimant's onset of acromioclavicular joint symptoms set in long after

the date of injury, and that the acromioclavicular joint pathology is therefore unrelated to Claimant's work injury. Respondent's point to the various cross-body adduction tests as evidence demonstrating the lack of causal relationship between the work injury and the acromioclavicular joint pathology. The cross-body adduction test is a clinical diagnostic test for ruling out the presence of an acromioclavicular joint pathology as the source of the patient's symptoms. Respondents point out that on August 15, 2022, shortly after the injury, and Claimant had a negative cross-body adduction test. They also point out that Claimant did not have a positive cross-body adduction test until August 7, 2023, more than a year after Claimant's date of injury.

23. These two arguments highlight facts that appear at odds with one another. On one hand, the Court recognizes the improbability that it is simply a coincidence that Claimant's right shoulder acromioclavicular joint first became symptomatic during the course of his treatment for a right shoulder injury. On the other hand, the initial negative cross-body adduction test on August 15, 2022, suggests that Claimant's acromioclavicular joint was not symptomatic during Claimant's initial treatment. Neither party has presented evidence of the probability—or lack thereof—that such a test could produce a false negative. Nevertheless, weighing the evidence, the Court finds that Claimant has proved by a preponderance of the evidence that it is more likely than not that his right shoulder acromioclavicular joint symptoms—and therefore the need for a distal clavicle resection as recommended by Dr. Ferrari—are related to Claimant's April 22, 2022 injury and subsequent treatment.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation 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).

Medical Benefits

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

As found above, Claimant has proved by a preponderance of the evidence that the arthroscopic distal clavicle resection surgery recommended by Dr. Ferrari is reasonably necessary to cure and relieve Claimant of the effects of his April 22, 2024 injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the arthroscopic distal clavicle resection surgery recommended by Dr. Ferrari.

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

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

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 7, 2023.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-243-233-001

ISSUES

- Did Claimant prove she suffered a compensable injury to her right shoulder on April 17, 2023?

- If the claim is compensable, did Claimant prove an arthroscopic shoulder surgery recommended by Dr. Craig Yager is reasonably needed and causally related to the work injury?

- The parties stipulated to an average weekly wage of $1,246.56.

- If the claim is compensable, the parties stipulated that Claimant is entitled to TTD benefits commencing September 13, 2023, and continuing until terminated according to law. The parties also stipulated that Claimant has received benefits under the Colorado Family & Medical Leave Insurance Program ("FAMLI") but neither party had a definitive position whether FAMLI benefits can be offset against TTD. The parties reserved that issue and agreed that any award of TTD benefits is "subject to applicable offsets."

FINDINGS OF FACT

1. Claimant works for Employer as a correctional officer.

2. On April 17, 2023, Claimant participated in an all-day Defensive Tactics class, which involved demonstrating and practicing techniques for subduing and controlling aggressive inmates. The Course Study Guide lists seventeen techniques covered during the class. Claimant signed a Defensive Tactics Participation form before starting the course which acknowledges the training "can be physically demanding."

3. Near the conclusion of the class, Claimant was selected to help demonstrate the Straight Armbar Takedown. This maneuver involves grasping the inmate's wrist with one hand, placing the other hand immediately above the elbow, pivoting the inmate to get them off-balance, and driving them down to the floor. Once the inmate is face-down on the ground, the arm is rotated behind their back and the officer kneels on their back to apply handcuffs.

4. Claimant played the role of the inmate in the demonstration. Claimant is relatively diminutive, standing 5'5" tall. The course instructor, Lt. Daniel Roberts, is considerably larger than Claimant (5'11" and 225 pounds). The maneuvers are performed at approximately 30-40 percent of full capacity during the class. Lt. Roberts did not specifically recall Claimant's class on April 17, 2023, because he has "taught a lot of classes." But based on his general practice, Lt. Roberts believes he performed the demonstration with Claimant in a "slow" and controlled manner. However, Claimant perceived it to be "a quick takedown."

5. Claimant felt no shoulder pain during the straight arm bar demonstration. She was sore after the demonstration but assumed it was because “we’d been throwing each other on the mats for the past four hours.” After the class, she signed an attestation form stating, “I have not incurred any injuries as a result of participating in Defensive Tactics training.”

6. Claimant worked her scheduled shift the next day. After arriving at work, she told a coworker that her shoulder was sore. At one point during her shift, Claimant felt pain in her right shoulder when reaching overhead to unlock a toolbox. She mentioned the pain to a coworker, who helped Claimant complete the task. Claimant also told another coworker about the shoulder pain that day.

7. Claimant awoke the morning of April 19 with numbness and weakness in her right upper arm and shoulder. The symptoms persisted at work that day and the remainder of the week. The shoulder pain interfered with her activities somewhat, but she was able to perform her duties.

8. Claimant did not report the injury to her direct supervisor because the supervisor was out that week. On Friday, April 21, 2023, she notified two captains in her unit about the injury.

9. By Monday, April 24, Claimant’s shoulder was still painful and gradually worsening. She had received no response from the captains she emailed the previous Friday. Therefore, she reported the injury to the facility commander.

10. Claimant completed an incident report on April 24, 2023. She stated she was placed in a straight armbar takedown for training demonstration, during which she felt “the normal pressure that one will feel during a normal takedown in training.” She described waking up on April 19 with numbness in her right upper arm and shoulder. She also described “pain and discomfort. Feels like a Charlie horse. Lack of mobility and tightness.” Claimant stated the symptoms gradually worsened the rest of the week while performing regular work duties. Claimant believed the symptoms were related to the defensive tactics training on April 17, because she had participated in no other recent activities that could have injured her shoulder.

11. Claimant had a telehealth consultation with Dr. Mitchell Stotland on April 25, 2023. Claimant told Dr. Stotland she had done takedown training on April 17, 2023, and developed right shoulder pain two days later. Dr. Stotland opined the symptoms Claimant described were consistent with the reported mechanism of injury. On directed self-examination, she had pain to palpation primarily over the anterior aspect of the shoulder, and pain with abduction. Dr. Stotland opined the symptoms and exam findings were consistent with impingement or a rotator cuff tear. He imposed work restrictions and referred Claimant to physical therapy.

12. Claimant attended an initial PT session on April 26, 2023. She told the therapist she injured the right shoulder in a defensive tactics class when her arm was

"pulled behind her and she was pinned down." She described sharp and throbbing pain radiating from the shoulder to her hand, which had gradually worsened since the incident.

13. A right shoulder MRI on May 9, 2023, showed a SLAP tear, partial-thickness supraspinatus and infraspinatus tendon tears, and a supraspinatus muscle strain. No arthritis or other degenerative changes were noted.

14. After receiving the MRI report, Dr. Stotland referred Claimant to Dr. Craig Yager, an orthopedic surgeon.

15. Claimant saw Dr. Yager on May 26, 2023. Dr. Yager documented that Claimant's instructor had demonstrated an arm bar takedown and she developed an acute onset of pain in the anterior right shoulder.[1] She was minimally better despite several weeks of PT. Neer, Hawkins, Speed's, and O'Brien's tests were positive. Dr. Yager reviewed the MRI images and concurred with the radiologist's interpretation of a SLAP tear and partial-thickness rotator cuff tears. The joint space was well maintained and there was no evidence of degenerative changes. Dr. Yager gave Claimant a cortisone injection and recommended additional PT before considering surgery.

16. Claimant followed up with Dr. Yager in July and August 2023. Despite regular PT, her symptoms and exam findings were similar at each visit, including positive Speed's and O'Brien's tests.

17. Respondent filed a Notice of Contest denying the claim on August 22, 2023.

18. Claimant returned to Dr. Yager on September 1, 2023. She expressed frustration over her lack of progress to date. Speed's and O'Brien's tests were again positive. Dr. Yager opined Claimant's symptoms "continue to be consistent with tearing of the labrum." Considering the "extremely limited improvement" in Claimant's symptoms despite PT, injections, and anti-inflammatory medications, Dr. Yager recommended shoulder surgery.

19. Claimant stopped working on September 12, 2023 because of the injury. She was approved for paid medical leave under the Colorado FAMLI program.

20. Dr. William Ciccone, Jr. performed an IME for Respondent on November 1, 2023. Dr. Ciccone concluded that Claimant did not have a work-related injury. He emphasized the two-day delay before the manifestation of significant shoulder symptoms, and opined an acute SLAP tear or RTC tear would cause pain immediately. He noted that labral tears are frequently degenerative and unrelated to trauma. Even though he did not review the MRI images, he questioned the interpretations of the radiologist and Dr. Yager,

[1] Dr. Yager testified he had no independent recollection of Claimant's exact words at this appointment. However, it is unlikely Claimant would have reported a history appreciably different from what she previously told Employer and Dr. Stotland. Any perceived discrepancy in the documented history is probably attributable to paraphrasing by Dr. Yager rather than inconsistent reporting by Claimant.

opining that “normal anatomy can be confused with a labral tear on MRI.” Dr. Ciccone also opined surgery is not reasonably needed.

21. In his deposition, Dr. Yager maintained his opinion that Claimant’s symptoms, examination findings, and MRI are consistent with a symptomatic SLAP tear. Dr. Yager concluded the pathology is work-related based on the described mechanism of injury, the progression of symptoms, Claimant’s age, and the absence of any prior shoulder issues. He explained that non-traumatic, degenerative SLAP tears are common in older patient populations, but not in Claimant’s age group. The delay in developing symptoms did not preclude a causal nexus because, in Dr. Yager’s experience, “it’s quite typical for there to be a lag between the initial injury and onset of symptoms.” He opined surgery was appropriate because Claimant failed to improve with injections and extensive PT.

22. Dr. Ciccone testified at the hearing consistent with his report. He disagreed with Dr. Yager that a two-day delay in the onset of shoulder pain is common or consistent with a SLAP tear. He also disagreed that surgery is appropriate. He testified Claimant has “shown good progress” in PT and recommended a home exercise program and return to regular duties.

23. Dr. Yager’s opinions are credible and more persuasive than the contrary opinions offered by Dr. Ciccone.

24. Claimant proved she suffered a compensable injury to her right shoulder on April 17, 2023 while participating in defensive tactics training.

25. Claimant proved the surgery recommended by Dr. Yager is reasonably needed to cure and relieve the effects of her compensable injury.

26. Claimant stopped working on September 12, 2023 because of the injury. Claimant is entitled to TTD benefits, subject to applicable offsets, commencing September 13, 2023 and continuing until terminated by law.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which they seek benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A pre-existing condition does not disqualify a claim for compensation where the industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant proved she suffered a compensable injury on April 17, 2023. Despite some minor inconsistencies, the timeline outlined by Claimant is reasonable and generally credible. She spent several hours on April 17 engaged in a defensive training class, wherein the risk of injury is high enough that Employer requires participants to sign a statement afterwards attesting they were not injured. Claimant felt "pressure" in her right shoulder during the takedown demonstration, but assumed it was normal for the activity. The next day her shoulder felt sore, which she mentioned to a coworker. Later during that shift, Claimant had an episode of shoulder pain when reaching overhead. The pain was severe enough that a coworker helped complete the activity. When she awoke on April 19, her arm felt "dead" and was difficult to move. In addition to the numbness, she also felt "pain and discomfort" as referenced in her incident report and Dr. Stotland's report. The symptoms gradually worsened over the next few days while doing her regular job. This sequence of events is consistent with an injury suffered during the training class on April 17.

Claimant had no history of shoulder issues before April 17, 2023, and there is no persuasive evidence of any other event that could have injured Claimant's shoulder around that time. As Dr. Yager explained, it is unlikely that the SLAP tear and RTC tears are degenerative in nature, because Claimant is young, and the MRI showed no other degenerative changes. But even if Dr. Ciccone is correct that the pathology pre-dated the incident, it was asymptomatic, nondisabling, and required no treatment. Claimant either injured her shoulder during the class, aggravated a pre-existing but asymptomatic condition, or some combination thereof.

B. Medical benefits

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

As found, Claimant proved the shoulder surgery recommended by Dr. Yager is reasonably needed to cure and relieve the effects of the compensable injury. Dr. Yager's opinions regarding treatment are persuasive. Dr. Yager and the radiologist agree the MRI shows a probable SLAP tear and partial rotator cuff tears. Dr. Ciccone's supposition that the MRI was misread is unpersuasive, considering he did not personally review the images. Claimant's shoulder has been continuously symptomatic for months despite injections and extensive PT. The symptoms and associated limitations are interfering with Claimant's ability to pursue her new career as a police officer. It is unlikely Claimant will improve with home exercise and return to full duty, as opined by Dr. Ciccone. Surgery is the logical and appropriate next step.

C. TTD benefits

Claimant stopped working on September 12, 2023 and has not returned to work. The parties stipulated to TTD benefits commencing September 13, 2023 if the claim is compensable, subject to applicable offsets.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right shoulder injury is compensable.

2. Respondent shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including the right shoulder surgery recommended by Dr. Yager.

3. Claimant's average weekly wage is $1,246.56, with a corresponding TTD rate of $831.04, before applicable offsets.

4. Respondent shall pay Claimant TTD benefits, subject to applicable offsets, commencing September 13, 2023 and continuing until terminated according to law.

5. Respondent shall pay statutory interest of 8% per annum on all compensation not paid when due.

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

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

DATED: March 8, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-196-383-001

ISSUES

1. Whether Respondents established by clear and convincing evidence that the Division Independent Medical Examination (DIME) physician's opinion that Claimant is not at maximum medical improvement (MMI) is incorrect.

2. If Respondents overcome the DIME's MMI opinion, whether Respondents established by clear and convincing evidence that the DIME physician's provisional permanent partial disability impairment rating is incorrect.

FINDINGS OF FACT

1. Claimant is a 46-year-old woman who has worked in Employer's billing department since 2006. Claimant's job duties included posting cash payments and using a ten-key. Claimant sustained an admitted occupational disease to her bilateral hands and wrists with a date of onset of October 1, 2021.

2. At Claimant's initial evaluation on October 8, 2021 at Concentra, Claimant reported gradual-onset numbness, tingling and pain in both hands, including the first three fingers of the left hand, and the first four fingers of the right hand (the "first" finger being the thumb). It was noted that Claimant had pain localizing over the carpometacarpal (CMC) joint and base of the thumb, bilaterally. Claimant was diagnosed with bilateral thumb pain, and CMC joint sprains. (Ex. 2).

3. On December 9, 2021, Robert Kawasaki, M.D. performed an EMG/nerve conduction study that showed evidence of bilateral carpal tunnel syndrome. (Ex. 2).

4. On January 28, 2022, David Bierbrauer, M.D., a hand surgeon, performed a carpal tunnel release surgery on Claimant's left wrist. Subsequently, on March 15, 2022, Dr. Bierbrauer performed a carpal tunnel release on her right wrist. (Ex. 2).

5. Following these surgeries, Claimant continued to follow up with providers at Concentra, including physical therapy. During the next four months after surgery, Claimant reported improvement in pain and strength in both wrists. On August 11, 2022, Claimant was released from physical therapy. (Ex. 2).

6. On August 22, 2022, Claimant was referred to Nicholas Olsen, M.D., for an impairment rating. Dr. Olsen noted that Claimant overall improvement and full strength of the left wrist, and continuing symptoms in the right wrist with a sense of loss of strength on the right. Dr. Olsen determined that Claimant had no impairment of the left wrist, and a 4% upper extremity impairment of the right wrist. (Ex. 2).

7. On September 8, 2022, Claimant was placed at MMI, and released to full duty. The provider, Dr. Lain, noted that Claimant was having flare ups of a right index trigger finger, and would require maintenance care for her wrists and trigger finger. (Ex. 2).

8. On December 8, 2022, Claimant returned to Dr. Bierbrauer reporting pain in the left wrist, and pain over the 1st CMC joint of the left wrist (*i.e.*, the joint at the base of the left thumb). Dr. Bierbrauer diagnosed Claimant with moderate 1st CMC joint arthritis, and performed a cortisone injection. He noted tenderness in the left thumb with a positive grind and squeeze testing (Ex. 2).

9. Claimant returned to Dr. Bierbrauer on January 5, 2021, reporting persistent pain at the base of the left thumb, and no relief from the previous cortisone injection. On examination of Claimant's left thumb, Dr. Bierbrauer found tenderness over the A1 pulley with palpable popping during flexion and extension. He indicated that Claimant would like to proceed with surgery for the left thumb arthritis and trigger thumb. (Ex. 2).

10. On January 20, 2023, Respondents filed a Final Admission of Liability, admitting for a 4% right upper extremity impairment, consistent with Dr. Olsen's impairment rating. (Ex. A). Claimant timely filed an objection to the FAL, and requested DIME.

11. On June 27, 2023, hand surgeon Sean Griggs, M.D., performed a DIME examination. Claimant's primary complaint at that time was left thumb pain. Claimant reported developing left thump popping, with clicking and locking. Dr. Griggs' examination showed mild tenderness of the CMC joint, tenderness at the A1 pulley, and triggering of the left thumb. (Ex. 3 & 4).

12. Following the DIME examination, Dr. Griggs issued two undated reports -- Exhibits 3 and H, in which he summarized Claimant's medical records from October 8, 2021, through January 5, 2023, and offered opinions concerning diagnosis and MMI. Exhibit 3 appears to be the earlier report as it includes a DIME Examiner's Summary Sheet dated June 27, 2023, indicating Claimant is not at MMI, and a blank impairment rating section. (Ex. 3). Exhibit H appears to be the later-issued report and includes a different DIME Examiner's Summary Sheet dated August 28, 2023, indicating Claimant is not at MMI, and assigning an impairment rating for the right upper extremity. Exhibit H also incorporates the full text of Exhibit 3 and adds sections discussing MMI and impairment ratings not contained in Exhibit 3. Based on the date of the Summary Sheets and the inclusion of additional discussion, the ALJ finds that Exhibit H is Dr. Griggs' final report. (Exhibit 3 will be referred to as the "Initial DIME Report." Exhibit H will be referred to as the "Final DIME Report").

13. When read by itself, the Final DIME Report contains several ambiguities regarding the diagnoses Dr. Griggs attributes to Claimant's employment and MMI. Resolution of these ambiguities is a factual determination for the ALJ. *See Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 388 (Colo. App. 2000). A comparison of the two reports clarifies some of these ambiguities.

14. With respect to diagnoses, the Initial DIME Report includes only a diagnosis of "left trigger thumb," and does not discuss other diagnoses. The Final DIME Report lists "trigger thumb" under the heading "Clinical diagnosis," but also discusses bilateral carpal tunnel syndrome (CTS), left-sided CMC osteoarthritis (CMC OA), and left trigger thumb, under the heading "Date and Discussion of MMI." (Ex. 4).

15. When discussing of Claimant's trigger thumb and CMC OA in the Initial DIME Report, Dr. Griggs wrote:

> "The claimant was that told at this point on her exam she has minimal CMC joint pain and tenderness. I would not recommend CMC arthroplasty. I would recommend treatment of the trigger thumb. "
>
> In regard to causality, it is possible the trigger thumb would be caused by repetitive activities, however CMC joint arthritis would not likely be caused by her work. If there is a question of causality, a job site analysis should be performed."

(Ex. 3, p 180).

16. In the Final DIME Report, Dr. Griggs incorporated the statements above, but included additional language expressing a more definitive opinion regarding the relatedness of Claimant's trigger thumb. Specifically, he wrote:

> "The claimant was that told at this point on her exam she has minimal CMC joint pain and tenderness. I would not recommend CMC arthroplasty. I would recommend treatment of the trigger thumb. <u>It is my opinion that the trigger thumb is related to her work but that the CMC OA is not.</u>"
>
> In regard to causality, it is possible the trigger thumb would be caused by repetitive activities, however CMC joint arthritis would not likely be caused by her work. If there is a question of causality, a job site analysis should be performed."

(Ex. H, p. 55 (emphasis added)).

17. The ALJ infers that Dr. Griggs' addition in the Final DIME Report of the statement that "It is my opinion that the trigger thumb is related to her work…" was meant to offer a definitive statement of Dr. Griggs' opinion regarding causation, and to clarify the more ambiguous statement in the Initial DIME Report. The ALJ thus finds the Final DIME Report expresses Dr. Griggs' opinion that Claimant's left trigger thumb is causally-related to her work.

18. Dr. Griggs opinion regarding MMI also reflects his determination that Claimant's left trigger thumb is causally-related to her October 1, 2021 work-related condition. The Final DIME Report indicates Claimant was at MMI for her bilateral CTS, and assigned an impairment rating for the right upper extremity due to continued symptoms. (Ex. H). Although neither DIME Report discusses MMI of Claimant's left trigger thumb, both

recommend additional treatment for that condition, and indicate the typical treatment for trigger thumb is "either injection or surgical release." The Final DIME Report also discusses work restrictions, and indicates Claimant "can work full duty pending trigger thumb release." Given that Dr. Griggs had definitively stated his opinion that Claimant's CTS was at MMI, and that her CMC OA was unrelated to her work, the only logical conclusion is that Claimant's was not at MMI because Claimant's trigger thumb is causally-related to her October 1, 2021 work condition and requires additional treatment.

19. On September 28, 2023, the Division issued a Notice indicating that the Division's DIME Unit had received Dr. Griggs' report, and indicated that Claimant was "Not at MMI." (Ex. I).

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).

Overcoming DIME (MMI and Impairment)

The Act defines MMI as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. Where disputes exist on whether a Claimant has reached MMI, the ALJ must resolve that issue.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

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). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAO July 26, 2016).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Serv.,* W.C. No. 4-941-721-03 (ICAO Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.*, W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation, and the mere existence of impairment does not create a presumption of contribution by a factor with which the

impairment is often associated. *Wackenhut Corp. v. Indus. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

MMI

Respondents have failed to establish by clear and convincing evidence that the DIME physician's determination that Claimant is not at MMI is incorrect. Respondents contend that Dr. Griggs' statement that it is "possible" Claimant's trigger thumb is related to repetitive movement does not constitute an opinion that Claimant's condition is "probably" related to her October 1, 2021 work condition.

As found and discussed in Findings of Fact ¶¶ 12-17, a comparison of the Final DIME Report and the Initial DIME Report demonstrates that Dr. Griggs determined that Claimant's left trigger finger condition is causally-related to Claimant's industrial injury of October 1, 2021, and that Claimant is not at MMI, because that condition and requires additional treatment. Respondents have offered no expert opinion or other credible evidence indicating Dr. Griggs' causation and MMI opinions are incorrect. The ALJ concludes that Respondents have failed to prove, by clear and convincing evidence that the DIME physician's MMI opinion is incorrect.

Impairment Rating

Because Respondents have failed to establish by clear and convincing evidence that the DIME physician's determination that Claimant is not at MMI is incorrect, the issue of whether his provisional impairment rating for Claimant's right-sided CTS is incorrect is not ripe for determination.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the DIME physician's opinion that Claimant is not at MMI by clear and convincing evidence.

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

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

DATED: March 11, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-217-321-001

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he suffered a compensable injury on July 16, 2022?

2. If Claimant suffered a compensable injury, did Claimant prove by a preponderance of the evidence that the medical care he sought was reasonable, necessary, and related to his injury?

FINDINGS OF FACT

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

1. Claimant began working for Employer as a truck driver in February 2019. His daily work activities consisted of picking up, loading, and transporting carts of U.S. mail across Colorado, and unloading those carts at various postal facilities. The carts are aluminum boxes on wheels, approximately six-feet tall, four- or five-feet deep, three-and-one-half-feet wide, and they weigh roughly 400-500 pounds. (Tr. 14:10-16:14).

2. Claimant testified that on July 16, 2022,[1] he started work at approximately 8:45 p.m., and his usual shift was anywhere from 10-14 hours. (*Id.* at 16:21-17:6). Claimant testified that while unloading his trailer in Glenwood Springs, he was pushing one of the mail carts. A cable attached to a pin used to anchor the cart to the floor of the trailer was broken, and when Claimant was pushing the cart slightly up an inclined grade to unload the cart, the unsecured pin got jammed on the dock plate, causing the cart to abruptly stop. Claimant testified he felt a strong pop in his back, his legs got weak, and he had to sit down to catch his breath. (*Id.* at 17:17-21).

3. Claimant testified he called the night dispatcher, [Redacted, hereinafter DG], before he left Glenwood Springs, to notify him of the incident. Claimant was advised to finish his route if possible, and DG[Redacted] would notify the daytime supervisor, [Redacted, hereinafter MM]. Claimant was directed to call MM[Redacted] after he finished his route and got some sleep. (*Id.* 17:25-18:19).

4. Claimant testified he left Glenwood Springs and headed to Grand Junction. The crew at Grand Junction unloaded and loaded his truck. He then returned to Denver. Claimant testified he had trouble sleeping when he got back, so he called his supervisor, MM[Redacted], around 11:00 a.m., and told him that "he couldn't go Saturday night." (*Id.* 19:3-20:13). Claimant testified he told MM[Redacted] he would get to a doctor as soon as he could. Claimant further testified that his only option on the weekend was to go to

[1] July 16, 2022 was a Saturday. The ALJ infers that Claimant began working on Friday, July 15, 2022, and allegedly injured himself sometime during the morning of Saturday, July 16, 2022.

an emergency room, and he did not want to sit there for hours just to get ibuprofen, so he "waited until Monday to get - to get to a doctor." (*Id.* at 21:1-9).

5. On Monday, July 18, 2022, Claimant saw his long-time chiropractor, Jay Hafner, D.C. Claimant testified this was not a scheduled visit, and he called the office to see if Dr. Hafner could fit him in that day. (Tr. 88:17-21). According to Dr. Hafner's record, Claimant complained of a headache, spasms, neck, back, low back, bilateral shoulders (right being worse), stiffness and pain post his February 19, 2021 motor vehicle accident. In the "Subjective/Assessment" section, Dr. Hafner noted Claimant aggravated his back at work on July 16, 2022, and had been off of work for three days. He also noted Claimant had been to the emergency room and had back spasms. In addition to other diagnoses, Dr. Hafner diagnosed Claimant with a sprain of ligaments of the thoracic spine, lumbar spine and cervical spine. (Ex. D at 447).

6. There is no objective evidence in the record that Claimant went to an emergency room following his alleged injury on July 16, 2022, as he told Dr. Hafner. Moreover, Claimant testified that he did not want to go to an emergency room, and this is why he waited until Monday to see a doctor. Similarly, there is no objective evidence in the record that Claimant was off work three days, particularly since the alleged injury occurred on July 16, 2022, and he saw Dr. Hafner on July 18, 2022.

7. Claimant returned to Dr. Hafner for treatment two days later, on July 20, 2022. According to the Subjective/Assessment section of the report, Claimant was improving, and there was no mention of the July 16, 2022 incident. The medical record continued to reference Claimant's 2021 motor vehicle accident. (Ex. D at 448). Similarly, at Claimant's August 18, 2022 appointment, there is no mention of the alleged work injury. The record still contains the references to the 2021 motor vehicle accident, and notes Claimant aggravated his neck on the right side. (*Id.* at 449).

8. In 2022, Claimant treated with Dr. Hafner multiple times prior to the alleged July 16, 2022 injury. Claimant saw Dr. Hafner on February 24, 2022, March 3, 2022, March 24, 2022, April 12, 2022, April 20, 2022, June 7, 2022 and June 23, 2022. At the June 23, 2022 appointment, Claimant's chief complaints included headache, spasms, neck, back, low back, bilateral shoulders (right being worse), stiffness and pain post his February 19, 2021 motor vehicle accident. These are the same chief complaints Claimant presented with on July 18, 2022. Additionally, Claimant's diagnoses of sprain of ligaments of thoracic spine, lumbar spine and cervical spine, were noted at all of Claimant's 2022 visits prior to July 18, 2022. (Ex. D).

9. On September 1, 2022, Claimant was evaluated by Theodore Villavicencio, M.D., at Concentra. According to the medical record, Claimant reported suffering a back injury on July 16, 2022.[2] Claimant reported having bilateral lower back pain, greater on the left side, with pain radiating to his left lateral foot. His pain level was a 4/10, and his symptoms were improving. Claimant reported being diagnosed with Covid on July 19, 2022, and being home for two to three weeks. He also reported seeing Dr. Hafner on July 18, 2022,

[2] There are instances in the record where the date of injury is July 15, 2022.

for an initial evaluation. Dr. Villavicencio diagnosed Claimant with a lumbar strain. He referred him for physical therapy, and gave him 10 pound lifting and 20 pound pushing and pulling restrictions. (Ex. 4 at 73-75).

10. Claimant also treated with Dr. Hafner on September 1, 2022. Dr. Hafner noted Claimant had much better range of motion in his neck and back. There is no reference in the record of Claimant seeing Dr. Villavicencio, having Covid, or being home two to three weeks due to Covid. (Ex. D at 450). In fact, Dr. Hafner treated Claimant on July 20, 2022, which was a day after Claimant was allegedly diagnosed with Covid.

11. Claimant began physical therapy on September 21, 2022. Christi Galindo, PT, noted under history of present condition that after the injury, Claimant went to the emergency room and was written a note to see his primary care doctor. She further noted Claimant contracted Covid, called work and then started treating with Dr. Villavicencio. (Ex. 4. at 99-102).

12. Claimant testified he remembered seeing Dr. Villavicencio before September 1, 2022. He testified that Employer gave him a list of providers, and he chose Concentra because it was close to his house, and Dr. Villavicencio had treated him previously. (Tr. 22:1-14). He also testified that he saw Dr. Villavicencio the week after the accident. (*Id.* at 22:23-23:3).

13. Claimant told multiple providers, and the Court, varying stories regarding the treatment he sought after his alleged injury on July 16, 2022. He told Dr. Hafner, Dr. Villavicencio, and Ms. Galindo that he went to the emergency room following his alleged injury. He testified, however, that he waited until Monday to see a provider because he did not want to go to the emergency room. Claimant told Dr. Hafner he had been off of work three days when he saw him on July 18, 2022, but he told N. Neil Brown, M.D. he worked his Sunday night shift following the alleged accident. Claimant told Dr. Villavicencio that he was diagnosed with Covid on July 19, 2022, and was home two to three weeks. He saw Dr. Hafner, however, on July 20, 2022, the day after he was allegedly diagnosed with Covid, for treatment. Claimant further testified that he saw Dr. Villavicencio the week he was allegedly injured, which was also the week he allegedly contracted Covid. Claimant's Concentra records from 2014 to present were admitted into evidence, and there are no records indicating Claimant saw Dr. Villavicencio between July 16, 2022 and September 1, 2022. Claimant's testimony is not credible.

14. Based on the totality of the evidence, the ALJ finds Claimant did not see Dr. Villavicencio, for the July 16, 2022 incident, before September 1, 2022.

15. Claimant continued to treat with Dr. Villavicencio. On December 2, 2022, Dr. Villavicencio released Claimant for regular duty, three days per week, and he ordered an MRI study of the lumbar spine. (Ex. 4 at 159-163). Claimant underwent an MRI on December 19, 2022. The MRI reading noted disc protrusions at L3-4 and L5-S1, along with impingement of the right exiting nerve root at L5, and severe canal narrowing at multiple levels. (Ex. 7).

16. Dr. Villavicencio referred Claimant to physiatrist Fredric Zimmerman, D.O., on December 30, 2022. (Ex. 4 at 172). Claimant saw Dr. Zimmerman on January 6, 2023. He reviewed Claimant's MRI and noted that it showed chronic degenerative findings throughout the lumbar spine. Dr. Zimmerman assessed Claimant with a lumbar strain and recommended bilateral L4-5 and L5-S1 medical branch blocks for diagnostic purposes to determine how much of his pain is facet related. (Ex. 8).

17. On April 25, 2023, Claimant advised Dr. Villavicencio that his company had been bought out by another company, and the new employer would not allow him to work with any restrictions. Claimant was released for full duty without restrictions on that visit. (Ex. 4 at 220-226). Claimant was seen by Dr. Villavicencio on May 25, 2023, and was noted to be working regular duty without restrictions. (*Id*. at 236).

18. Claimant testified that he continued to work his regular duties for the new employer until early July 2023. Claimant testified he contracted pneumonia, had trouble sleeping and had constant pain in his low back. Based on this, Claimant decided to leave that type of work as it was taking too much of a toll on his health and well-being. (Tr. 27:10-28:4).

Claimant's History of Back Issues

19. Claimant testified he had no ongoing low back complaints prior to his alleged July 16, 2022 work injury. (Tr. 52:22-53:1).

20. Claimant had a prior work-related back injury on May 12, 2010. He underwent a laminectomy procedure on August 30, 2010, and a total hip arthroplasty on November 4, 2010. (Tr. 29:7-13).

21. Dr. Villavicencio treated Claimant in 2014 in relation to his May 12, 2010 occupational injury. Claimant was taking oxycodone for his chronic low back pain. In December 2015, Claimant was complaining of lower back pain. (Ex. C). On January 18, 2018, Claimant went to the emergency room because of acute chronic back pain. He underwent a repeat lumbar spine MRI that indicated Claimant had multilevel multifactorial degenerative changes. He was diagnosed with acute right-sided low back pain with right-sided sciatica, lumbar radiculopathy, and lumbar and sacral osteoarthritis. (Ex. I). In 2019, Claimant went to Concentra on multiple occasions with complaints of left shoulder and lower back pain. (Ex. C).

22. Claimant was involved in motor vehicle accidents on February 6, 2020 and February 22, 2021. Claimant testified that in both of those accidents he injured his neck and shoulders, and he continued to receive treatment for those injuries from Dr. Hafner. (Tr. 29:14-30:14). Claimant testified he had been receiving chiropractic treatment from Dr. Hafner since 2008. (*Id.* at 30:25-31:4). Based upon the records admitted into evidence, as of November 13, 2017, Claimant had no chief complaints and was seeking routine chiropractic spinal maintenance therapy from Dr. Hafner. (Ex. D).

23. Following his February 6, 2020 motor vehicle accident, Claimant saw Dr. Hafner for a chiropractic treatment on February 10, 2020. Claimant's chief complaints included headache, neck, back, left ribs lateral sternum, low back stiffness and pain post-accident.

Dr. Hafner noted Claimant had a lumbar discectomy several years prior without residual symptoms. Dr. Hafner diagnosed Claimant with a sprain of ligaments of the lumbar spine, thoracic spine, and cervical spine, amongst other diagnoses. (Ex. D at 352-353).

24. Claimant continued seeing Dr. Hafner regularly in 2020. Claimant would have periodic flare ups in his neck and back. On April 4, 2020, Claimant had an urgent visit because he had upper back spasms and his hands were going numb. (*Id.* at 366). On June 9, 2020, Claimant reported having about 25% overall improvement with his neck and back. (*Id.* at 377). On July 30, 2020, Claimant reported a severe flare up in his upper back, and his lower back was somewhat aggravated. (*Id*. at 393).

25. On February 22, 2021, Claimant saw Dr. Hafner in relation to his February 19, 2021 motor vehicle accident. Claimant reported having immediate pain in his spine (neck and back), head, right hip and shoulders following the accident. Claimant's mid and low back pain was at a 7/10 pain level. It is further noted that Claimant reported some minimal occasional neck and back symptoms from the 2020 motor vehicle accident. Dr. Hafner continued to diagnose Claimant with a sprain of ligaments of the lumbar spine, thoracic spine, and cervical spine, amongst other diagnoses. (*Id.* at 410-412). At Claimant's August 16, 2021 appointment, Dr. Hafner noted Claimant's low back was chronically achy. (*Id.* at 424). On October 24, 2021, Claimant reported much improvement in his back. (*Id.* at 431). On November 22, 2021, Claimant reported that his neck and back are stubborn and he cannot get them stretched out. (*Id.* at 434).

26. Claimant's testimony that Dr. Hafner treated him for neck and shoulder issues only, in relation to the motor vehicle accidents, is not credible and it is contradicted by the records. Claimant's testimony that he had no ongoing low back complaints prior to July 16, 2022 is not credible and is contradicted by the medical records.

27. Based on the totality of the evidence, the ALJ finds Claimant had long-standing back problems prior to July 16, 2022.

28. On December 1, 2022, Dr. Brown conducted an Independent Medical Examination (IME). Claimant described his mechanism of injury to Dr. Brown. He told Dr. Brown that he went to Lutheran Hospital the following day, but since it was still during the time of Covid[3], they did not do a thorough workup, and just gave him Tylenol and told him to follow up with his primary care physician. This is contrary to Claimant's testimony that he did not go to the emergency room because all they would do is give him ibuprophen. Claimant told Dr. Brown he subsequently began treatment with Dr. Villavicencio and had treatment with Dr. Hafner. Claimant told Dr. Brown that his treatment with Dr. Hafner following his motor vehicle accidents related to neck and shoulder problems, not his lower back. (Ex. B).

29. As found, Dr. Hafner consistently treated Claimant for multiple issues following his motor vehicle accidents, including back issues. Dr. Hafner consistently diagnosed Claimant with strained ligaments in his lumbar spine, thoracic spine, and cervical spine.

[3] This was two years after the height of Covid affecting the health care system.

The ALJ finds that Claimant did not provide Dr. Brown with an accurate account of his treatment with Dr. Hafner.

30. Dr. Brown reviewed Claimant's Concentra medical records and physical therapy records. There is no indication that Dr. Brown reviewed Dr. Hafner's records. The ALJ infers that Dr. Brown reached his opinions regarding Dr. Hafner's care based solely upon Claimant's statements, not a review of Dr. Hafner's records. Dr. Brown concluded "there was no evidence that [Claimant] required any intervening treatment for his low back until his occupational injury. He had chiropractic treatments over 15 years, but these were related to his neck and shoulders from a prior motor vehicle accident. As a consequence, his low back complaints are caused by the occupational injury." (*Id.* at 34). The ALJ finds Dr. Brown's opinions to be credible, but not persuasive.

31. Respondents retained Lawrence Lesnak, D.O., to perform an IME. On September 11, 2023, Dr. Lesnak evaluated Claimant, and he subsequently reviewed Claimant's medical records. Claimant described his injury on July 16, 2022. He told Dr. Lesnak he called off of work for his Saturday night shift, but worked his Sunday night shift as scheduled. Claimant told Dr. Lesnak he damaged his truck the morning of July 18, 2022, but he suffered no injuries. He further stated that he was seen at Concentra on July 18, 2022. Claimant's report to Dr. Lesnak is not consistent with Claimant's reports to his treating physicians and Dr. Brown. Claimant also told Dr. Lesnak that he continued his treatment with Dr. Hafner for "chiropractic maintenance." Claimant reported sustaining neck and shoulder injuries in the 2020 and 2021 motor vehicle accidents. (Ex. A).

32. Dr. Lesnak opined that Claimant has had chronic severe low back pain and leg symptoms dating back to at least May 2010. He further opined that "there is no medical evidence to support that [Claimant] sustained any type of injuries whatsoever or developed any type of medical diagnoses whatsoever that would in any way pertain to his reported occupational incident of 7/16/22. His subjective complaints, documented reproducible objective findings, as well as MRI studies performed prior to and after 7/16/22, appear to be unchanged." Dr. Lesnak testified in support of his opinion. The ALJ finds Dr. Lesnak's opinion to be credible and persuasive.

33. As found, Claimant's reports to his treating providers, Dr. Brown and Dr. Lesnak were inconsistent and not credible. Similarly, Claimant's testimony was not credible. Based on the totality of the evidence, the ALJ finds that Claimant had a long history of back pain, particularly low-back pain and stiffness, prior to the alleged injury on July 16. 2022. As found, the ALJ finds the opinion of Dr. Lesnak to be credible and persuasive.

34. Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury on July 16, 2022.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

For a claim to be compensable, the claimant must prove that: (1) the injury arose out of the claimant's employment, and (2) that the injury was in the course of the claimant's employment. C.R.S. §8-41-301(1)(b). The "course of employment" requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). An injury "arises out of" employment when it has its origin in an employee's work-related

functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). It is claimant's burden to prove by a preponderance of the evidence that he was injured in the course and scope of employment. Claimant was working in the course and scope of his employment on July 16, 2022.

A claimant must also prove that an injury was directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251 (Colo. App. 1999). Further, while a pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce the need for medical treatment, when the claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

Claimant saw Dr. Hafner on July 18, 2022, but Dr. Hafner was Claimant's chiropractor who regularly treated him. Other than a reference to aggravating his back at work, all of the chief complaints and diagnoses were consistent with his prior and subsequent appointments. As found, Claimant did not see ATP, Dr. Villavicencio, until September 1, 2022, nearly six weeks after the alleged injury.

The medical records admitted into evidence indicate Claimant has had prior medical treatment for his lower back as far back as 2010. Claimant admitted that he had a low back injury with resulting surgery in 2010 that resulted in a PPD rating and permanent medical restrictions. Claimant repeatedly denied that he ever had any intervening treatment for his low back in the 10 years leading up to the alleged work injury. The evidence, however, demonstrates that Claimant had been consistently reporting ongoing low back problems for years.

Contrary to Claimant's representations, the motor vehicle accidents in 2020 and 2021, involved injuries to his low back, in addition to other body parts. Claimant repeatedly asserted that the motor vehicle accidents only involved his neck and shoulders, but this is contrary to the objective evidence in the record.

As found, Claimant representations about his medical history and prior low back problems were not credible. Despite the history of low back problems, Claimant repeatedly misrepresented his medical history to the IME, Dr. Lesnak, and his treating physicians. As found, Claimant's testimony was not credible.

The ALJ found Dr. Lesnak's opinion that Claimant did not suffer a compensable injury to be credible and persuasive. Based on the totality of the evidence, Claimant has failed to meet his burden of proving that he suffered a work-related lower back injury on July 16, 2022.

Medical Benefits

Even if a claimant proves a compensable injury in the first instance, an ALJ may still deny a claim for workers' compensation benefits if the claimant fails to establish, by a preponderance of the evidence, that the current and ongoing need for medical treatment or disability is proximately caused by an injury arising out of and in the course of the employment. *See Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, a party has a viable defense to a claim for benefits even if the claim was originally compensable as long as the medical condition at issue is no longer related to, or caused by, the compensable work injury. *Id.*; *see also Cooper v. Indus. Claim Appeals Office,* 1999 WL 976657 (Colo. App. 1999); *Seifried v. Indus. Commission*, 736 P.2d 1262 (Colo. App. 1986) (a claimant is entitled to compensation only for the disability caused by the industrial injury). As found, Claimant did not suffer a compensable injury, so he is not entitled to medical benefits.

ORDER

It is therefore ordered that:

1. Claimant failed to prove that he suffered a work injury on July 16, 2022.

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

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

DATED: March 11, 2024

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

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

ISSUES

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

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

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

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

STIPULATIONS

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

FINDINGS OF FACT

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

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

manager passed away unexpectedly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

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

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

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

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

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

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

Madden at 864.

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

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

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

Id. at 865.

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

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

Id. at 865.

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

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

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

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

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

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

To prove entitlement to temporary disability benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Off., supra*.

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

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

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

Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Off.,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (ICAO. July 18, 2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Comm'n,* 740 P.2d 999 (Colo. 1987). However, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. This is true even if the claimant is not specifically warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Off., supra.*

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

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

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

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

ORDER

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

1. Claimant's claim is compensable.
2. Respondents shall pay Claimant temporary total disability benefits starting February 21, 2023.[2]
3. Claimant is not at-fault for her termination and subsequent wage loss.
4. Claimant's AWW at the time of the accident and injury is $800.00.
5. Pursuant to the stipulation of the parties, Respondents shall provide reasonable and necessary medical treatment to cure and relieve Claimant from the effects of her work injury.
6. Issues not expressly decided herein are reserved to the parties for future determination.

[2] Because the record is insufficient to determine when Claimant worked for SE[Redacted] and SY[Redacted], the ALJ is unable to order the payment of TTD for specific time periods and TPD for specific time periods. The ALJ is also unable to determine the unemployment offset. The parties are, however, ordered to attempt to resolve the amount of temporary disability benefits payable. If the parties are unable to resolve the TTD/TPD matter, either party may file an application to resolve the matter.

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: March 13, 2024.

/s/ Glen Goldman

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence what conditions were causally related to the work accident of January 19, 2022 or aggravated by the same, and the extent of the relatedness and what treatment was reasonably necessary and related.

II. Whether Claimant has proven by a preponderance of the evidence which providers were "authorized" treating providers (ATPs) for purposes of treatment of Claimant's causally related injuries from the January 19, 2022 admitted accident.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on August 3, 2023, endorsing the issues of compensability, medical benefits, average weekly wage, and temporary total and temporary partial disability benefits beginning from January 15, 2022.

Respondents filed a Response to Application on August 31, 2023 noting that the "[c]laim is on GAL with TPD being paid. Claimant continues to work. There is a question re the scope of the injuries/conditions stemming from the 1/19/22 DOI; Relatedness; Claimant has pursued some treatment on his own with unauthorized providers; Offsets (if applicable)."

At the time of the hearing, Claimant's counsel withdrew the issues of AWW and temporary disability benefits with prejudice as benefits were being paid.

At the hearing this ALJ's enquired whether the parties could obtain Dr. Dietz's February 9, 2023 EMG report as the parties and multiple providers had quoted from the document. A Status Conference was held with the ALJ on February 14, 2024, at which time the parties agreed to the admission of Dr. Dietz's report, which was admitted as Claimant's Exhibit "7". Since an Exhibit 7 was previously admitted at hearing on January 3, 2024, however, Dr. Dietz's report was labelled as Exhibit 8.

FINDINGS OF FACT

Based on the evidence presented at the hearings of January 3, 2024 and January 17, 2024, the ALJ enters the following findings of fact:

Claimant's Testimony:

1. Claimant, 47 years old at the time of the hearing, was employed by Employer for approximately 18 to 20 years, though he was by then working as a supervisor/foreman due to his upper extremity injury. However, prior to his injury he was a laboring landscape foreman, working with rock, installing water fall features, trees, sprinkler systems, retaining walls, pathways and any other high end landscaping. He had not had any prior problems while working for Employer. His boss and he would install the

large trees together as his boss did not trust the laborers with the expensive large trees. They had both planted them on many occasions without incident.

2. On January 19, 2022 Claimant was assisting his boss to install a large tree. His boss was driving a large forklift with the tree on the forks. He was driving up the hill, where the hole for the tree was and Claimant was waiting to assist in the placement of the large tree. Claimant was holding the tree to stabilize it while on the forklift. Because the forklift was on a steep incline, the forks were unable to deposit the tree directly into the hole, and when it dropped into the hole, it fell towards Claimant, hitting him on the left shoulder. Claimant pushed the tree hard to get it upright. He then proceeded to push and pull it from side to side, pushed it forward, and pulled backwards to get it into place with his arms outstretched and overhead. Following the incident, both continued to work normally and he did not start feeling the numbness and coldness in his left arm, that went from the shoulder all the way into his hands, until the following days, which got worse, and he went to the hospital.

3. Prior to the January 19, 2022 incident, while Claimant had a prior thoracic outlet condition that was congenital, he had never had any problems or symptoms because of the condition.

4. Claimant explained that, though the symptoms were relieved for two to three weeks following the second surgery with Dr. Hupp in March of 2022, they came back, with the exception of the numbness into the thumb, and index finger. He did confirm that the rib resection did not improve his symptoms significantly. Dr. Hupp also performed a vein bypass in May 2023 that relieved a lot of his symptoms for about three to four weeks, but it did not take away all the pain and coldness, and it has returned. Claimant also confirmed that he had an infection from that last surgery with Dr. Hupp and did not wish to have any further surgeries with her as he is not happy with the results of her treatment. Claimant continued to have symptoms of coldness and numbness in the left arm.

The Boss' Testimony:

5. Employer's owner, whom Claimant called "boss," was called to testify on Claimant's behalf. He explained that he owned the company and they did high end residential landscape and landscape art. He explained that he knew Claimant for approximately 25 years and that Claimant had worked for him approximately 18-20 years. They would plant lots of large trees, prep bare ground soil for irrigation and grass, they would move lots of big trees. They would install water features, tennis courts, pools, and other high end items. The job was very labor intensive.

6. The boss was able to observe Claimant work for many years before the January 19, 2022 work injury as they would work at least one to five hours together every day and he never observed that Claimant had any issues with his left arm. He had no issues with gripping tools and Claimant never complained of anything. He was very emphatic about this, that it was never, ever.

7. The boss explained that he was present on January 19, 2022 as he was driving the machine that was holding the tree and Claimant was on the other side. They brought in a lot of trees from Oregon and this one was a giant bonsai that had branches all over that stuck out. He picked it up off the trailer, went through the yard and up the hill

to where the hole was. He had a hard time getting the right angle to drop the tree into the hole because he was on an uphill angle. The tree catapulted into Claimant and yet Claimant was able to catch it and hold onto it. It was a tree that weighted around 700 lbs. He got off, went around and asked Claimant if he was ok and saw that Claimant was rubbing his shoulder. Together they pushed and pulled and spun the tree in the hole to get the tree just right before burying the roots.

8. Owner filed the First Report of Injury (FROI) some days later but could not remember exactly when. The boss confirmed that Claimant still continued to work for him doing pretty much the same thing though could not lift his left arm and was acting as a foreman, with people helping him, using machinery instead of the heavy laboring.

9. He attended a lot of Claimant's medical appointments with Claimant to help him with breakdowns in communications and to clarify a lot of things. He was with him when Claimant went to the emergency room on January 21, 2022 and even though there may not have been any mention of the impact and trauma to Claimant's shoulder in the report, he was present and knows that it was hard. There was a communication barrier and the boss stated that he did not realize how important all the details of the accident were to address Claimant's condition and symptoms. He explained that the tree fell off at a 45 degree angle and "he was kind of squished under the tree."

10. The boss was concerned that Claimant was not diagnosed correctly from the first at the emergency room which caused the subsequent problems. Claimant continued to report having the problems with numbness and cold sensation. He explained that Claimant had the loss of blood flow for so long that, while there had been improved circulation, they have still not figured it all out as he continued with problems and was advised by Claimant's providers that he likely continued to have some clots.

11. At one point he was attending an appointment with Claimant at On the Mend and was turned away because the claim had been denied and they would not see Claimant.

Medical Records:

12. Claimant presented to Littleton Adventist Hospital Emergency on January 21, 2022 with left forearm and hand numbness, tingling, cold sensation and pain with onset the day prior. The triage nurse, [Redacted, hereinafter WG], took a history of Claimant working with trees, and that he was pushing a heavy tree with his wrists and elbows flexed, which was repetitive. Of note was that Nurse WG[Redacted] did obtain information about Claimant moving a tree but failed to ask any further pertinent questions. He also advised that he had been doing it for 20 years without any problems. He reported that his symptoms would worsen with movement and improve with rest. At the time he was being evaluated he did not have pain in his upper arm, shoulder or neck. Very little other history or demographic information was obtained at that time by either Nurse WG[Redacted] or PA Angela C. Widler.

13. While PA Widler found no musculoskeletal abnormalities she did note that neurologically he had diffuse decreased sensation to the left forearm and hand/fingers. She noted she suspected that it was a repetitive use injury with nerve involvement. She provided a differential diagnosis of repetitive use injury, ulnar tunnel syndrome, cubital

tunnel syndrome, less likely TOS, but did not suspect cervical radiculopathy or CVA. She recommended a period of rest and referred Claimant to an orthopedic specialist. They took x-rays of the elbow and hand and determined that there were no bony abnormalities but also to rule out any vascular or nerve compression. This ALJ noted that PA Widler sent Claimant home with an admonition that since his blood pressure was elevated he should change lifestyle including weight loss. His admission BP was extremely elevated at 164/100 and at discharge was 140/90, still elevated. They also documented his BMI which was 20.67 which was on the low end of normal for a 5'9" male weighing only 140 lbs. Therefore, this ALJ could not understand why this was not further investigated.

14. Dr. Christopher Fender of Precision Plastic and Hand Surgery attended Claimant on January 24, 2022 for numbness, pain and increased coldness in his left hand and forearm that was affecting his fingers. Dr. Fender found a positive Tinel's at the palm, a negative Phalen's, normal strength and "no radial pulse." He ordered an EMG. He diagnosed carpal tunnel syndrome and counselled Claimant to stop smoking due to vasoconstriction.

15. On January 26, 2022 Claimant was evaluated at On the Mend Occupational Medicine. Dr. Sharon Walker took a history of Claimant pushing on a large tree that was being planted and Claimant developing acute pain in the left volar forearm that radiated down into his hand. He felt pain, cold, numbness into the thumb and index finger and some in the middle finger, and later feelings of aching pain, pins and needles, and throbbing. He explained he had been seen at the ER and by Dr. Fender who had referred him to a vascular surgeon and neurologist. On exam Claimant continued to have a positive Tinel's sign, negative Phalen's test. He was unable to pinch his thumb and index finger with resistance, his ulnar nerve strength was decreased significantly and also the radial nerve, but not as much. He had decreased sensation on the left thumb and index finger. She found significantly decreased ulnar and radial left pulses with capillary refill on the left hand greater than 30 seconds. She assessed left forearm strain, left arm vascular compromise, and left hand neuropraxia. She communicated with a radiologist, made a referral for an arterial ultrasound, requested and reviewed the records from Dr. Fender. She also later received a phone call from the radiologist reporting that Claimant had decreased blood flow in the radial and ulnar arteries. He recommended a CT angiogram.

16. The following day Dr. Walker spoke with another radiologist that recommended an MRI of the forearm to rule out muscle swelling that was compressing the ulnar and radial arteries. She also received another call from Dr. Kershen with the results stating that there was edema and possibly hemorrhage in the left antecubital fossa that could either mean trauma or inflammation. He recommended a CT angiogram.

17. Dr. Walker followed up on January 28, 2022, noted the significant findings on CT angiogram, discussed them with Dr. Weinstein and prescribed Claimant Eliquis after consulting cardiovascular specialist Eric Weinstein, M.D. By February 10, 2022 Dr. Walker was diagnosing left brachial artery occlusion, left forearm strain, left arm vascular compromise, and left hand neuropraxia.

18. Claimant was first evaluated by Dr. Eric S. Weinstein on February 2, 2022. He took a history, and documented the course of testing performed. On exam, he noted

the absence of a brachial pulse on the left, a cool hand with non-palpable pulses, and decreased capillary refill on the left. He diagnosed a brachial artery occlusion secondary to embolic phenomenon versus hypercoagulable disorder versus underlying dissection. He recommended a tuberculosis test with an infectious disease specialist before proceeding with the recommended "brachial artery thrombectomy possible repair."

19. On February 21, 2022 Dr. Weinstein performed the left brachial radial and ulnar thromboembolectomy, due to left arm ischemia secondary to probable embolus. He noted a moderate inflammatory reaction around the artery. He removed both subacute and chronic thrombus from the brachial artery. He passed a catheter into the brachial artery and retrieved another small thrombus plug as well as through the radial and ulnar arteries removing small amounts of thrombus from the origin of each.

20. On February 28, 2022 Dr. Walker followed up with Claimant following the surgery though claimant was reporting worse pain. Dr. Walker made a referral to a hematologist, Dr. R. Alvarez due to the blood clots that were subacute and chronic in the left brachial artery.

21. From this point, there were no further notes from Dr. Walker for over a year.

22. There are, however, notes from providers at Pinion Family Practice from April 6, 2022 through March 15, 2023 in follow up care regarding Claimant's continuing arm pain. The records show Claimant's continuing treatment and symptoms including the history regarding removal of blood clots and surgeries. They provided prescriptions for blood thinners and ordered INR[1] labs showing fluctuating levels. Claimant reported burning, cold that travelled down to his hand and affected him daily. Claimant complained of paresthesia, pins and needles of the left upper extremity. He described neck pain on the left side as well. On exam he would have a slightly diminished radial pulse and capillary refill. They ordered lifestyle changes, such as smoking cessation, ultrasounds, and other medications. They referred him to hematology, physical therapy, and to his vascular surgeon.

23. On March 27, 2022 Claimant returned to the emergency room with a history of left brachial artery occlusion, for left hand numbness that had started that morning, including left thumb numbness. Shannon Mazer, DO admitted Claimant at Littleton Adventist Hospital—Centura Health. He had pain in his left first finger, denied fever, chills, nausea, vomiting, dyspnea or weakness. In the ED Claimant had nonpalpable left radial and ulnar pulses but were faintly present with Doppler. A CT of the left upper extremity showed a reocclusion of the left brachial artery. Francis J del Rosario, MD called in the results of the CT as it was "critical findings of arterial occlusion." Dr. Colleen S. Hupp,[2] a vascular specialist, was consulted in the ED and planned to take Claimant to the operating room for an embolectomy to address the reocclusion.[3] Three days later, on March 30, 2022, Dr. del Rosario discharged Claimant to his home. Dr. del Rosario questioned an Eliquis failure.

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[1] INR stands for "international normalized ratio," a blood tests that shows how long it takes for blood to clot.

[2] Dr. Hupp was a colleague of Dr. Weinstein's at Cardiovascular Surgical Associates.

[3] This ALJ failed to locate the operative report in the exhibits.

24. Claimant was last seen by Dr. Weinstein on June 3, 2022 with continued complaints. He performed an ultrasound, noting that Claimant's symptoms were more neurogenic and due to irritation of the median nerve within the operative scar tissue and also in the brachial artery but he did not recommend any further intervention for it. He recommended anti-inflammatories and that he return to consul in 6 months for further arterial studies.

25. On July 26, 2022 Claimant had a bilateral upper extremity multilevel arterial assessment performed by Dominic C. Yee, M.D. of RIA Endovascular. He found that Claimant had decreased blood flow to the left upper extremity in comparison to the right upper extremity. A duplex ultrasound performed on the same day by Dr. Todd Kooy showed high grade stenosis[4] in the distal left brachial artery with at least 50-75% stenosis as well as stenosis just above the bifurcation of the radial and ulnar arteries. He also found that there was monostatic[5] flow in brachial, radial and ulnar arteries as well as biphasic signal in the left axillary artery and the proximal aspect of the left brachial artery, which are both signs of abnormal blood flow.

26. Claimant was evaluated by Dr. Nishant A. Patel on July 29, 2022 pursuant to a referral, from Jacqueline Van Cleave, R.N. of Pinion Family Health, regarding a left upper extremity ischemia. He took a history of Claimant being symptom free until January 2022 when he started experiencing acute pain in his left hand. He had a work up for an embolic occlusion of his distal brachial artery extending into the radial ulnar arteries. He noted both surgeries which provided him with limited relief with the exception that his hand pain resolved but continued to have deep pain in his forearm extending to his hand primarily on the lateral and dorsal side. Dr. Patel reviewed the imaging performed on July 26, 2022 and ultrasound in his office which revealed diminished left wrist brachial index of 0.77. He also reviewed prior ultrasounds that showed moderate wall thickening in the distal brachial artery extending in the proximal radial and ulnar arteries. He noted that there were dampened waveforms in the left radial and ulnar artery distribution. Dr. Patel also noted that the CT from January 28, 2022 showed the left C7 cervical rib and a significant compression of the left subclavian artery with poststenotic dilation, which he continued to see on the ultrasound he performed that day. Dr. Patel ultimately opined that Claimant had an arterial thoracic outlet syndrome caused by the January 2022 work injury, that was then stable but continued with diminished left wrist brachial index. He further opined that Claimant's continued pain was caused by his continued nerve impingement and should be seen by a thoracic outlet specialist for surgical decompression and resection of his C7 cervical rib.

27. On August 12, 2022 Claimant was evaluated by Dr. Colleen S. Hupp, at Colorado Cardiovascular Surgical Associates regarding thoracic outlet syndrome (TOS) pursuant to Dr. Walker's referral. She noted that Claimant had prior brachial embolectomies and that recent imaging was more suggestive of arterial thoracic outlet

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[4] This ALJ infers that the high grade stenosis indicated that there was a significant narrowing of the artery that supplied blood to the arm due to inflammation and/or the trauma causing the abnormal blood flow, pain, weakness, a weak pulse and/or muscle weakness.

[5] This ALJ infers that a monostatic blood flow is not normal as normal arterial blood flow is generally pulsing, because of surges in blood velocity when the heart pumps and ebbs when the heart relaxes.

syndrome. Claimant complained of significant pain in the forearm and hand which radiated to his shoulder with symptoms that were significantly debilitating. She performed a duplex ultrasound noting a significantly diminished waveforms with arm elevation and poststenotic dilation of his subclavian artery after the stenosis with thrombus. She opined that the Claimant's symptoms were caused by arterial thoracic outlet syndrome related to the cervical rib aggravated by the type of manual labor he performed. She recommended a left arm angiogram to assess for further occlusion and plan for surgery. She stated Claimant would require a cervical rib resection and subclavian interposition grafting to replace the injured vessel.

28. Dr. Hupp performed the angiogram on August 23, 2022 based on a diagnosis of arterial thoracic outlet syndrome. The angiogram showed the cervical rib, an area of aneurysmal dilatation of the proximal subclavian artery with thrombus (a clot) present and patent proximal brachial artery with subsequent occlusion with multiple collaterals distal to reconstitution below the elbow of the radial and ulnar artery with flow to the hand.

29. Claimant proceeded with left cervical and first rib resection, left subclavian to axillary bypass with vein graft and open harvest of right saphenous vein on September 14, 2022 by Dr. Hupp at Sky Ridge Medical Center. Claimant was discharged on September 17, 2022 with good blood flow and equal pulses.

30. On September 16, 2022 Albert Hattem, M.D., an occupational medicine Physician Advisor for Insurer issued a record review report regarding the arterial thoracic outlet syndrome diagnosis. He reviewed the records. He cited to the Medical Treatment Guidelines stating that "[I]n light of the Guidelines, [Claimant]'s right upper extremity symptoms/thoracic outlet syndrome cannot be considered work related because the condition was caused by a left sided 7th cervical rib that is congenital and not related to his work activities." He opined that all treatment for this conditions should be addressed outside the workers' compensation system.

31. Claimant was seen by Landon Peterson for physical therapy at Rocky Mountain Spine & Sports on October 17. 2022 pursuant to Dr. Hupp's referral. This treatment went through April 24, 2023, and while Claimant continued to make progress, he also continued to have weakness and pain with movement.

32. During the November 14, 2022 follow up with Dr. Hupp she noted that Claimant had significant improvement in the left hand pain following surgery but still had complaints of pain that started from the lateral aspect of his shoulder down to the outside of his arm and hand which was present prior to the surgery. He continued to do physical therapy and seemed to be getting stronger. She recommended an EMG to evaluate with neurology as Claimant had nerve compression for quite some time prior to his first rib resection.

33. Claimant was admitted to Swedish Medical Center due to a cardiac event on January 12, 2023. Dr. Andrew Fisher diagnosed normal deep vein thrombosis. However, on January 13, 2023 a non-invasive venous waveform analysis (NIVA) left arterial ultrasound duplex showed monophasic blood flow indicating stenotic tension in the brachial to the ulnar and radial arteries and diagnosed left thoracic outlet obstruction syndrome. Dr. Mary Warner and Dr. Rafid Al Daly, M.D. recommended consideration of

vascular surgery consultation related to the findings. During his stay, Claimant had a drug-eluting stent placed into the blockage of Claimant's left anterior descending (LAD) artery occlusion. He was discharged by Michael Wahl, M.D. on January 14, 2023.

34. Dr. Alex Dietz, M.D., Board Certified in Neurology, Neuromuscular Medicine and Electrodiagnostic Medicine, performed a nerve conduction and electromyography (EMG) studies on February 9, 2023. He concluded as follows:

> This study provides electrodiagnostic evidence for a chronic left lower brachial plexus lesion, localized to the medial cord or more proximal. This finding would be consistent with the diagnosis of left neurogenic thoracic outlet syndrome.
>
> There is no evidence for a left cervical radiculopathy or left arm entrapment neuropathy. Please note this test may not detect mild radiculopathies.

35. On February 15, 2023 Dr. Patel wrote that while the thoracic outlet condition is a condition with which someone is born it does not necessarily manifest during a patient's lifetime. However, in this case, he strongly opined that the work related injury of January 19, 2022 damaged the structures surrounding the thoracic outlet, which exacerbated any compression of blood vessels and nerves in the area. He noted that "[A]s a result, this patient experienced injury to his left subclavian artery, and a blood clot (embolus) to his brachial artery. This is evidenced by the fact that the embolus occurred just two days after the injury, whereas the patient lived his whole life prior to this with the anatomy of thoracic outlet compression."

36. A cervical spine MRI was performed on February 27, 2023 that showed moderate C3-4 canal stenosis and moderate to severe bilateral C5-6 foraminal stenosis.

37. Brian Mathwich, M.D. of Mathwich & Associates evaluated Claimant on March 21, 2023 at Respondents' request for an independent medical exam (IME). Dr. Mathwich took a history of Claimant being in a hole, pushing on a tree while his boss was taking the forks of the forklift out from under a large tree they were planting. The tree was falling over and Claimant was pushing against the tree forcibly with his arms at about head height in order to keep the tree from falling and was able to straighten it out. He reported increased left shoulder pain that radiated into his left arm but completed his shift. Claimant returned the next day but felt cold and numbness into his left arm. He was taken to the emergency. Dr. Mathwich reviewed the medical records. When asked about his current symptoms, Claimant reported he had:

> … no pain in the left shoulder when at rest, but with any type of movement of the shoulder, he has increased pain generally in the shoulder joint and clavicular area. He generally takes tramadol or Tylenol when the pain increases. He states anything where he moves his arm to chest high causes pain. Distally from about the mid humerus to his fingers, he has coldness and occasional numbness. He states it is very difficult to describe the sensation, but it is not overt pain such as in his left shoulder. He is able to accomplish all activities of daily living but again has difficulty with anything where he needs to reach at shoulder height or above. He is currently working for the landscaping company but does not do any heavy lifting and supervises other workers.

38. On exam, Dr. Mathwich noted that the left shoulder showed significant supraclavicular and infraclavicular wasting. Claimant was unable to lift his arm above 60

degrees flexion, 20 degrees extension, and Dr. Mathwich was unable to move it passively due to Claimant's pain and discomfort. With regard to the left elbow he noted that Claimant had full range of motion but capillary refill was decreased compared to the right by several seconds, and there was a noticeable difference in temperature, with the left being slightly colder from the hand up to the mid upper arm. He diagnosed left subclavian artery intima injury that was resolved and left brachial artery thrombi/emboli secondary to the intima injury, both work related. He placed Claimant at MMI for both of these conditions. He also diagnosed as not work related the left arterial thoracic outlet syndrome, the silicosis vs sarcoidosis, the anterior myocardial infarction and atherosclerotic heart disease.

39. Claimant returned to see Dr. Hupp on April 3, 2023 who conducted a repeat duplex ultrasound which showed decreased velocities in his radial and ulnar artery. She opined that he continued to be symptomatic and it was reasonable to proceed with a brachial to radial artery bypass to further improve his blood flow to see if his symptoms and blood flow would improve his continuing symptoms of cold in his left upper extremity. Claimant did well and post-surgery reported that his arm felt warm compared to post operatively during prior surgeries.

40. Claimant returned to see Dr. Walker on April 27, 2023. She noted that she had not seen Claimant since about one week after his February 21, 2022 surgery by Dr. Weinstein and was informed that his claim was no longer accepted. Dr. Walker recapped his course of treatment and she noted the subsequent procedures by Dr. Hupp and Claimant's cardiac event. Claimant was very uncomfortable with examination of his left arm, quiet, and distress. He had scars in the infra and supraclavicular areas, was very tender to palpation in a hypersensitive way in the chest, and the left arm at the shoulder only achieved 45 degrees of abduction and flexion, both accompanied by pain. She noted significant biceps and triceps muscle atrophy. She reviewed the medical records, including Dr. Dietz's follow up evaluation and notes regarding the March 1, 2023 MRI which showed increased T2 signal in the left supra- and infraspinatus muscles.[6] She stated that Claimant continued to have blockage in the brachial artery in the left forearm, and Dr. Hupp planed on doing bypass surgery on May 2, 2023. Claimant was reporting he was always in pain. He pointed to the left dorsal forearm and hand, stating this area was painful, numb, and cold. He also showed his left upper arm and left chest as having pain, but not like the forearm. Dr. Walker was very concerned that Claimant seemed to be worsening and was not on a more significant blood thinner other than aspirin. She referred Claimant to a hematologist at National Jewish.

41. Insurer obtained another physician advisor record review from Kathy McCranie, M.D. on April 28, 2023. She received very limited information from Insurer. She agreed with the initial physician advisors "based on review of the records presented."

42. Claimant proceeded with the left axillary to radial bypass with non-reversed saphenous vein and left leg open saphenous vein harvest on May 2, 2023 with Dr. Hupp at Sky Ridge.

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[6] This ALJ infers that a subtle increased T2 signal in the left supra- and infraspinatus muscles means inflammation or fluid collection around the muscles of the shoulder/rotator cuff.

43. Claimant attended several sessions with Dr. Jennifer Sandberg, MA, LPC, for psychotherapy from May 23 through July 11, 2023.

44. Dr. McCranie provided another Rule 16 record review on May 31, 2023 stating that since the May 2, 2023 left radial artery bypass graft was not authorized as work related, then the physical therapy for that surgery should also not be authorized for the left leg graft harvest site. However, for the left upper extremity that might be related as the patient's subclavian artery compression and resultant blood clot formation that was related, Claimant would benefit from a course of PT for strengthening in order to improve function and return to work.

45. Dr. Walker referred Claimant to PT at Allied Professional Therapeutics and Rehabilitation, which he attended for the first time on June 8, 2023. They listed multiple diagnosis including mononeuropathy of the left limb, neuralgia and neuritis, pain and stiffness of the left lower and left upper extremity. Carla Devenpeck, DPT, stated that Claimant was referred to PT for left side TOS with inability to straighten L knee all the way and antalgic gait as well as left arm muscle atrophy and neuralgia. She noted that skilled PT was to address the limitations listed and to improve functional use of the left arm and allodynia response at the anterior chest.

46. Claimant was admitted to Swedish Medical Center again on June 12, 2023 due to infection in his surgical site of left arm and leg. Claimant had some redness for approximately 3 weeks but saw his primary physician who prescribed antibiotics one week prior. Claimant reported suddenly having purulent drainage from his forearm and that is why he reported to the emergency room. They performed a bedside limited ultrasound and found no drainable fluid collection on either surgical incision site as well as took labs which showed no leukocytosis (absence of increased white blood cell count). Claimant was provided with antibiotics as a prophylactic measure and advised to follow up with his surgeon.

47. Claimant was seen by Colorado Infectious Disease Associate Dana Hammonds, N.P. on June 23, 2023 who examined Claimant, noted no further infection and provided further instructions regarding continued use of antibiotics.

48. Between June 5 and July 10, 2023 Dr. Walker was very concerned with Claimant's lab numbers, and the infection at the surgical sites as well as Claimant's migratory arthritis that might be caused by infections. She noted a definite temperature change in the skin on the left arm but could not clearly identify what artery would supply that area of the skin. She ordered another CT angiogram of the left arm to verify the absence of any additional clot formation. She noted that infectious disease had released Claimant from their care. Claimant did increase his gabapentin which was helping. On July 14, 2023 Dr. Walker referred Claimant to a new vascular surgeon and also put in a referral to a new hematologist on July 28, 2023.

49. By July 26, 2023 Claimant had met some of his short term goals and long term goals in PT. He demonstrated understanding of his home exercise program (HEP). He had plateaued with regard to ROM of the left shoulder due to continued restrictions which appeared to be scar tissue, neuritis with neural tension or possibly adhesive capsulitis that the patient needed to address with the specialist. On July 31, 2023 Claimant reported to Ms. Devenpeck that the coldness and stabbing pain in the left elbow

with light touch to the left side of his chest had gotten worse. Discharge occurred on August 2, 2023.

50. On August 11, 2023 Dr. Walker noted that Claimant needed to see both a hematologist as well as a second opinion thoracic outlet specialist. She contacted Dr. Annest of Vascular Institute of the Rockies and was advised that Claimant would be seen by a Spanish speaking vascular specialist he works with and Dr. Walker requested that Dr. Annest reach out to her.

51. On September 12, 2023 Barbara Melendez, M.D., of Vascular Institute of the Rockies evaluated Claimant pursuant to a referral by Dr. Walker, regarding complaints of pain in the shoulder going to his hand, coldness and numbness. She took a history and noted that Claimant had cyanosis and coldness of his left upper extremity. She reviewed prior tests and diagnostics. She noted that blood pressure on the left side upper extremity was slightly dampened at the forearm. Dr. Melendez diagnosed arterial thoracic outlet syndrome and requested authorization for a CT. She specifically stated:

> I believe the patient has neurogenic symptoms at this time. His vascular exam seems to be within normal limits. His cervical rib does seem to be quite large. At this time, we will obtain a CT scan with bone reconstruction to determine the exact size of his first rib as well as cervical rib.

52. The last report written by Dr. McCranie on September 14, 2023 was pursuant to a request for prior authorization for a CT scan of the neck and chest. Dr. McCranie again went back to other provider records to state that the tests were not work related without making a causation analysis.

53. On September 15, 2023 Claimant was attended by Dr. Walker who noted that Claimant had seen Dr. Melendez who had indicated that they may not have cut enough rib when they did the cervical and first rib resection surgery and he may still have a rib that was pinching a nerve or an artery. Claimant's arm continued to have increased pain and coldness, which involved the entire left arm, though some days were better than others. Dr. Walker recommended Claimant restart PT per Dr. Melendez's referral, ordered continued mediations and provided restrictions. She specifically stated that MMI was unknown as Claimant required further PT.

54. Claimant returned to see Dr. Melendez, who explained that she ordered the CT to determine whether there was any further portions of cervical rib that needed to be removed. She cited to the Health Images report for the CTA of the neck dated September 18, 2023 including that there were postoperative changes related to resection of the left anterior C7 cervical rib and left first rib and a short segment left distal brachial artery occlusion seen on the prior exam poorly evaluated on the current study.

55. Dr. Melendez also noted that Claimant had a diagnosis of arterial thoracic outlet syndrome but that she opined that his symptoms were more consistent with neurogenic thoracic outlet. She opined and recommended that Claimant proceed with further cervical rib resection and scalenectomy.[7]

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[7] This ALJ infers scalenectomy to be a removal or partial removal of the scalene muscle running between the ribs, in order to relieve compression of the brachial plexus and alleviate pressure on the nerves that control movement and sensation in the upper extremity.

56. On November 1, 2023 Claimant was evaluated by Dr. Drew M. Trainor, D.O. of The Denver Spin & Pain Institute for a left upper extremity EMG. He reviewed the February 27, 2023 cervical spine MRI which showed a C5-6 disc osteophyte complex, moderate right and mild left facet arthropathy resulting in moderate to severe bilateral foraminal narrowing. With regard to the EMG/Nerve conduction studies he stated:

> This is an abnormal electrophysiologic study. There is EMG and nerve conduction study evidence of a chronic left C6 radiculopathy without signs of active denervation. There is no EMG or nerve conduction study evidence of a left upper extremity brachial plexopathy, compressive mononeuropathy or large fiber peripheral neuropathy.

57. Dr. Walker saw Claimant on November 13, 2023. She documented that Claimant had increased pain in the left arm and left chest under his collar bone and increased heaviness of his left arm and decreased range of motion and flexibility of his left arm. She stated that he had recently noticed that if he sleeps on his back, he did not sleep very well and he had pain in the left infraclavicular area and left arm, and it was "bad." He could not sleep on his left side because of the severe pain. He also continued to have a sensation of numbness, and pins and needles in the left infraclavicular area and the dorsal left arm, noting that cold weather increased his pain.

58. She documented that he had tenderness over the left paracervical musculature and hypersensitivity over the left trapezius muscle, with decreased extension with reproduction of pain in the left infraclavicular area and the left arm. She noted muscle atrophy in the supraclavicular area. She observed that he had hypersensitivity in the left parathoracic musculature, with tenderness and referral pain with palpation over the left trapezius and upper parathoracic musculature into the left infraclavicular area. She also noted that the entire left arm now had atrophy. She documented significant loss of range of motion and on neurologic exam she noted decreased left arm strength in the biceps, triceps, as well as in the median, radial and ulnar nerves and decreased left grip strength and no left shoulder shrug.

59. Dr. Walker continued to diagnose left brachial artery occlusion status post left brachial, radial and ulnar thromboembolectomy with Dr. Weinstein and repeat left brachial, radial and ulnar thromboembolectomy with Dr. Hupp, left forearm strain, left arm vascular compromise, left hand neuropraxia, left arterial thoracic outlet syndrome, left cervical rib resection and interposition graft by Dr. Hupp, EMG evidence of neurogenic thoracic outlet syndrome per Dr. Dietz, increased T2 signal in the left supra- and infraspinatus muscles as seen on MRI, moderate to severe bilateral C5-6 foraminal stenosis as seen on MRI, left forearm and left thigh surgical site infection, heavy growth gram negative rods, Klebsiella aerogenes infection, staphylococcus epidermis infection, migratory arthritis.

60. Dr. Walker reviewed the EMGs of both Dr. Dietz and Dr. Trainor. She noted that Dr. Dietz had found a chronic left lower brachial plexus lesion consistent with left neurogenic thoracic outlet syndrome but not cervical radiculopathy or left arm entrapment neuropathy. She noted that even if the EMG performed by Dr. Trainor did not show any, does not mean that there was no brachial plexus symptoms as it does not always show up as positive on testing and did not rule out neurogenic TOS. She spoke with Dr. Trainor

with regard to the differing results on EMG, and based on her conversation as well as an extensive analysis of the medical records, she concluded:

1) The patient has had no further injuries since then.[8]
2) He has been working doing modified duty, but not using his left arm very much, and he is unable to reach overhead with his left arm.
3) It is my opinion within a reasonable degree of medical probability he has not developed the C6 radiculopathy outside of work, and it is likely that it was present when the first EMG was done but was not identified.
4) The C6 radiculopathy could account for some of the patient's left arm pain.
5) He certainly has had objective blood clots in the left arm that would cause pain, but he continues to have worsening pain, and yet his CT angiograms do not look like there are any new clots happening.
6) Dr. Trainor and I discussed doing a left C6 selective nerve root block as a diagnostic test and potentially therapeutic test to see if that does identify this as the etiology of his left arm pain.
7) I also discussed with the patient that I would reach out to Dr. Melendez and provide her with the EMG report and clarify whether she still would recommend doing the rib resection.
8) It is still my opinion within a reasonable degree of medical probability that all of the patient's complaints of his left arm including the arterial and neurogenic thoracic outlet syndrome is the result of his work.
9) He had no symptoms prior to the date of injury of 01/19/2022 when he was at work applying a lot of upper arm pressure to a large tree preventing it to fall as it was getting planted.

Dr. Walker went through the extensive diagnostic history in this matter outlining all significant interventions and tests. She continued to prescribe Cymbalta, and gabapentin. She also provided restrictions that included no lifting, pushing, pulling, or carrying greater than 5 pounds with left arm and no reaching overhead with left arm. She stated that maximum medical improvement was still unknown because of the nature of this complicated claim, and that she did anticipate permanent medical impairment.

61. Dr. Frank Polanco issued a Rule 16 physician advisor medical records review report at Insurer's request on November 15, 2023. He reviewed only the limited reports of Drs. Mathwich, McCranie, Melendez and Trainor and the request for prior authorization. Insurer advised that they had previously authorized 24 sessions of physical therapy but did not provide any physical therapy notes. Dr. Polanco opined that further PT was not reasonably necessary as they exceeded the MTG recommendations. Dr. Polanco also kept referring to Dr. Mathwich as the "DIME physician" and deferred to his causation determinations and finding of MMI. This was corrected in a later report but he failed to review further reports and his opinions did not change.

[8] This ALJ infers that this means since the EMG performed by Dr. Dietz, based on the context of the prior sentences.

Pleadings and Correspondence:

62. Employer filed a First Report of Injury (FROI) on January 24, 2022 noting that Claimant was injured on January 19, 2022 while he was straightening a tree, including pushing on it, overexerting himself and pulling a muscle in his forearm causing problems with the nerve and hand. He noted that Claimant was a landscape foreman that worked full time.

63. Respondents filed a Notice of Contest (NOC) on March 8, 2022 stating that the injuries were not work related.

64. Claimant filed an Amended Workers' Claim for Compensation on November 28, 2022 reporting a left arm and shoulder injury while pushing a heavy tree.

65. On May 2, 2023 Respondents sent correspondence to Colorado Cardiovascular Surgical Associates, stating that their request for payment of a left brachial to radial artery bypass graft with harvest of the femoropopliteal vein was denied. A similar letter was sent to On The Mend Occupational Medicine on May 23, 2023 for PT 2-3 times per week for 6 weeks. The last denial letters in evidence were dated November 21, 2023 for a request for prior authorization and payment of additional PT for the upper extremity/TOS condition, left C6 selective nerve root block injection, thoracic outlet syndrome and left upper extremity brachial plexopathy, compressive, sent to On The Mend, Vascular Institute of the Rockies and Denver Back Pain Specialists. The letters notified Claimant that the conditions were not compensable and not related to the admitted claim.

66. Eventually Respondents filed a General Admission of Liability (GAL) on May 22, 2023 admitting to medical benefits and temporary total and partial disability benefits. Subsequent GALs were filed on August 17, 2023 and November 13, 2023.

The Adjuster's Testimony:

67. Insurer paid for the initial two surgeries, but only after the claim was admitted on May 22, 2023. The first was performed by Dr. Eric S. Weinstein on February 21, 2022 and the second surgery was performed by Dr. Colleen Hupp. The adjuster confirmed that treatment with the authorized treating provider, Dr. Sharon Walker from On the Mend Occupational Medicine was also authorized and paid for. They did not pay for any of the treatment related to the thoracic outlet which included the third and fourth surgeries performed by Dr. Hupp. She agreed that she did not authorize treatment after the NOC was filed and no further providers were authorized. As found, Respondents did not designate any other providers when Dr. Walker declined to treat when the NOC was filed.

68. The adjuster did authorize the referral by Dr. Walker to Allied Professional Therapeutics that treated Claimant between June 8, 2023 and August 2, 2023, and paid those bills. Insurer also paid for the initial ER visit at Littleton Hospital.

69. Insurer received a request for prior authorization for a selective nerve root block, which they denied based on Dr. Polanco's physician advisor report.

70. The adjuster stated that Rocky Mountain Sports and Spine Physical Therapy was not an authorized provider, and she never received any bills from them.

She explained that Pinon Family Medicine and their referral to Dr. Patel, were also not authorized and that Dr. Walker did not make the referrals to her knowledge.

71. Insurer alleged that Dr. Dietz, National Jewish and Dr. Melendez were not authorized providers.

72. She confirmed that she first admitted to the claim as of May 22, 2023 and the treatment at Pinion Family Health occurred after the claim was denied but before the claim was admitted. And there was a period of over a year gap when Insurer was not paying for Claimant's medical care and his ATP provider refused to treat him. The last time Claimant was seen by Dr. Walker was March 28, 2022 and he was unable to return until April 27, 2023, which coincided with the time between the Notice of Contest was filed on March 8, 2022 and closely before the date of the admission.

73. Insurer conceded that Dr. Walker changed her mind regarding causation in this case as she originally agreed with Dr. Mathwich's opinion on May 26, 2023, then later changed her opinion on November 13, 2023 when Dr. Walker stated as follows:

> … within a reasonable degree of medical probability that all of the patient's complaints of left arm including the arterial and neurogenic thoracic outlet syndrome is (sic.) the result of his work. He had no symptoms prior to the date of injury of 1/19/2022 when he was at work applying a lot of upper arm pressure to a large tree preventing it to fall as it was getting planted.

Dr. Mathwich Testimony:

74. Dr. Mathwich testified as an expert in Occupational Medicine, as a Level II accredited physician, and was Board Certified in Family Medicine. He performed an IME at Respondents' request as stated above. Dr. Mathwich took a history, completed an exam, reviewed the records provided and went through his causation analysis. He explained that the thoracic outlet was like a tunnel through which ran the subclavian artery, the nerve and a vein. The tunnel and the structures within it could be compressed by different positions including when holding the arm outstretched overhead as Claimant had reported occurred during his injury.

75. Dr. Mathwich opined that on January 19, 2022 Claimant might have injured the intima of the subclavian artery, which is the lining of the artery as the thoracic outlet tunnel was compressed. But when Claimant straightened out his posture, the thoracic outlet would have resituated and repositioned itself without injury. He also opined that the injury to the intima is what caused the blood clots, which went downstream to Claimant's elbow level, which was treated as any emboli or thrombi would be by surgical means. He explained that surgical repair of the intima itself would not be necessary.

76. Dr. Mathwich in effect opined that Claimant's TOS was preexisting, was not the result of the work injury or the subsequent surgeries performed by Dr. Hupp would have resolved Claimant's issues and symptoms. He also opined that Claimant did not have either occupational arterial or neurogenic TOS.

77. Dr. Mathwich testified that the finding in the EMG study showing cervical radiculopathy on November 1, 2023 was not related to the January 19, 2022 work injury as a prior EMG performed by Dr. Dietz on February 9, 2023 failed to show any signs of a

cervical radiculopathy. He did not recommend authorizing the C6 nerve root block as it would not be related to the claim.

Medical Treatment Guidelines:

78. The Medical Treatment Guidelines, W.C.R.P. Rule 17, Exhibit 7, Definition, p. 6, states as follows:

> Thoracic Outlet Syndrome (TOS) may be described as a neurovascular disorder affecting the upper extremity which, on rare occasions, is caused by workplace factors, such as jobs that require repetitive activities of the upper extremities with forward head and shoulder postures. It should be emphasized that occupational TOS is a relatively uncommon disorder …
>
> Neurogenic TOS (described by some literature as true or classic TOS) consists of a chronic lower trunk brachial plexopathy diagnosed by positive electrodiagnostic testing. It is usually unilateral, predominantly affects women, and results in classic electrophysiologic and physical exam findings such as hand atrophy.
>
> Arterial TOS is usually associated with a cervical rib or anomalous first rib. This is regarded primarily as a predisposing factor. Most people with these ribs never develop symptoms. Precipitating factors in patients with cervical or anomalous ribs are trauma such as motor vehicle accidents or other events causing hyperextension neck injuries. Arterial TOS is rarely a work related condition.

79. Under "Initial Diagnostic Procedures" for history taking and physical examination at p. 7 it states that:

> Although the cervical rib has been implicated in TOS, less than 1% of the population has a supernumerary rib from the 7th cervical vertebra, and only 10% of this population has symptoms. Treatment for patients with TOS symptoms begins with jobsite alteration and therapy as described in Section F does not require surgical intervention. Neurogenic TOS may require early surgical intervention if there is significant weakness with corresponding Electromyography/Nerve Conduction Velocities (EMG/NCV) changes.

80. The history taking indications in the MTGs at pp. 7-8 for both neurogenic TOS and arterial TOS symptoms, as found, were present throughout Claimant's medical examinations by Dr. Walker, Dr. Hupp, Dr. Weinstein, Dr. Patel and others, including Dr. Mathwich.

81. Claimant showed early common symptoms of neurogenic TOS such as coldness of the arm and shoulder, weakness, numbness and paresthesia in the arm, hands and fingers. He complained of arm elevation exacerbating his symptoms, symptoms disturbing his sleep, causing problems when he attempted to carry things. Claimant also showed common symptoms of arterial TOS such as actual findings of embolus, claudication, ischemia, numbness, and continuous pain and subsequent signs of continued wasting and muscle atrophy, first above the shoulder joint and then into the arm as outlined by Dr. Walker.

82. When looking at the Occupational Relationship for Neurogenic and Vascular TOS, the Guidelines at W.C.R.P. Rule 17, Exhibit 7, p. 9, indicate that "[I]n many cases, trauma is the cause of venous and arterial or neurogenic TOS." They further state

that “[T]he causes of TOS can be placed into 3 general categories: trauma, posture, and repetitive activities.” And while arterial thrombosis is associated with a cervical rib or anomalous first rib, the key word here is usually, which does not mean always, as is the consensus in this case as all providers indicate that the arterial subclavian thrombosis was caused by the January 21, 2022 work injury.

Ultimate Findings:

83. Here, as found, Claimant has proven by a preponderance of the evidence that the January 19, 2022 work injury when the large tree fell against him and he had to push very hard with his arms extended overhead to prevent the tree from falling onto him and then to straighten it out, caused an injury and an aggravation of his preexisting thoracic outlet condition, crushing the structures in the shoulder, including the subclavian artery and surrounding structures. Prior to Claimant’s injury, Claimant had worked for Employer approximately 18 to 20 years without incident or symptoms. Employer credibly testified that he had worked closely with Claimant performing heavy work over the years, for many years, and Claimant had never had any complaints of pain or discomfort of his left neck, shoulder or left upper extremity. This is supported by Claimant’s authorized treating provider, Dr. Walker’s reports and opinions. Dr. Walker, who was involved in the claim since almost the beginning, and reviewed in detail all the records, specialist’s reports, testing and diagnostics, including consulting with specialists when she found conflicting information, as well as Dr. Mathwich’s opinions, which did not change from the time he issued his report to when he testified at hearing, and based on this ALJ’s detailed review of the evidence, as found, Dr. Walker opinions are more credible and persuasive over the opinions of Dr. Mathwich.

84. As found, Dr. Walker documented Claimant’s consistent symptoms from the first time she evaluated Claimant and noted his ongoing deterioration, despite conservative and surgical treatments, and despite the occasional periods of temporary improvement in Claimant’s condition. She noted the decreased strength, the loss of muscle mass beginning in the tissue surrounding the shoulder structures including muscle atrophy, through when Claimant was showing atrophy in his arm muscles. She noted that Claimant consistently had coldness in his extremity and continues to have coldness in that left upper extremity, even though the clots or thrombus were cleared, the stenosis were repaired with bypasses, the first rib and cervical rib were resected to take off the pressure on the artery. The reality is that the surgeries also had an effect. They caused scar tissue which in turn irritated the median nerve and brachial artery according to Dr. Weinstein’s observations on June 3, 2022, whose opinions are also found to be credible and persuasive.

85. As found, diagnostics, such as the angiogram of August 23, 2022 still showed abnormalities such as the aneurysmal dilation of the proximal subclavian artery and an occlusion just below the brachial artery which Claimant’s body compensated for, by reestablishing collateral vessels that bypassed the blockage so that Claimant would have blood flow to his hand. As found, because of the damage caused by both the crush injury on January 19, 2022 and the subsequent scarring and irritated tissue, Dr. Hupp performed not just the ribs resection but also the left subclavian to axillary bypass in order to restore adequate blood flow to the left upper extremity in the hopes that it would

improve and relieve Claimant's symptoms related to the poor circulation, including the pain, coldness and weakness of the arm.

86. As found, even after the surgery on September 16, 2022, according to the NIVA left arterial ultrasound duplex, Claimant still showed abnormal blood flow indicating stenotic tension in the brachial to the ulnar and radial arteries. Dr. Patel was found credible and persuasive in his explanation that the work related injury of January 19, 2022 damaged the structures surrounding the thoracic outlet, exacerbating the compression of blood vessels and nerves in the area.

87. All providers agreed that Claimant had a congenital thoracic outlet condition related to an anomaly with a C7 cervical rib, as it was fairly rare to have a cervical rib and that would sometimes cause thoracic outlet syndrome due to the small space for nerves, veins and arteries to pass through.

88. As found, while Dr. Mathwich testified that damage to the subclavian artery, nerve and vein in the thoracic outlet is not the same as a diagnosis of thoracic outlet syndrome, this ALJ's reading of the MTGs is contrary to this opinion, stating that damage to those structures is the very definition of TOS of the three types in accordance with W.C.R.P. Rule 17, Exhibit 3, p.6.

89. Dr. Mathwich described that the passage that nerves, artery and veins went through was a tube or tunnel. As found, Dr. Mathwich's description was very obscure and not reliable. As found, in this ALJ's review of the totality of the medical records, the thoracic outlet is simply an area surrounded by multiple structures, bordered by the clavicle and scalene muscles on one side, and the first rib (or in rare cases the seventh cervical rib) and scalene muscles on the other side, through which the subclavian artery, the brachial plexus nerve and the subclavian vein went through. They passed through the outlet area, proceed down through to the axilla area and then down the upper extremity. The brachial plexus nerves, the subclavian artery as well as the subclavian vein all exited through this area, and when the surrounding structures were compressed, it would cause injury to the surrounding structures including muscles as well as the nerves, veins and arteries. The artery and nerves may be compressed between the clavicle and the first rib/cervical rib, the scalene muscles and the clavicle or the pectoralis muscles and the bones.

90. As found, Dr. Mathwich was not found persuasive in his opinion that Claimant did not have an injury causing thoracic outlet syndrome or that all of his TOS and subsequent symptoms were preexisting, or not the result of the work injury. Further, his opinion is not persuasive that since subsequent surgeries performed by Dr. Hupp did not resolved Claimant's issues and symptoms that it demonstrated that the symptoms were not related to the January 19, 2022 work injury. Just because a surgery did not work, does not mean or show that the injury was not work related. If that were the case, many surgeries that are performed for patients that did not work would be challenged by insurers as not causally related because of an assumption that it must not have been the problem. The reality is that surgery cannot always repair damaged tissue, especially if there is extensive damage to surrounding structures as noted by Dr. Patel. In fact, the treating providers are still attempting to determine the cause of all of Claimant's symptoms may be, according to Dr. Walker's November 13, 2023 report, which is found credible and

persuasive over the contrary opinions of other medical opinions including Dr. Mathwich's and the Insurer physician advisors', whom did not examine neither Claimant nor all of the medical records.

91. As found, the February 21, 2022 thromboembolectomy performed by Dr. Weinstein, the March 27, 2022 embolectomy of the brachial artery performed by Dr. Hupp, as well as the left cervical and first rib resection, left subclavian to axillary bypass with vein graft and open harvest of right saphenous vein on September 14, 2022 and left axillary to radial bypass with non-reversed saphenous vein and left leg open saphenous vein harvest on May 2, 2023, with Dr. Hupp were all proximately related to the January 19, 2022 work related injury. Claimant had continual problems related to the symptoms of the left upper extremity which included pain, weakness, loss of range of motion and coldness going down the left upper extremity. These were symptoms localized to his left shoulder and left upper extremity that were not fully alleviated by the surgeries and it was clear that Claimant continued to deteriorate as demonstrated in his ATP examinations that showed atrophy, first of the muscles of the infra and supraspinatus then of the arm itself. Claimant continued to have a permanent nerve impingement as well as a vascular component of his injury that has not resolved and he did not have prior to his injury of January 2022. As found, all of this treatment was reasonably necessary and related to the January 19, 2022 admitted work injury, including all the procedures, diagnostic and conservative care ordered by his treating providers for the TOS.

92. The reference by multiple providers that the MTGs supported that TOS is not work related, this is not persuasive. As found, the reality is that the MTGs do address occupational TOS. While it may be rare, Claimant is a rare individual with a particular unique body structure. As the MTGs state he is one of 10% of 1% of the population affected by TOS, and Employers must take the worker as they find them when employing them, with their weaknesses and predispositions. Claimant worked for many years with a seventh cervical rib with a small thoracic outlet, installing trees for almost two decades, as well as performing other heavy duty tasks. Claimant did not have any problems prior to the injury, and following the accident, that frailty was affected, causing injury on January 19, 2022 and the need for medical care. As found, the damage to the structures within the thoracic outlet was such that it damaged both the nerves and the arteries, more likely than not causing both arterial TOS and neurogenic TOS as credibly diagnosed by Dr. Hupp, Dr. Walker and Dr. Melendez.

93. As found, while there was conflicting EMG testing at different times, there was also evidence that EMG testing may not detect all radiculopathies. It was not until after the C7 rib and 1st rib resection that an MRI was performed showing moderate to severe bilateral C5-6 foraminal stenosis, indicating that there may be some other indicia of additional damage that might account for the Claimant's symptoms. During the time period between January 2022 through the date of the hearing Claimant's symptoms and conditions were without resolution and continued to cause significant symptoms and physically demonstrable evidence of decline, such as significant muscle atrophy and weakness, despite extensive treatment. Dr. Walker, who has been treating Claimant since the beginning, analyzed all the data, reviewed all the reports and concluded that Claimant developed a C6 radiculopathy, that was likely present when the first EMG was performed based on her conversation with Dr. Trainor. She also opined that a C6

selective nerve root block (SNRB) be performed both as a diagnostic test and for therapeutic purposes to determine whether the C6 radiculopathy might be the source of some of Claimant's left upper extremity problems. As found, Dr. Walker, Dr. Hupp and Dr. Melendez are more credible and persuasive than any other providers mentioned above and their opinions support the determinations that the neurogenic and arterial TOS and that the C6 radiculopathy were proximately caused by the January 19, 2022 work related injury. The treatment specifically for the arterial and neurogenic TOS and the C6 radiculopathy is reasonably necessary and related to the injury including the physical therapy ordered by Dr. Wilson and Pinion Family Health, as well as the PT ordered by Dr. Walker. The surgeries performed by Dr. Hupp and the evaluations performed by Dr. Melendez as well as her referrals and medications for these conditions provided by the authorized providers are determined reasonably necessary and related.

94. Further, as found, due to Insurer's denial of the claim, Claimant's and Employer's credible testimony that Claimant was turned away from On The Mend/Dr. Walker's office when the NOC was filed, Respondents failure to establish that they had designated another physician willing to treat despite the denial, the right of selection passed to Claimant. Claimant selected Pinion Family Practice. As found, the medical care Claimant received at the ER at Littleton where Dr. Weinstein's partner, Dr. Hupp took over Claimant's care was authorized by virtue of being emergent care. Dr. Hupp, On The Mend, Vascular Institute of the Rockies, Denver Back Pain Specialists, Precision Plastic and Hand Surgery, Rocky Mountain Sports and Spine PT, Allied Professional Therapeutics, Colorado Infectious Disease Associates, The Denver Spine and Pain Institute, Pinion Family Health (related to the TOS and C6 radiculopathy or diagnosis listed above by Dr. Walker), Health Images, and the ER facilities, Littleton Adventist Hospital, Centura Health, Sky Ridge Medical Center, Swedish Medical Center (related to the arm and leg infection, June 23, 2023 and July 6, 2023) mentioned above that treated Claimant for the TOS and/or radicular issues are authorized treating providers as they were designated providers or the provider selected by claimant upon denial of the claim, or providers within the chain of referral.

95. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2023). 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*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as

not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. Arenas v. ICAO, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability Work Related Conditions

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

"Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* ICAO, WC 4-934-689-01 (Nov. 21, 2014). The "arising out of" element is narrower and requires Claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* ICAO, WC 4-952-153-01 (Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* ICAO, WC 4-894-311-03, (Apr. 9, 2014).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Sec. 8-40-201(1), C.R.S. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., ICAO, WC 4-989-682-01 (August 17, 2016). Compensable medical treatment includes evaluations or diagnostic testing.

A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, ICAO, WC 4-960-513-01 (Oct. 2, 2015). As stated in the *Kiewit Son's* case, "Compensation is not dependent on the state of an employee's health or his freedom from constitutional weakness or latent tendency." *Kiewit Sons' Co. v. Indus. Comm'n*, 124 Colo. 217, 236 P.2d 296 (1951); *In re Claim of Waters v. King Soopers, Inc*, ICAO, WC 5-181-279 (September 20, 2022). An employer takes the employee as it finds him or her. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo.App.1992). Moreover, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Finn v. Indus. Comm'n*, *supra*; *Atsepoyi v. Kohl's*

Department Stores, ICAO, WC 5-020-962-01 (Oct. 30, 2017); *Sanchez v. Honnen Equip. Co*., *supra*. 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*, *supra*; *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Medical Treatment Guidelines (MTGs), contained in Workers' Compensation Rule of Procedure 17, 7 CCR 1101-3, provide that health care providers shall use the Guidelines adopted by the Director of the Division of Workers' Compensation. Sec. 8-42-101(3)(b), C.R.S. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the Colorado Court of Appeals noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. The Guidelines are regarded as accepted professional standards for care under the Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in making determinations. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005). The ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, ICAO, WC 4-665-873 (Jan. 25, 2011). The Guidelines, however, do not constitute evidentiary rules, and an expert's compliance with them does not dictate whether the expert's opinions are admissible, or whether they may constitute substantial evidence supporting a fact finder's determinations. Rather, compliance with the Guidelines may affect the weight given by the ALJ to any particular medical opinion. *Cahill v. Patty Jewett Golf Course*, ICAO, WC 4-729-518 (February 23, 2009); *In re Claim of Foust*, ICAO, WC 5-113-596, I.C.A.O. (October 21, 2020). The Guidelines are not definitive and the ALJ need not utilize the medical treatment guidelines as the sole basis for determinations of benefits. Sec. 8-43-201(3), C.R.S. See also *Thomas v. Four Corners Health Care*, ICAO, WC 4-484-220 (April 27, 2009); *Jones v. T.T.C. Illinois, Inc.,* ICAO, WC 4-503-150, I.C.A.O. (May 5, 2006), affirmed *Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (NSOP); *In re Claim of Reyes*, ICAO, WC 4-968-907-04 (December 4, 2017).

All providers agreed that Claimant had a congenital thoracic outlet condition related to an anomaly with a C7 cervical rib, as it was fairly rare to have a cervical rib at this level and that it will frequently cause thoracic outlet syndrome due to the small space for nerves, veins and arteries to pass through.

As found, Claimant has proven by a preponderance of the evidence that the January 19, 2022 work injury when the large tree fell against him and he had to push very hard with his arms extended overhead to prevent it from falling onto him and then to straighten it out by twisting it from side to side, caused an injury to his neck, and left upper extremity including the shoulder, causing thoracic outlet syndrome or aggravating his preexisting thoracic outlet condition. Prior to Claimant's injury, Claimant had worked for Employer approximately 18 to 20 years without incident or symptoms. Employer credibly testified that he had worked closely with Claimant and Claimant had never had any complaints of pain or discomfort of his left neck, shoulder or left upper extremity despite the heavy work they performed during all that time, including installing many trees just like the one that caused the Claimant's injuries.

As found, the February 21, 2022 thromboembolectomy performed by Dr. Weinstein, the March 27, 2022 embolectomy performed by Dr. Hupp, as well as the left

cervical and first rib resection, left subclavian to axillary bypass with vein graft and open harvest of right saphenous vein performed on September 16, 2022 and left axillary to radial bypass with non-reversed saphenous vein and left leg open saphenous vein harvest on May 2, 2023, both with Dr. Hupp were all reasonably necessary and related to the January 19, 2022 work injuries sustained by Claimant. Claimant had continual problems related to the symptoms of the left upper extremity which included pain and coldness going down the left upper extremity. These were localized symptoms that were not alleviated by the conservative or surgical care and it was clear that Claimant continued to deteriorate as demonstrated in his ATP examinations that showed atrophy. Claimant continued to have a permanent nerve impingement as well as a vascular component of his injury that had not resolved and that he did not have prior to his injury of January 2022. As found, all of this treatment, and the conservative treatment, diagnostic testing and other procedures which was carried out in furtherance of his care related to the arterial and neurogenic TOS was reasonably necessary and related to the injury.

The references by multiple providers, upon record reviews, that the MTGs supported that TOS was not work related, was not persuasive. The reality is that the MTGs do address occupational TOS. While it may be rare, Claimant was a rare individual with particular, unique body structure and physiology, and Employers must take the worker as they find them when employing them, with their vulnerabilities and susceptibilities. As found, Claimant worked for many years with a seventh cervical rib and a narrowed thoracic outlet, installing trees for almost two decades, as well as performing other heavy duty tasks. Claimant did not have any problems prior to the injury, and following the accident, that frailty was affected, proximately causing injury on January 19, 2022 and the need for medical care.

As found, the damage to the structures within the thoracic outlet caused by the January 19, 2022 accident was such that it damaged both the nerves and the arteries, causing both neurogenic TOS as diagnosed by Dr. Walker, Weinstein, Dr. Dietz, Dr. Hupp and Dr. Melendez and arterial TOS affecting the subclavian artery and the arteries downstream, which was compressed and caused blood clots, as credibly and persuasively diagnosed by Dr. Walker, Dr. Hupp, Dr. Fisher, and Dr. Melendez. While there was conflicting diagnostic testing at different times during the two years of treatment, this ALJ finds that those as explained by Dr. Walker are more persuasive and credible than any of the contrary opinions as laid out in the above ultimate findings.

As found, both Dr. Walker and Dr. Trainor credibly and persuasively explained the findings of the C6 radiculopathy as having been proximately caused by the January 19, 2022 work related accident. While there does seem to be some delay between the time Claimant started treating and when he was ultimately diagnosed with a radiculopathy, that is credibly and persuasively explained by Dr. Walker, given the Claimant's symptoms, the prior diagnosis of TOS that have similar symptoms than does a radicular complaint, the initial EMG findings and other issues such as blood clots, lack of a pulse, and intermittent monostatic blood flow, all of which took priority over any other medical investigation into Claimant's complaints and symptoms. As found, Claimant has proven that it was more likely than not Claimant sustained a cervical spine injury causing radicular symptoms into the left upper extremity and that the injury to the spine was proximately

caused by the January 19, 2022 admitted injury, requiring reasonably necessary and related medical care, including the spinal block injection prescribed by Dr. Trainor.

C. Authorized Medical Benefits

"Authorization" refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005). Further, a claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission*, 701 P.2d 168, 170 (Colo. App. 1985); see also, *Brickell v. Business Machines, Inc.,* 817 P.2d 536. Lastly, an insurer may, by their conduct, waive the right to object that the medical provider was not an authorized provider. *Wielgosz v. Denver Post Corporation*, W. C. No. 4-285-153, (ICAP, December 3, 1998).

Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010).

A referral in the normal progression of authorized treatment allows for the authorized treatment provided by the medical provider accepting the referral. *Greager v. Industrial Commission, supra*. When the referral reveals it is based on the independent medical judgment of the referring doctor, it may be construed as an authorized referral. *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997).

8-42-101(6)(a), C.R.S, applies in the alternative. This statute states:

> If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant … for the costs of reasonable and necessary treatment that was provided.

See also *In re Claim of Bell*, ICAO, WC 5-044-948-01 (October 16, 2018).

Claimant was first evaluated at Littleton Hospital for emergent care, who referred Claimant to Dr. Fender for an orthopedic evaluation. Therefore, Littleton Hospital is authorized. However, neither Employer nor Claimant reported the injury until January 24, 2022, when Claimant was seen by Dr. Fender. There is no indication that Claimant advised Insurer that he was to be seen by Dr. Fender. Therefore, Dr. Fender is not authorized as a selection had not yet been made.

Claimant was then referred by Insurer to On the Mend and Dr. Walker for the January 19, 2022 accident where Claimant was seen as of January 26, 2022, and there is no dispute that Dr. Walker is authorized. Dr. Walker referred Claimant to Dr. Weinstein, Dr. Hupp and Colorado Cardiovascular Surgical Associates, Health Images, Rocky Mountain Spine and Sport PT, as well as for multiple diagnostic test providers including CTA and MRI of the left upper extremity, lab work, hematology (Dr. Witta), chest CT, chest x-rays, which was necessitated for the purpose of determining whether it was safe to proceed with treatment related to the thrombus.

As found, it is clear that Insurer advised Dr. Walker and On The Mend that the claim was being denied and no further payments would be made in the claim. Claimant credibly and persuasively testified that he was turned away from seeing Dr. Walker. This was also testified to by Employer, who frequently accompanied Claimant to his medical appointments. As found there was no credible evidence that Respondents made any further designation, following the denial of treatment and further payment of medical care after the filing of the NOC.

As found, the adjuster also confirmed that the treatment at Pinion Family Health occurred after the claim was denied but before the claim was admitted. Insurer failed to admit liability through May 2, 2023. And there was a period of over a year gap when Insurer was not paying for any of Claimant's medical care and his ATP provider was not treating him. Insurer's denial of the claim provided Insurer with notice that Claimant required a new designated provider willing to treat. Respondents' failure to act caused the right to select a new physician to pass to Claimant. Dr. Walker noted that she stopped treating Claimant in February 2022 when she was informed that the claim was no longer accepted. Claimant was forced to see his own personal providers, including the providers at Pinion Family Practice and testified that Medicaid had to pay for his treatment and evaluations outside of workers' compensation.

Under these circumstances, the ALJ reasonably infers that Employer did not provide treatment in a timely manner and that the right of selection passed to Claimant. See *Bunch*, *supra* at 383 (an employer is deemed notified of an injury when it has some knowledge of facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that a potential compensation claim may be involved). Employer's challenge to the compensability of the claim and after May 2023 when they filed a GAL, their challenge to the compensability of the TOS and C6 radiculopathy did not excuse the obligation to tender timely treatment. See *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228, 229 (Colo.App.1999) (employer has right to select treating physician although it contests liability but must continue to pay for the treatment). Claimant has proven by a preponderance of the evidence that Claimant selected Pinion Family Health as his ATP, which was paid with Medicaid. The hospital bills were not paid to his knowledge because Claimant was waiting to find out what would happen in court.

As found, Pinion Family Practice became an authorized provider by virtue of this selection and Pinion referred Claimant to hematology, Health Images, Dr. Patel, Dr. Weinstein, Dr. Hupp, RIA, Dr. Kooy, Dr. Yee, among other providers that provided treatment, diagnostic tests and evaluations necessary to treat the work related conditions, which were within the chain of referral, and authorized.

Dr. Hupp is Dr. Weinstein's partner in the same practice and started treating Claimant when he was admitted emergently to Sky Ridge Medical Center on March 27, 2022 for surgery related to the second blood clot caused by the January 19, 2022 work injury. Dr. Hupp and Sky Ridge are found to be authorized providers. Dr. Hupp made referrals to multiple providers, including Health Images, RIA Endovascular, Dr. Kooy for the duplex ultrasound, Dr. Dietz for an EMG. As found, the above medical providers have provided reasonably necessary medical care proximately caused by Claimant's January 19, 2022 work related injuries or sequelae of his injuries.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for Claimant's reasonably necessary medical care related to left brachial artery occlusions, left brachial radial and ulnar thromboembolectomies with Dr. Weinstein and Dr. Hupp, left forearm strain, left arm vascular compromise, left hand neuropraxia, left arterial thoracic outlet syndrome, the left cervical rib resection and sequelae, the interposition graft by Dr. Hupp, the neurogenic thoracic outlet syndrome, C6 radicular complaints, left forearm and left thigh surgical site infections, Klebsiella aerogenes infection, staphylococcus epidermis infection, and migratory arthritis diagnosed and found to be related to the January 19, 2022 work related injury per Dr. Walker.

2. On The Mend, Dr. Weinstein, his partner, Dr. Hupp, Colorado Cardiovascular Surgical Associates, Vascular Institute of the Rockies, RIA Endovascular, Rocky Mountain Cancer Center, Envision Radiology, Health Images, Denver Back Pain Specialists, Rocky Mountain Sports and Spine PT, Allied Professional Therapeutics, Colorado Infectious Disease Associates, The Denver Spine and Pain Institute, Pinion Family Health (related to the TOS and C6 radicular complaints or other diagnosis listed above by Dr. Walker), and the ER facilities, Littleton Adventist Hospital, Centura Health, Sky Ridge Medical Center, Swedish Medical Center (related to the NIVA performed January 13, 2023 and arm and leg infections, June 23, 2023 and July 6, 2023) mentioned above that treated Claimant for the TOS and/or radicular issues are authorized treating providers as they were designated providers or the provider selected by claimant upon denial of the claim, or providers within the chain of referral. Dr. Fender and National Jewish are specifically found not authorized.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts** or email the Petition to Review to oac-ptr@state.co.us. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 13th day of March, 2024.

By: _____
ELSA MARTINEZ TENREIRO
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-206-591-001

ISSUES

- Did Claimant prove by a preponderance of the evidence she suffered a whole person impairment to her right shoulder?
- If Claimant proved a whole person impairment, did Respondent overcome the DIME's 7% whole person rating by clear and convincing evidence?
- Did Claimant prove by clear and convincing evidence the DIME erred by not providing a cervical or thoracic spine rating?
- Did Claimant prove a right shoulder surgery performed by Dr. Derek Purcell was reasonably needed and causally related to the admitted injury?
- Did Claimant prove Dr. Purcell is an authorized provider?
- Did Claimant prove entitlement to TTD benefits from September 26, 2022 through November 1, 2022, and TPD benefits from November 2, 2022 through March 22, 2023?
- At the hearing, the parties discussed submission of photographs to evaluate Claimant's eligibility for a disfigurement award. No photographs were submitted, and the issue of disfigurement will be reserved for future determination.

FINDINGS OF FACT

1. Claimant works for Employer as a Police Officer. She suffered admitted injuries on May 11, 2021 when she fell while chasing a burglary suspect.

2. Claimant sought treatment at the Memorial Hospital emergency department the evening of the accident. She reported pain in her right shoulder, right knee, and left hip. She did not immediately feel any neck or upper back symptoms. Claimant was diagnosed with multiple abrasions, contusions, and acute shoulder pain.

3. Claimant saw PA-C Magan Grigg at Employer's occupational medicine clinic on May 14, 2021. She reported right shoulder pain radiating to the chest, right pectoral muscle, and right scapula. Physical examination showed tenderness to palpation at the subscapularis insertion with reduced strength of multiple rotator cuff muscles. Impingement signs were negative. Ms. Grigg ordered a shoulder MRI to rule out internal derangement, and referred Claimant to PT.

4. A right shoulder MRI was completed on May 17, 2021. The radiologist observed full-thickness supraspinatus tendinopathy but no rotator cuff tear, and intra-articular biceps tendinopathy.

5. Claimant returned to the occupational medicine clinic on May 27, 2021, and saw PA-C Paula Homberger. Claimant's knee felt better but her shoulder was worse. She described constant 2/10 right shoulder pain, radiating to the neck and mid back. Ms. Homberger advised Claimant the MRI showed no rotator cuff tear and she should improve quickly with conservative treatment. Ms. Homberger recommended additional PT.

6. Dr. Nicholas Kurz evaluated Claimant on June 15, 2021. Her shoulder pain had improved to 1/10, but still radiated to the right neck, trapezius, and scapular area. Dr. Kurz recommended four more weeks of PT.

7. On July 15, 2021, Ms. Homberger documented Claimant's right shoulder and neck pain had worsened. She recommended additional PT. That same day, Claimant's therapist noted pain radiating to Claimant's neck and a large trigger point in the right upper trapezius.

8. On August 3, 2021, Ms. Homberger noted pain throughout the shoulder girdle region, including the right trapezius and rhomboid muscles. She referred Claimant to Dr. Chad Abercrombie for chiropractic treatment.

9. Claimant had an initial evaluation with Dr. Abercrombie on August 30, 2021. She reported pain in the right shoulder, right neck, and right upper back. The examination showed tenderness and trigger points along the right trapezius and levator scapula. Dr. Abercrombie also noted increased tone and tenderness at the anterior deltoid, coracobrachialis, pectoralis minor, and proximal bicipital tendon region. Dr. Abercrombie diagnosed a shoulder strain, cervicothoracic strain, and scapulothoracic pain. He recommended myofascial release therapy, chiropractic manipulation, and dry needling.

10. Claimant treated with Dr. Abercrombie for several months, during which time he consistently documented proximal symptoms affecting the shoulder girdle and right upper quadrant, including the right trapezius, rhomboids, levator scapulae, and pectoralis muscles.

11. On October 20, 2021, Claimant had an orthopedic evaluation with Dr. Michael Simpson. Dr. Simpson noted "pretty significant" rotator cuff tendinitis/tendinosis per the MRI. Physical examination showed positive impingement signs, pain with supraspinatus strength testing, mildly positive Speed's test, and crepitation with dynamic labral testing. Shoulder range of motion was normal. Dr. Simpson diagnosed a right shoulder strain and impingement syndrome, and administered a subacromial steroid injection.

12. Claimant followed up with Dr. Simpson on November 17, 2021. The injection had helped, but only lasted two weeks. As a result, Dr. Simpson did not think another injection was warranted. Instead, he recommended platelet rich plasma (PRP) injections.

13. Dr. Kurz re-evaluated Claimant on November 23, 2021. Claimant stated her shoulder was feeling much better after the shoulder injection. She was having no pain at rest, and only 1-2/10 when using the shoulder. The examination showed full range of

motion of the shoulder and neck, with no tenderness to palpation or spasm. Dr. Kurz advised Claimant that PRP injections were no longer recommended under the MTGs, and in any event were only previously approved when prescribed to avoid surgery. Claimant had completed treatment with Dr. Abercrombie and was doing a home exercise program. Dr. Kurz put Claimant at MMI with no impairment, no restrictions, and no need for maintenance care.

14. On February 24, 2022, Claimant returned to Ms. Homberger because of worsening symptoms. Her neck and upper back had not fully resolved when she was discharged in November 2021, and had worsened in early January. She described daily headaches and difficulty sleeping. Her shoulder pain had also gotten worse in the interim. Claimant's pain diagram endorsed pain in the right shoulder radiating to the scapulothoracic region, base of the neck, and back of the head. Ms. Homberger noted tenderness and tightness with palpation of the right trapezius, periscapular area, and occipital muscles showed. Ms. Homberger opined Claimant was no longer at MMI and recommended additional PT and chiropractic treatment. She added a diagnosis of "cervicothoracic strain, previously treated, not listed formally as a diagnosis, worsened."

15. Claimant re-started PT on February 28, 2022. She reported sharp pain at the base of the neck causing intermittent headaches. She was having difficulty reaching behind her back and sleeping because of shoulder, neck and scapulothoracic pain. The therapist documented tenderness and trigger points in the right trapezius, right supraspinatus, and along the right rib area.

16. Claimant resumed treatment with Dr. Abercrombie on March 1, 2022. She reported continued right-sided neck and upper back pain that had escalated over the past few months with no new injury. Palpation revealed increased muscle tone across the right upper trapezius into the levator scapula, rhomboids, latissimus dorsi and serratus anterior. Dr. Abercrombie performed dry needling to the trapezial ridge, rhomboids, and levator scapula.

17. Claimant saw Dr. Kurz on March 24, 2022. Her neck and upper back were "in knots." She denied any new incident, injury, or change in activity that could be responsible for her symptoms. Dr. Kurz stated Claimant remained at MMI but ordered an updated right shoulder MRI to look for "objective worsening." He opined the cervical and upper back symptoms "were not original complaints, and with no new work-related injury, are more medically likely unrelated to her original DOI."

18. The right shoulder MRI was completed on March 27, 2022. The radiologist opined the findings were "not significantly changed" since the prior MRI.

19. Claimant next saw Dr. Kurz on July 1, 2022. Because the MRI showed no new pathology, Dr. Kurz opined Claimant remained at MMI and "no additional treatment is necessary or reasonable as causally or temporally related to her initial mechanism of injury." He further opined that treatment for Claimant's nonwork-related cervicothoracic pain and headaches "should continue to be followed privately by her PCP, outside of the WC system."

20. Dr. Nicholas Olsen performed an IME for Respondent on August 8, 2022. Claimant described ongoing neck pain and headaches as her most bothersome symptoms at that time. She rated her shoulder pain as 1/10. Dr. Olsen inquired if Claimant had ever had neck or midback issues before. She related an episode of right trapezius pain in 2020, which resolved after a course of therapy. She said her current symptoms were "nothing like" the episode in 2020. Dr. Olsen told Claimant it was difficult to square her description of symptoms and associated limitations with her low reported pain levels. On examination, Dr. Olsen noted normal range of motion of the right shoulder and neck. Impingement signs were negative. Palpatory examination demonstrated mild tenderness over the biceps tendon and moderate tenderness in the upper trapezius. He also noted mild somatic dysfunction in the midthoracic spine with tenderness along the right side. No trigger points were identified. Dr. Olsen agreed Claimant was at MMI and no additional treatment was warranted for the right shoulder. He further opined that Claimant's cervicothoracic pain and right upper trapezius pain were not work-related. Finally, Olsen opined the situs of any functional impairment from the shoulder injury was distal to the glenohumeral joint and would not represent a whole person impairment.

21. Claimant subsequently pursued additional evaluations and treatment for the right shoulder from her PCP, who referred her to Dr. Derek Purcell, an orthopedic surgeon. She was evaluated by PA Matthew Albrecht in Dr. Purcell's office on September 6, 2022. She described persistent pain and dysfunction in the right shoulder since the work accident on May 11, 2021. She also described right-sided neck and thoracic pain. Impingement signs, O'Brien's test, Speed's test, and Yergason's test were positive. Mr. Albrecht personally reviewed the March 2022 MRI images. He agreed with the radiologist's interpretation of mild supraspinatus tendinosis but also noted moderate tendinopathy of the long head of the biceps tendon. He diagnosed shoulder impingement syndrome and referred Claimant to PT. They discussed other treatment options, including surgery.

22. Dr. Derek Purcell performed right shoulder arthroscopic surgery on September 26, 2022. Intraoperatively, he observed "extensive" subacromial bursitis, a labral tear, and tendinopathy of the long head of the biceps tendon. He performed a subacromial decompression including an anterior acromioplasty, a biceps tenodesis, and debrided the labral tear.

23. Dr. Purcell restricted Claimant from work after the surgery. Because Claimant had pursued the surgery outside of her workers' compensation claim, she utilized Employer's procedures regarding nonwork-related leave.

24. Claimant was off work from September 26, 2022, through November 1, 2022, during which time she was in a sling and body wrap. On November 2, she returned to part-time "light duty," and continued in that capacity through March 22, 2023. She received a combination of wages and short-term disability benefits while on light duty. Claimant returned to full duties at full wages on March 23, 2023.

25. Claimant underwent a Division IME with Dr. John Bissell on December 12, 2022. Dr. Bissell opined the surgery performed by Dr. Purcell was causally related to the

work accident. Dr. Bissell determined Claimant was not at MMI because she was still recovering from surgery and had not completed post-operative rehabilitation.

26. Dr. Bissell also opined that Claimant's cervical and thoracic spine myofascial pain were "pre-existing [and] not claim related." Confusingly, he opined the symptoms are probably myofascial in nature and "likely to resolve as her shoulder condition improves." He did not explain why the myofascial neck pain would be expected to resolve with treatment for the shoulder if the neck and shoulder symptoms were, in fact, unrelated.

27. Respondent filed a General Admission of Liability (GAL) on January 9, 2023, accepting that Claimant was not at MMI. But Respondent denied liability for the "unauthorized" surgery, and denied that Claimant was entitled to any temporary disability caused by the surgery.

28. Post-surgical records from Mr. Albrecht describe Claimant generally "doing well" and making steady improvement.

29. Claimant attended a follow-up DIME with Dr. Bissell on June 6, 2023. Claimant reported ongoing pain in the right shoulder, neck, and mid back. Her shoulder pain was improving. Examination of the shoulder showed tenderness to palpation about the right parascapular region. The last treatment record available to Dr. Bissell, dated March 22, 2023, showed Claimant progressing well and working light duty, with an expected return to full duty shortly thereafter. Dr. Bissell determined Claimant was at MMI as of March 22, 2023. He assigned an 11% upper extremity rating based on 5% for the subacromial decompression and 6% for range of motion, which converts to 7% whole person. Consistent with the most recent (July 2020) version of the Division's Impairment Rating Tips, Dr. Bissell justified the 5% surgical rating because Claimant also had a labral debridement and biceps tenodesis as additional work-related conditions unaccounted for by other methods. Dr. Bissell opined Claimant had no ratable impairment to any other body part, and maintained his belief that the cervical and thoracic myofascial symptoms were pre-existing and unrelated to the industrial injury.

30. Dr. Olsen performed a second IME for Respondent on July 20, 2023. He was "surprised" Claimant had undergone surgery given the minimal 1/10 pain level described in his previous IME. Claimant clarified that her typical shoulder pain before the surgery was 1/10 but it frequently flared to 5/10 or 6/10 and interfered with activities. She reported significant benefit from the surgery. Dr. Olsen's examination showed negative impingement signs and essentially full range of motion. Dr. Olsen opined the surgery was not reasonably needed based on the minimal findings at his prior IME and lack of significant pathology shown on the MRIs. To the extent Dr. Purcell identified any reasons for surgery, Dr. Olsen did not believe they were causally related to the work accident. Dr. Olsen disagreed with Dr. Bissell's impairment rating. He did not think the 5% surgical rating was warranted under the Rating Tips, and he found normal shoulder range of motion.

31. Claimant saw Dr. Miguel Castrejon on September 12, 2023 for an IME at the request of her counsel. Claimant described intermittent pain from the base of the neck, through the shoulder, and extending below the right scapula. Claimant told Dr. Castrejon she did not recall experiencing any neck or midback pain immediately after the accident but started experiencing stiffness in the neck and midback within two weeks of the accident. She reported "substantial benefit" from the shoulder surgery, although she still had some residual symptoms and limitations. Physical examination showed tenderness throughout the right upper quadrant, including the cervical paraspinals, trapezius, rhomboids, and right scapula. The proximal biceps tendon was also tender.

32. Dr. Castrejon agreed Claimant was at MMI with permanent impairment to the right shoulder. He used the same methodology as Dr. Bissell, including 5% for "anterior acromioplasty with subacromial decompression"[1] as outlined in the Rating Tips. Dr. Castrejon assigned a 10% upper extremity rating for the right shoulder, which converts to 6% whole person.

33. Dr. Castrejon agreed with Dr. Bissell that Claimant has no ratable cervical or thoracic impairment under Table 53 of the *AMA Guides*. But Dr. Castrejon was impressed by the voluminous documentation of symptoms and treatment directed to areas proximal to the glenohumeral joint including the right paracervical muscles, trapezius, rhomboids, and scapula. He saw no evidence of any significant pre-injury neck pain, treatment, or functional limitations. As a result, Dr. Castrejon thought Claimant met the criteria set forth in the Impairment Rating Tips for a cervical range of motion rating despite the absence of a Table 53 specific disorder impairment. He calculated an 8% whole person rating based on cervical ROM deficits, which he combined with the 6% shoulder rating for an overall rating of 14% whole person.

34. Dr. Olsen testified at hearing consistent with his reports. He reiterated that the surgery was not warranted given Claimant's minimal symptoms and lack of identified pathology. He dismissed Mr. Albrecht's reading of the MRI and Dr. Purcell's intraoperative findings in favor of the radiologist's reports. He also opined the surgery did not meaningfully improve Claimant's symptoms and function, despite her reports to multiple IME physicians that she appreciated substantial benefit from the procedure. He disagreed with Dr. Bissell and Dr. Castrejon that Claimant warranted a rating for the right shoulder. But to the extent that Claimant may be found to have impairment, Dr. Olsen opined it is a purely scheduled impairment that only affects Claimant's arm, and all proximal symptoms are unrelated to the work injury.

35. Dr. Bissell and Dr. Castrejon's opinions regarding Claimant's right shoulder impairment are credible and more persuasive than the contrary opinions offered by Dr. Olsen. Dr. Castrejon's opinions regarding the nature and cause of Claimant's proximal symptoms, including paracervical, trapezial, and scapular pain, are credible and persuasive with respect to the existence of functional impairment beyond the arm.

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[1] Dr. Castrejon neglected to mention the 5% rating in the narrative section of his report but noted it on the rating worksheet.

36. Claimant credibly testified she had no neck or upper back symptoms immediately before the work accident. She received treatment for an episode of right trapezius pain in 2020 and the symptoms resolved after approximately five PT sessions. Claimant credibly testified the symptoms in 2020 were "not anything" like the neck and shoulder symptoms she experienced since the accident.

37. Claimant proved by a preponderance of the evidence that she suffered functional impairment to her right shoulder not listed on the schedule.

38. Respondent failed to overcome Dr. Bissell's 7% whole person right shoulder rating by clear and convincing evidence.

39. Claimant failed to overcome Dr. Bissell's determination that she has no ratable impairment to the cervical or thoracic spine by clear and convincing evidence. Dr. Castrejon's opinion that Claimant qualifies for an isolated cervical ROM rating in the absence of a Table 53 rating does not rise to the level of clear and convincing evidence.

40. Claimant proved the September 26, 2022 right shoulder surgery performed by Dr. Purcell was reasonably needed to cure and relieve the effects of her industrial injury.

41. Claimant failed to prove Dr. Purcell is an authorized provider.

42. Claimant proved she is entitled to TTD benefits from September 26, 2022 through November 1, 2022, and TPD benefits from November 2, 2022 through March 21, 2023.

CONCLUSIONS OF LAW

A. Burdens and standards of proof

The parties have raised several interrelated issues regarding permanent impairment. The DIME provided an impairment rating for Claimant's right shoulder, which may reflect whole person or scheduled impairment. Claimant believes she suffered whole person impairment to her shoulder, whereas Respondent believes any impairment is confined to the schedule. Additionally, Claimant argues the DIME erred by failing to include a rating for the cervical spine.

As postured, the issues create split burdens of proof. Additionally, there are preliminary questions regarding which of the DIME's findings are entitled to presumptive weight, and which are evaluated based on a preponderance of the evidence. Regarding the shoulder, the initial consideration is whether it constitutes a scheduled or whole person impairment. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Conversely, scheduled impairment is a question of fact for the ALJ based on a preponderance of the evidence.

Whether a claimant sustained a scheduled or non-scheduled impairment is a threshold question of fact for determination by the ALJ. The heightened burden of proof

that attends a DIME rating only applies if the claimant establishes by a preponderance of the evidence that the industrial injury caused functional impairment not found on the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the DIME's rating. *Webb v. Circuit City Stores, Inc*. W.C. No. 4-467-005 (August 16, 2002). Although the DIME's opinions may be relevant to this determination, they are not entitled to any special weight on this threshold issue. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

In light of the foregoing principles, the burdens of proof are allocated as follows: (1) Claimant must prove by a preponderance of the evidence she sustained whole person impairment to the right shoulder; (2) if Claimant has whole person impairment to her shoulder, Respondents must overcome the DIME rating by clear and convincing evidence; (3), if Claimant does not have a whole person impairment, Claimant must prove the proper shoulder rating by a preponderance of the evidence; (4) Claimant must prove by clear and convincing evidence the DIME erred by not providing a cervical spine rating; (5) if either party overcomes the DIME by clear and convicing evidence in any respect, the proper rating is a factual question based on a preponderance of the evidence.

B. Claimant proved whole person impairment to her right shoulder

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

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

Pain and limitation in the scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the

"torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved she suffered a whole person impairment to her right shoulder. Claimant reported right shoulder pain radiating to the chest, right pectoral muscle, and right scapula at her initial occupational medicine evaluation three days after the accident. Ms. Homberger subsequently documented pain radiating to Claimant's neck and mid-back on May 27, 2021, only two weeks after the injury. The record thereafter is replete with reports of symptoms affecting structures proximal to the arm, including the trapezius, rhomboids, and right scapula. These proximal symptoms have interfered with activities such as reaching overhead, reaching behind her back, sleeping, and exercising. The argument that all of Claimant's proximal symptoms and associated limitations are pre-existing and unrelated to the work accident is unconvincing. Claimant acknowledged prior episodes of neck and trapezius pain, but credibly testified the issues resolved after a short course of therapy. As Dr. Castrejon persuasively opined, there is no documentation of neck or midback pain, treatment, or functional limitations immediately before the May 2021 work accident. To the contrary, Claimant was working without difficulty in a physically demanding occupation as a police officer, and there is no persuasive reason to think she otherwise would have had these symptoms absent the injury to her right shoulder.

C. Respondent failed to overcome the DIME shoulder rating

A DIME's whole person impairment rating is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing burden also applies to the DIME's determination of what impairment was caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A deviation from the *AMA Guides* protocols is a relevant factor when evaluating the validity of the rating, but does not automatically mean the DIME has been overcome as a matter of law. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

Respondent failed to overcome Dr. Bissell's 7% whole person right shoulder rating by clear and convincing evidence. Claimant suffered an admitted injury to her shoulder in May 2021, and remained symptomatic nearly two years later. There is no persuasive evidence connecting her ongoing shoulder symptoms to any nonwork-related cause.

Claimant received extensive treatment for the shoulder, including eventual surgery. Dr. Bissell determined the surgery was reasonably needed and causally related to the work injury, as did Dr. Castrejon. Both Dr. Bissell and Dr. Castrejon assigned a 5% rating for the subacromial decompression, pursuant to the Division's Rating Tips. The remainder of Dr. Bissell's rating was appropriately based on ROM deficits he personally measured at the DIME. Although Dr. Olsen found normal shoulder ROM during his IME, Dr. Bissell expressed no concern about the validity of the measurements he obtained at the DIME. Dr. Castrejon's similar measurements lend further credence to Dr. Bissell's rating. At most, Dr. Olsen and Dr. Kurz's determinations that Claimant has no impairment are "mere differences of opinion," and do not rise to the level of clear and convincing evidence.

Respondent argues that Dr. Bissell's inclusion of 5% for the subacromial decompression and acromioplasty surgery is incorrect as a matter of law under *Serena v. SSC Pueblo Belmont Op Co. LLC*, W.C. No. 4-922-344-01 (ICAO, December 1, 2015). In *Serena*, the ALJ awarded PPD based on a 10% rating for shoulder decompression surgery. The ALJ had relied on the General Principles section of the Rating Tips and the definition of impairment found in the *AMA Guides* to support the rating. The Panel reversed the ALJ and held that an additional rating for shoulder surgery is only allowed "when the surgery involved is an arthroplasty." The record in *Serena* contained unrebutted testimony from the respondents' expert that a subacromial decompression is not an "arthroplasty," and that, under the *AMA Guides*, a decompression surgery can only be rated using range of motion. The ICAO essentially adopted the reasoning of the respondents' expert.

Respondent submits that Claimant's surgery was "remarkably similar" to the procedure performed in *Serena*, and therefore, Dr. Bissell's rating has necessarily been overcome. The problem with this argument is that the Impairment Rating Tips were amended in July 2020 and now specifically state that "subacromial arthroplasty" includes "acromioplasty or subacromial decompression."[2] This clarifying language alters the definitional foundation underlying the *Serena* decision, and points to a different outcome here. Whereas the 10% surgical rating that was disapproved in *Serena* had been justified by reference to the General Principles section of a prior version of the Rating Tips, Dr. Bissell's rating rests on explicit language in the "Shoulder Surgery" section of the current version of the Rating Tips. Dr. Bissell's determination that an additional 5% can be assigned for acromioplasty and subacromial decompression is consistent with the Division's interpretation of the *AMA Guides*, as reflected in the Rating Tips.

The Rating Tips state that an additional surgical rating is allowed in "some situations" where "range of motion alone may not adequately represent the extent of the impairment." In those cases, the rating physician "may" assign an additional rating "up to 10%." But the Rating Tips do not delineate the "situations" where an additional rating is warranted. This lack of specificity, coupled with use of the term "may," indicates that the rating physician has a degree of discretion in determining whether to apply the additional rating. When a rating falls within the DIME's zone of discretion, it must be upheld even though different physicians might view the matter differently if they were the DIME. *Fisher*

[2] Desk Aid #11 - Impairment Rating Tips (July 2020), "Shoulder Surgery," p. 7.

v. Industrial Claim Appeals Office, 484 P.3d 816 (Colo. App. 2021) ("when the legislature stated that impairment ratings shall be 'based on' the revised third edition of the Guides, the legislature made clear that doctors should have some leeway and discretion when determine a patient's final rating.").

Dr. Bissell provided his rationale for the additional 5% surgical rating, as required by the Rating Tips. His rating is supported by the opinion of Dr. Castrejon, who agreed that Claimant satisfies the criteria for an additional 5% surgical rating under the current version of the Rating Tips. Dr. Bissell and Dr. Castrejon's opinions are more persuasive than the contrary opinions offered by Dr. Olsen. Respondent failed to overcome Dr. Bissell's rating by clear and convincing evidence.

D. Claimant failed to overcome Dr. Bissell's rating

As found, Claimant failed to overcome Dr. Bissell's determination she has no ratable impairment to the cervical or thoracic spine. Claimant's IME agreed no thoracic spine rating is warranted, and there is no opinion in the record to the contrary. Regarding the cervical spine, no treating or evaluating Level II physician has found impairment under Table 53, which is generally a threshold requirement for a spinal rating under the *AMA Guides*. *E.g., Rojahn v. Monaco Rehabilitation*, W.C. No. 4-055-695-02 (October 5, 2017). Dr. Castrejon agreed that Claimant does not qualify for a Table 53 rating, but invoked the exception outlined in the Division's Rating Tips that allows an isolated cervical ROM impairment in "unusual cases" involving a "severe" shoulder injury. The language used in the Rating Tips reflects an element of discretion on the part of the rating physician, stating that a rating is "allowed" where the doctor believes it can be "well justified." But there does not appear to be any scenario where such a rating is mandatory under the Tips. Claimant failed to prove by clear and convincing evidence that Dr. Bissell erred by declining to assign a cervical ROM rating without a corresponding Table 53 rating.

E. The September 26, 2022 shoulder surgery was reasonably needed to cure and relieve the effects of the admitted injury

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Claimant proved the September 26, 2022 right shoulder surgery performed by Dr. Purcell was reasonably needed and causally related to her industrial injury. Claimant credibly explained that her right shoulder was minimally painful at rest, but it repeatedly flared and interfered with her ability to engage in activities. Mr. Albrecht concluded

Claimant's clinical presentation and MRI findings were sufficient to justify surgery, and Dr. Purcell obviously agreed. Dr. Bissell and Dr. Castrejon concurred the surgery was reasonably needed and related to the work accident. Intraoperatively, Dr. Purcell observed and treated pathology in the right shoulder that was not fully appreciated by the radiologists who read the MRIs. The surgery ultimately improved Claimant's symptomology and function even though it did not completely resolve the condition.

F. Dr. Purcell is not an authorized provider

Besides showing treatment is reasonably necessary, the claimant must also prove the treatment is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). "Authorization" refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Authorization is distinct from whether treatment is "reasonably needed" within the meaning of § 8-42-101(1)(a). *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Claimant failed to prove Dr. Purcell is an authorized provider. Claimant was referred to Dr. Purcell by her PCP, whom she saw after being put at MMI and released by Dr. Kurz. No authorized provider referred Claimant to her PCP or Dr. Purcell for treatment related to her right shoulder. Admittedly, Dr. Kurz advised Claimant to follow up with her personal physicians for what he considered nonwork-related *cervical and upper back complaints*. But while that might constitute a referral for treatment of the neck and upper back under *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008), it did not authorize Claimant to choose her own physician to treat the right shoulder. Dr. Kurz specifically opined Claimant's right shoulder injury was at MMI and required no additional treatment. That opinion is consistent with the statutory definition of MMI, which is reached "when no additional treatment is reasonably expected to improve the condition." Section 8-40-201(11.5). An ATP's determination of MMI does not entitle a claimant to unilaterally change physicians to pursue additional treatment at the respondents' expense. *E.g.*, Story v. Industrial Claim Appeals Office, 910 P.2d 80 (Colo. App. 1995); *Gosselova v. Vail Resorts*, W.C. No. 4-975-232-02 (December 24, 2018); *Edelen v. BCW Enterprises, LTD.*, W.C. No. 4-155-609 (September 20, 1995). Because Dr. Purcell was not authorized, Respondent is not liable for the surgery, notwithstanding that it was otherwise reasonably needed.

G. Claimant proved entitlement to TTD and TPD benefits after surgery

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes them to leave work, and they miss more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). To receive TTD benefits, a claimant must establish a causal connection between a work-related injury and the subsequent

wage loss. Section 8-42-103(1)(a). Once commenced, TTD benefits shall continue until one of the terminating events enumerated in § 8-42-105(3), including return to work.

A temporarily partially disabled claimant is entitled to TPD benefits calculated at two-thirds of the difference between the average weekly wage and their earnings during the period of partial disability. Section 8-42-106(1). Entitlement to TPD benefits ends when the claimant reaches MMI. Section 8-42-106(2)(a).

Claimant proved she was disabled by the September 26, 2022 surgery which proximately caused a wage loss. The ALJ credits the opinions of Dr. Purcell, Dr. Bissell, and Dr. Castrejon that the surgery was reasonably needed, and credits Dr. Bissell and Dr. Castrejon that the surgery was causally related to the work injury. The fact that the surgery was unauthorized does not preclude an award of temporary disability benefits. The issue of authorization pertains to liability for treatment, and not whether the treatment was reasonably needed to cure and relieve the effects of an injury. Despite Dr. Purcell's unauthorized status, Respondent is still liable for any disability following the treatment. *E.g., Mennonite Hospital v. Corley*, 476 P.2d 274 (Colo. App. 1970); *Cordova v. Butterball*, W.C. No. 4-755-343 (March 9, 2010).

Claimant was off work from September 26, 2022 through November 1, 2022. She returned to part-time light duty on November 2, 2022, and continued working in that capacity until she reached MMI on March 22, 2023. Therefore, she is entitled to TTD benefits from September 26, 2022 through November 1, 2022, and TPD benefits from November 2, 2022 through March 21, 2023.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant PPD benefits based on the DIME's 7% whole person rating for the right shoulder.

2. Respondent's request to overcome the DIME's whole person shoulder rating is denied and dismissed.

3. Claimant's request to overcome the DIME regarding spinal impairment is denied and dismissed.

4. Respondent shall pay Claimant TTD benefits from September 26, 2022 through November 1, 2022.

5. Respondent shall pay Claimant TPD benefits from November 2, 2022 through March 21, 2023.

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

7. Claimant's request for payment of treatment provided by Dr. Derek Purcell, including the September 26, 2022 surgery, is denied and dismissed.

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

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

DATED: March 14, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-214-043-002

PROCEDURAL MATTER

Claimant seeks Temporary Total Disability (TTD) benefits for the period August 26, 2022 through July 31, 2023. At hearing, Respondents sought to reserve the issue of TTD benefits until Claimant produced documentation of her short-term disability benefits for purposes of an offset. The undersigned ALJ permitted Claimant to produce the requested documentation by the due date for position statements. However, as noted in the position statements, the parties have been unable to confirm the status of Claimant's short-term disability benefits. Accordingly, the issues of Average Weekly Wage (AWW) and TTD benefits are reserved for future determination.

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she suffered an acute left-sided sternoclavicular strain on August 10, 2022 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered an occupational disease in the form of bilateral shoulder bursitis and impingement syndrome during the course and scope of her employment with Employer.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment designed to cure and relieve the effects of her acute industrial injury and occupational disease.

FINDINGS OF FACT

1. Claimant is a 43 year-old, right-handed female. On May 5, 2020 Claimant began working for Employer as a Production Technician. Her position initially involved working on a machine with no lifting. Claimant performed the job for approximately six months.

2. In November 2020 Claimant moved to working on the floor of Employer's facility. Claimant worked 12 hours each day for six days per week. Her job duties included checking products by looking for defects in [Redacted, hereinafter MR] cans and domes or the tops of cans. The cans entered a "seamer" from one side and the domes went into the machine from the other side. The seamer sealed the dome onto the can. When the machine occasionally became jammed, Claimant cleared the obstruction.

3. The majority of Claimant's work involved individually lifting nine bags of domes from a container rack. She then carried them across the floor and threw them into a hopper. The process of removing and throwing call nine bags into the hopper took about

5-7 minutes. A new rack of nine bags came out of the dome presses approximately every 20 minutes.

4. Claimant testified that the box and hopper are about waist high. Each individual bag weighed approximately 20 pounds. While waiting for the dome presses to fill the box Claimant performed other work duties including inspecting cans and unblocking the seamer. Claimant had 30-40 minute breaks every two to three hours.

5. Claimant reported experiencing bilateral shoulder pain "several months" into her job duties on the floor. While she complained to her supervisors that her shoulders were sore, Claimant did not report a Workers' Compensation injury, seek treatment or receive work restrictions.

6. On August 10, 2022 Claimant participated in a training session involving a torque wrench. She was asked to utilize the torque wrench up to a 500-pound clamp load. Claimant held the torque wrench with her right hand and used her left hand to hold the wrench against a bolt. She used both hands on the handle to reach 500 pounds of force. Claimant noticed pain in her left clavicle a few minutes later. She sat for the rest of the meeting. Claimant reported a work injury on the following day.

7. Employer provided Claimant with a designated provider list. On August 11, 2022 Claimant visited John P. Ogrodnick, M.D. at Authorized Treating Provider (ATP) SCL Health for an examination. Claimant reported that at a work meeting she was demonstrating how to apply 500 ft/lbs of torque using a wrench. She used both hands to turn the torque wrench clockwise and it soon dipped down below her waist. She was thus bending over and pushing down on the wrench with both hands. Claimant initially felt fine and sat down. However, approximately three to five minutes later she noticed mild, sharp, constant pain in her left shoulder and along the collarbone. After conducting a physical examination, Dr. Ogrodnick diagnosed Claimant with a sternoclavicular joint strain. He determined that his objective findings were consistent with a work-related mechanism of injury. Dr. Ogrodnick assigned work restrictions of no lifting in excess of 10 pounds and no overhead reaching with the left arm.

8. On August 12, 2022 Claimant visited SCL Health occupational therapy for treatment. The provider noted that Claimant had been diagnosed with left clavicle pain and mentioned that Dr. Ogrodnick had recommended a sling for a few hours per day for 4-5 days.

9. In response to Insurer's letter of August 25, 2022 Dr. Ogrodnick stated that it was "unlikely the torque wrench incident would have caused a dysfunction of Claimant's sternoclavicular joint." He also commented that it was unlikely the incident "would have significantly aggravated her pre-existing, ongoing shoulder problem."

10. Claimant's last day working for Employer was August 26, 2022. She testified that Dr. Ogrodnick did not take her off work, but she ceased working for Employer because her left arm pain became too severe.

11. On August 26, 2022 Claimant visited SCL Health-Lutheran Emergency Services. She reported a "several week history of left shoulder pain with an acute injury during the past week while working overhead. The provider noted Claimant had a history of moderate injury from overuse/repetitive motion. However, during her testimony Claimant did not disclose any work activities involving "overhead" work. Notably, in the week prior to the emergency room visit, Claimant was working modified duty that did not involve overhead activities.

12. On August 29, 2022 Claimant returned to Dr. Ogrodnick for an examination. Dr. Ogrodnick commented that he and Claimant discussed photos of her use of the torque wrench while her left hand remained over the bolt. She was applying some force to the bolt to keep it from slipping out. Dr. Ogrodnick reasoned that the left-handed force was likely insufficient to cause any sternoclavicular dysfunction. However, he diagnosed Claimant with a sternoclavicular joint strain. Dr. Ogbrodnick reiterated that Claimant's objective findings were consistent with a work-related mechanism of injury. He recommended an MRI and physical therapy. Dr. Ogbrodnick assigned temporary work restrictions of no use of the left arm.

13. On August 31, 2022 Claimant underwent a left shoulder MRI. The imaging revealed mild supraspinatus and subscapulars tendinosis. There was also mild fraying of the superior fibers of the subscapulars tendon but no discrete rotator cuff tendon tear.

14. On September 6, 2022 Claimant presented to Panorama Orthopedics and reported bilateral shoulder pain. Claimant noted the symptoms began on August 10, 2022. She was demonstrating the use of a torque wrench when she experienced severe pain near the collarbone. The symptoms subsequently worsened and included popping. Lutfullah W. Almos, PA-C assessed Claimant with bilateral shoulder pain consistent with shoulder impingement and bursitis. She did not perform a causation analysis or otherwise address "repetitive motion" as a mechanism of injury because Claimant related her symptoms solely to the torque wrench.

15. On September 7, 2022 Claimant visited Rocky Mountain Primary Care. Claimant reported that she injured her left clavicle "doing a presentation at her work in which she had to pull a heavy object." Claimant reported bilateral shoulder pain "for months prior to the clavicle injury." Julie Sefcik, D.O. diagnosed Claimant with pain of the left clavicle and bilateral shoulder pain.

16. On October 19, 2022 Claimant visited orthopedic surgeon Rudy Kovachevich, M.D. at Orthopedic Centers of Colorado. Claimant presented with bilateral shoulder pain that began on August 10, 2023 when she was demonstrating the use of a torque wrench. Dr. Kovachevich assessed Claimant with bursitis of the left and right shoulders. He did not perform a causation analysis or otherwise address "repetitive motion" as a mechanism of injury.

17. On February 24, 2023 Claimant underwent left shoulder surgery. The pre-operative diagnoses included recalcitrant synovitis, bursitis, and long head biceps

tendinopathy. The surgical procedures included arthroscopic joint debridement and chondroplasty, subacromial decompression, and biceps tenodesis.

18. On April 25, 2023 Claimant underwent right shoulder surgery. The pre-operative diagnoses included recalcitrant synovitis, bursitis, and long head biceps tendinopathy. The surgical procedures included arthroscopic joint debridement and chondroplasty, subacromial decompression, and biceps tenodesis.

19. On July 28, 2023 Claimant underwent an Independent Medical Examination (IME) with Timothy S. O'Brien, M.D. Claimant reported that on August 10, 2022 she was at work demonstrating the use of a torque bar to generate 500 pounds of force. She was able to achieve 500 pounds of torque on the bolt by moving it between the 3:00 o'clock and the 5:00 o'clock position. Claimant kneeled on the ground and placed her hands on the bar at approximately chest or shoulder height. After she returned to her seat, she experienced severe left shoulder pain. Claimant reported the incident on the following day and obtained medical treatment. Regarding her bilateral shoulder symptoms, Claimant explained to Dr. O'Brien that her work activities included throwing bags into a large bin. Each bag weighed about 20-30 pounds. Claimant started to develop bilateral shoulder pain within a few months of performing her duties. Although she mentioned the pain to Employer, she never filed a Workers' Compensation claim for her shoulder symptoms.

20. Dr. O'Brien performed a physical examination and reviewed Claimant's medical records. He reasoned that the torque wrench incident on August 10, 2022 resulted in a very minor and self-limited, self-healing left shoulder sternoclavicular joint strain and sprain. Dr. O'Brien concluded that Claimant may have experienced minor sternoclavicular joint symptoms, but she did not suffer a structural injury or require medical treatment. The minor sternoclavicular strain or sprain healed within a matter of days. Claimant returned to a normal level of function with no permanent partial disability and no need for ongoing treatment. Notably, Dr. O'Brien explained that the August 10, 2022 work incident did not result in a rotator cuff injury or substantially aggravate Claimant's pre-existing, age-related rotator cuff degeneration beyond its normal rate of progression. At hearing, Dr. O'Brien reiterated that Claimant suffered a minor, left sterno-clavicular strain or sprain while demonstrating a torque wrench at work on August 10, 2022.

21. Dr. O'Brien also considered Claimant's cumulative trauma claims regarding her bilateral shoulder symptoms. At hearing Dr. O'Brien relied on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (MTGs) in concluding that Claimant did not suffer a cumulative trauma condition to her bilateral shoulders as a result of her work activities for Employer. Specifically, Rule 17, Exhibit 4 of the MTGs addresses shoulder pathology and occupational exposures. The MTGs specify that the following constitute "some evidence for the causative risk factors for shoulder tendon related pathology":

- Overhead work consisting of additive time per day of at least 30 minutes/day for a minimum of 5 years.

- Work that requires shoulder movement at the rate of 15-26 repetitions per minute and no 2 second pauses for 80% of the work cycle.

- Work that requires shoulder movement with force 10% or greater of the maximum voluntary force and has no 2 second pauses for 80% of the work cycle.

It is also likely that jobs requiring daily heavy lifting at least 10 times per day over the years may contribute to shoulder disorders. In a study relying on self-reporting, men over 45 and women of any age were more likely to note heavy lifting (greater than 44 pounds) that "was significantly related to shoulder findings." Rule 17, Ex. 4, pp.16-17.

22. Dr. O'Brien applied the preceding factors in assessing whether Claimant suffered a cumulative trauma condition to her shoulders as a result of her work activities for Employer. He concluded that Claimant's job duties did not meet the preceding criteria. First, Claimant's work activities did not require overhead lifting. Second, Claimant's job did not require 15-26 shoulder repetitions per minute. Third, to the extent Claimant's work required "shoulder movement" with greater than 10% of maximum voluntary force, the activity did not remotely reach 80% of Claimant's work cycle.

23. Dr. O'Brien elaborated that the primary action of the two main rotator cuff muscles is to keep the humeral head depressed in the middle of the glenoid so the ball of the humerus stays in the middle of the joints when the arm goes above 90 degrees. Shoulder movement above 90 degrees is the key area of stress regarding contraction of the muscles. Furthermore, based on Claimant's testimony, she did not engage in shoulder movement at the rate of 15-26 repetitions per minute without two second pauses for 80% of the work cycle. Claimant thus did not suffer an occupational disease in the form of a cumulative trauma condition to her bilateral shoulders as a result of her work activities for Employer. Notably, none of Claimant's treating physicians performed a causation analysis pursuant to the MTGs to determine whether her shoulder symptoms were related to her work activities.

24. Claimant has proven it is more probably true than not that she suffered a left-sided sternoclavicular strain on August 10, 2022 during the course and scope of her employment with Employer. Initially, during a training session on August 10, 2022 Claimant used both hands on the handle of a torque wrench to reach 500 pounds of force. Claimant noticed pain in her left clavicle a few minutes later. She reported her injury to Employer on the following day. On August 11, 2022 Claimant visited ATP Dr. Ogrodnick and reported that she used both hands to turn a torque wrench at work. She was specifically bending over and pushing down on a wrench with both hands. Approximately three to five minutes after she sat down she noticed mild, sharp, constant pain in her left shoulder and along the collarbone. After conducting a physical examination, Dr. Ogrodnick diagnosed Claimant with a sternoclavicular joint strain. He determined that his objective findings were consistent with a work-related mechanism of injury. Dr. Ogrodnick assigned work restrictions of no lifting in excess of 10 pounds and no overhead reaching with the left arm. On August 29, 2022 Claimant returned to Dr. Ogrodnick. He reasoned

that Claimant's left-handed force was likely insufficient to cause any sternoclavicular dysfunction. However, he diagnosed Claimant with a sternoclavicular joint strain. Dr. Ogbrodnick again commented that Claimant's objective findings were consistent with a work-related mechanism of injury. He recommended an MRI and physical therapy. He assigned temporary work restrictions of no use of the left arm.

25. Similarly, Dr. O'Brien reasoned that the torque wrench incident on August 10, 2022 resulted in a very minor, self-limited, self-healing left shoulder sternoclavicular joint strain and sprain. Dr. O'Brien concluded that Claimant may have experienced minor sternoclavicular joint symptoms, but she suffered no structural injury. The minor sternoclavicular strain or sprain healed within a matter of days. Notably, Dr. O'Brien explained that the August 10, 2022 work incident did not result in a rotator cuff injury or substantially aggravate Claimant's pre-existing, age-related rotator cuff degeneration. At hearing, Dr. O'Brien reiterated that Claimant suffered a self-limited, self-healing, minor left sterno-clavicular strain or sprain when demonstrating the torque wrench while working for Employer on August 10, 2022.

26. Based on Claimant's credible testimony, the consistent medical records and persuasive opinions of Drs. Ogrodnick and O'Brien, Claimant suffered an acute work injury on August 10, 2022. Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered a left sternoclavicular strain while working for Employer on August 10, 2022.

27. Claimant has failed to demonstrate it is more probably true than not that she suffered an occupational disease in the form of bilateral shoulder bursitis and impingement syndrome during the course and scope of her employment with Employer. Initially, Claimant's work activities involved individually lifting nine bags of domes from a container rack. She then carried the bags across the floor and threw them into a hopper. The process of removing and throwing all nine bags into the hopper took about 5-7 minutes. A new rack of nine bags came out of the dome presses about every 20 minutes. Claimant thus was lifting, carrying and then throwing 27 bags an hour for 9 to 10 hours each work day.

28. Claimant's work activities are inconsistent with the standards enumerated in MTG's for work related-exposure and shoulder pathology. Claimant lifted bags weighting 20-30 pounds to waist height approximately three times per hour for a total of about 20 minutes or 33% of each hour. She also had multiple breaks throughout each day. Claimant's work activities are inconsistent with the evidence based studies provided by the MTGs. Aside from Dr. O'Brien, no physician provided a persuasive opinion regarding causation of Claimant's bilateral shoulder problems. Finally, Claimant's descriptions to providers of the development and history of her shoulder pain renders deviation from the MTGs impractical and unjustified.

29. After conducting an IME of Claimant, Dr. O'Brien testified that Claimant did not suffer a cumulative trauma condition to her bilateral shoulders as a result of her work activities for Employer. He persuasively determined that Claimant's bilateral upper

extremity complaints are not causally related to her work activities. Dr. O'Brien specifically applied Rule 17, Exhibit 4 of the MTGs in assessing whether Claimant suffered a cumulative trauma condition to her bilateral shoulders. He concluded that Claimant's job duties did not meet the criteria. First, Claimant's work activities did not require her to lift overhead. Second, Claimant's job duties did not require 15-26 shoulder repetitions per minute. Third, to the extent Claimant's work required "shoulder movement" with force greater than 10% of maximum voluntary force, the activity did not reach 80% of Claimant's work cycle.

30. Based on the medical records, application of the MTGs and the persuasive opinion of Dr. O'Brien, it is unlikely that Claimant's bilateral upper extremity complaints were proximately caused by her work activities for Employer. Deviation from application of Rule 17, Exhibit 4 is not warranted. Claimant simply did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the MTGs. Accordingly, Claimant's request for Workers' Compensation benefits based on a cumulative trauma condition to her bilateral shoulders is denied and dismissed.

31. Claimant has established it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical treatment designed to cure and relieve the effects of her acute, left-sided sternoclavicular strain while working for Employer on August 10, 2022. The record reveals that she received authorized medical care from ATP SCL Health to address her condition. However, because Claimant has failed to prove that she suffered a compensable occupational disease to her bilateral shoulders, her request for medical benefits related to her shoulders is denied and dismissed.

32. On August 12, 2022 Claimant first visited ATP Dr. Ogrodnick for treatment. After conducting a physical examination, Dr. Ogrodnick diagnosed Claimant with a sternoclavicular joint strain. He determined that his objective findings were consistent with a work-related mechanism of injury, assigned work restrictions, and referred Claimant for occupational therapy. After visiting SCL Health Emergency services for left shoulder pain, Claimant returned to Dr. Ogrodnick on August 29, 2022. Although Dr. Ogrodnick reasoned that her left-handed force while using a torque wrench on August 10, 2022 was likely insufficient to cause any sternoclavicular dysfunction, he again diagnosed Claimant with a sternoclavicular joint strain. Dr. Ogbrodnick recommended an MRI and physical therapy. He assigned temporary work restrictions of no use of the left arm. Claimant subsequently underwent a left shoulder MRI. The preceding chronology reflects that Claimant received reasonable, necessary and causally related medical care for her August 10, 2022 acute injury.

33. The record reveals that Claimant's subsequent medical treatment, including bilateral shoulder surgeries, was not related to her August 10, 2022 sternoclavicular joint strain. Claimant relayed to subsequent providers that she suffered an acute injury on August 10, 2022 while using a torque wrench, but also mentioned continuing bilateral shoulder symptoms. The providers did not perform a causation analysis or otherwise address "repetitive motion" as a mechanism of injury for her bilateral shoulder pain. As Dr. O'Brien explained, the torque wrench incident on August 10, 2022 resulted in a very

minor, self-limited, self-healing left shoulder sternoclavicular joint strain and sprain. He reasoned that Claimant may have experienced minor sternoclavicular joint symptoms, but she suffered no structural injury. Dr. O'Brien remarked that the August 10, 2022 work incident did not result in a rotator cuff injury or substantially aggravate Claimant's pre-existing, age-related rotator cuff degeneration beyond its normal rate of progression. Similarly, Dr. Ogrodnick commented that it was unlikely the August 10, 2022 incident "would have significantly aggravated [Claimant's] pre-existing, ongoing shoulder problem." Claimant's work activities on August 10, 2022 thus aggravated, accelerated, or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Respondents are only financially responsible for Claimant's authorized medical care as a result of her August 10, 2022 sternoclavicular joint strain while demonstrating the use of a torque wrench at work.

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 litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

Compensability

Acute injury

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re*

Swanson, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

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

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

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

8. As found, Claimant has proven by a preponderance of the evidence that she suffered a left-sided sternoclavicular strain on August 10, 2022 during the course and

scope of her employment with Employer. Initially, during a training session on August 10, 2022 Claimant used both hands on the handle of a torque wrench to reach 500 pounds of force. Claimant noticed pain in her left clavicle a few minutes later. She reported her injury to Employer on the following day. On August 11, 2022 Claimant visited ATP Dr. Ogrodnick and reported that she used both hands to turn a torque wrench at work. She was specifically bending over and pushing down on a wrench with both hands. Approximately three to five minutes after she sat down she noticed mild, sharp, constant pain in her left shoulder and along the collarbone. After conducting a physical examination, Dr. Ogrodnick diagnosed Claimant with a sternoclavicular joint strain. He determined that his objective findings were consistent with a work-related mechanism of injury. Dr. Ogrodnick assigned work restrictions of no lifting in excess of 10 pounds and no overhead reaching with the left arm. On August 29, 2022 Claimant returned to Dr. Ogrodnick. He reasoned that Claimant's left-handed force was likely insufficient to cause any sternoclavicular dysfunction. However, he diagnosed Claimant with a sternoclavicular joint strain. Dr. Ogbrodnick again commented that Claimant's objective findings were consistent with a work-related mechanism of injury. He recommended an MRI and physical therapy. He assigned temporary work restrictions of no use of the left arm.

9. As found, similarly, Dr. O'Brien reasoned that the torque wrench incident on August 10, 2022 resulted in a very minor, self-limited, self-healing left shoulder sternoclavicular joint strain and sprain. Dr. O'Brien concluded that Claimant may have experienced minor sternoclavicular joint symptoms, but she suffered no structural injury. The minor sternoclavicular strain or sprain healed within a matter of days. Notably, Dr. O'Brien explained that the August 10, 2022 work incident did not result in a rotator cuff injury or substantially aggravate Claimant's pre-existing, age-related rotator cuff degeneration. At hearing, Dr. O'Brien reiterated that Claimant suffered a self-limited, self-healing, minor left sterno-clavicular strain or sprain when demonstrating the torque wrench while working for Employer on August 10, 2022.

10. As found, based on Claimant's credible testimony, the consistent medical records and persuasive opinions of Drs. Ogrodnick and O'Brien, Claimant suffered an acute work injury on August 10, 2022. Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered a left sternoclavicular strain while working for Employer on August 10, 2022.

Occupational Disease

11. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by

the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

12. The Colorado Division of Workers' Compensation has developed specific MTGs for assessing whether shoulder conditions are caused by cumulative trauma from work activities in Rule 17, Exhibit 4. The MTGs provide that there is some evidence jobs requiring heavy lifting, heavy carrying, above-shoulder work and handheld vibration are likely associated with an increased risk of shoulder conditions. Notably, there is some evidence for the following causative risk factors for shoulder tendon related pathology:

- Overhead work consisting of additive time per day of at least 30 minutes/day for a minimum of 5 years.

- Work that requires shoulder movement at the rate of 15-36 repetitions per minute and no 2 second pauses for 80% of the work cycle.

- Work that requires shoulder movement with force 10% or greater of the maximum voluntary force and has no 2 second pauses for 80% of the work cycle.

13. The MTGs specify that it is also likely that jobs requiring daily heavy lifting at least 10 times per day over the years may contribute to shoulder disorders. In a study relying on self-reporting, men over 45 and women of any age were more likely to report heavy lifting (greater than 44 pounds) that was significantly related to shoulder findings. However, based on the lack of multiple high quality studies it is necessary to consider each case individually when dealing with the likelihood of cumulative trauma contributing to or causing shoulder pathology. W.C.R.P. Rule 17, Exhibit 4, pp. 16-17.

14. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease in the form of bilateral shoulder bursitis and impingement syndrome during the course and scope of her employment with Employer. Initially, Claimant's work activities involved individually lifting nine bags of domes from a container rack. She then carried the bags across the floor and threw them into a hopper. The process of removing and throwing all nine bags into the hopper took about 5-7 minutes. A new rack of nine bags came out of the dome presses about every 20 minutes. Claimant thus was lifting, carrying and then throwing 27 bags an hour for 9 to 10 hours each work day.

15. As found, Claimant's work activities are inconsistent with the standards enumerated in MTG's for work related-exposure and shoulder pathology. Claimant lifted bags weighting 20-30 pounds to waist height approximately three times per hour for a total of about 20 minutes or 33% of each hour. She also had multiple breaks throughout each day. Claimant's work activities are inconsistent with the evidence based studies provided by the MTGs. Aside from Dr. O'Brien, no physician provided a persuasive opinion regarding causation of Claimant's bilateral shoulder problems. Finally, Claimant's

descriptions to providers of the development and history of her shoulder pain renders deviation from the MTGs impractical and unjustified.

16. As found, after conducting an IME of Claimant, Dr. O'Brien testified that Claimant did not suffer a cumulative trauma condition to her bilateral shoulders as a result of her work activities for Employer. He persuasively determined that Claimant's bilateral upper extremity complaints are not causally related to her work activities. Dr. O'Brien specifically applied Rule 17, Exhibit 4 of the MTGs in assessing whether Claimant suffered a cumulative trauma condition to her bilateral shoulders. He concluded that Claimant's job duties did not meet the criteria. First, Claimant's work activities did not require her to lift overhead. Second, Claimant's job duties did not require 15-26 shoulder repetitions per minute. Third, to the extent Claimant's work required "shoulder movement" with force greater than 10% of maximum voluntary force, the activity did not reach 80% of Claimant's work cycle.

17. As found, based on the medical records, application of the MTGs and the persuasive opinion of Dr. O'Brien, it is unlikely that Claimant's bilateral upper extremity complaints were proximately caused by her work activities for Employer. Deviation from application of Rule 17, Exhibit 4 is not warranted. Claimant simply did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the MTGs. Accordingly, Claimant's request for Workers' Compensation benefits based on a cumulative trauma condition to her bilateral shoulders is denied and dismissed.

Medical Benefits

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

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

20. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment designed to cure and relieve the effects of her acute, left-sided sternoclavicular strain while working for Employer on August 10, 2022. The record reveals that she received authorized medical care from ATP SCL Health to address her condition. However, because Claimant has failed to prove that she suffered a compensable occupational disease to her bilateral shoulders, her request for medical benefits related to her shoulders is denied and dismissed.

21. As found, on August 12, 2022 Claimant first visited ATP Dr. Ogrodnick for treatment. After conducting a physical examination, Dr. Ogrodnick diagnosed Claimant with a sternoclavicular joint strain. He determined that his objective findings were consistent with a work-related mechanism of injury, assigned work restrictions, and referred Claimant for occupational therapy. After visiting SCL Health Emergency services for left shoulder pain, Claimant returned to Dr. Ogrodnick on August 29, 2022. Although Dr. Ogrodnick reasoned that her left-handed force while using a torque wrench on August 10, 2022 was likely insufficient to cause any sternoclavicular dysfunction, he again diagnosed Claimant with a sternoclavicular joint strain. Dr. Ogbrodnick recommended an MRI and physical therapy. He assigned temporary work restrictions of no use of the left arm. Claimant subsequently underwent a left shoulder MRI. The preceding chronology reflects that Claimant received reasonable, necessary and causally related medical care for her August 10, 2022 acute injury.

22. As found, the record reveals that Claimant's subsequent medical treatment, including bilateral shoulder surgeries, was not related to her August 10, 2022 sternoclavicular joint strain. Claimant relayed to subsequent providers that she suffered an acute injury on August 10, 2022 while using a torque wrench, but also mentioned continuing bilateral shoulder symptoms. The providers did not perform a causation analysis or otherwise address "repetitive motion" as a mechanism of injury for her bilateral shoulder pain. As Dr. O'Brien explained, the torque wrench incident on August 10, 2022 resulted in a very minor, self-limited, self-healing left shoulder sternoclavicular joint strain and sprain. He reasoned that Claimant may have experienced minor sternoclavicular joint symptoms, but she suffered no structural injury. Dr. O'Brien remarked that the August 10, 2022 work incident did not result in a rotator cuff injury or substantially aggravate Claimant's pre-existing, age-related rotator cuff degeneration beyond its normal rate of progression. Similarly, Dr. Ogrodnick commented that it was unlikely the August 10, 2022 incident "would have significantly aggravated [Claimant's] pre-existing, ongoing shoulder problem." Claimant's work activities on August 10, 2022 thus aggravated, accelerated, or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Respondents are only financially responsible for Claimant's authorized medical care as a result of her August 10, 2022 sternoclavicular joint strain while demonstrating the use of a torque wrench at work.

ORDER

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

1. Claimant suffered a compensable left sternoclavicular joint strain while demonstrating the use of a torque wrench at work on August 10, 2022.

2. Respondents are financially responsible for Claimant's authorized, reasonable and necessary medical treatment as a result of her acute August 10, 2022 compensable work injury.

3. Claimant did not likely suffer a cumulative trauma condition to her bilateral shoulders while working for Employer. Her request for Workers' Compensation benefits related to her bilateral shoulders is denied and dismissed.

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

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

DATED: March 14, 2024.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

- Whether Respondents produced clear and convincing evidence to overcome the 9% cervical spine impairment rating of Division Independent Medical Examiner, Dr. Thomas Higginbotham.

- If Respondents established that Dr. Higginbotham erred in assigning Claimant 9% spinal impairment, whether Claimant is entitled to conversion of her 21% scheduled upper extremity impairment rating to whole person impairment.

- Whether Claimant established, by a preponderance of the evidence, that she is entitled to maintenance medical benefits.

FINDINGS OF FACT

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

Claimant's September 14, 2021 Injury and Subsequent Medical Treatment

1. Claimant is a fast food worker at a local [Redacted, hereinafter MS] restaurant in Colorado Springs. She sustained an admitted injury to her right shoulder on September 14, 2021, while loading a bucket of ice into a frappe machine. As she was lifting the bucket "up high", she developed a "pinching pain" in the shoulder which precluded further lifting with the right arm secondary to pain. (Respondents' Hearing Exhibits (hereinafter "RHE") B, p. 14-15; RHE C, p. 50).

2. Claimant was referred to Concentra Medical Centers (Concentra) for treatment. (RHE C; Claimant's Hearing Exhibits (hereinafter CHE) 2).

3. Despite conservative care, Claimant continued to experience upper extremity pain that would radiate into her upper back and neck. Indeed, on September 18, 2021, Claimant reported that the "worst" of her pain was located in her parascapular muscles. (RHE C, p. 50). She also complained of radiating pain into her chest and down her arm into the 4th and 5th fingers. *Id*.

4. Claimant returned to Concentra on September 25, 2021 where she was evaluated by Dr. L. Baron who documented that Claimant was being seen in follow-up for "injury to her right shoulder, neck". (CHE 2, p. 41). While it was noted that Claimant was slightly better, Dr. Baron documented that physical therapy (PT) was "put on hold as [Claimant] was not tolerating it due to the degree of pain she was in". *Id.* Moreover, Dr. Baron noted: "[Claimant] has pain in her right neck, right shoulder radiating down right back muscles and down right arm to 4th and 5th fingers". *Id*.

5. Claimant returned to Concentra on October 2, 2021, where she was reevaluated for "*injury to her right shoulder and neck*". (CHE 2, p. 41; RHE C, p. 50)(emphasis added). During this appointment, Claimant reported new tingling in the posterior aspect of her neck. *Id.*

6. An MRI of the right shoulder performed on October 3, 2021 demonstrated a "near" tear of the supraspinatus tendon along with biceps tendonitis and possible adhesive capsulitis prompting Physician Assistant (PA) Mary Kathryn Abraham to refer Claimant for an orthopedic surgical evaluation. (RHE C, pp. 49-50). As part of an IME, Dr. Scott Primack reviewed and commented on the October 3, 2021 MRI as follows:

> There was a Type 3 acromion. There was thickening of the coracoacromial ligament. There was capsular thickening and reactive edema at the level of the acromioclavicular joint. The chondral surfaces of the humeral head and glenoid were thin. There was a small joint effusion with synovitis. There was mild bony remodeling changes at the humeral head supraspinatus tendon at the level of the footplate. There was scuffing of the labrum. There were intra-articular tendinosis changes at the biceps tendon. There was no disruption of the biceps tendon. There was a near tear supraspinatus tendon complex from the bursal to the articular surface.

(RHE E, p. 57).

7. Claimant was evaluated by PA Jordan Paul Eatough, an assistant to orthopedic surgeon Dr. Michael Simpson on November 2, 2021. During this pre-surgical evaluation, Claimant's physical examination was significantly limited secondary to pain. (CHE 4, p. 161). Claimant's active forward elevation of the right shoulder was limited to approximately 90 degrees and shoulder abduction was limited to about 70 degrees. *Id.* Provocative testing, i.e. Hawkins and Speed signs were positive as was Claimant's impingement testing result. *Id.* Claimant expressed a desire to proceed with surgical intervention and the same was scheduled for November 11, 2021.

8. On November 11, 2021, Dr. Simpson took Claimant to the operating room for a planned rotator cuff repair procedure. Claimant's preoperative diagnosis was "Articular-sided rotator cuff tear right shoulder". (CHE 4, p. 166). Additional pathology was observed during surgery prompting Dr. Simpson to perform an arthroscopic right shoulder rotator cuff repair with a "single-anchor lateral edge repair" along with a right biceps tenodesis with a "Intra-articular Loop "N" Tack technique and a subacromial decompression. *Id.* at pp. 166-168. Claimant's postoperative diagnoses included:

> 1. Superior labral tear with involvement of the biceps root right shoulder.

2. Articular-sided rotator cuff tear right shoulder.

3. Subacromial impingement right shoulder.

Id.

9. Claimant underwent a post-surgical course of physical therapy and rehabilitation, but continued to complain of ongoing pain in her shoulder. She underwent a repeat MRI on January 3, 2022. The imaging showed tendonitis and AC arthritis but no new tears. (RHE C, p. 49). Nonetheless, by January 11, 2022, Claimant was once again experiencing significant pain in her right shoulder and neck. *Id*.

10. Claimant continued to undergo treatment. She was given a Medrol dosepak, Gabapentin and additional physical therapy, to no avail. On February 9, 2022, Claimant reported increasing pain in her shoulder and numbness and tingling in her arm which Dr. Simpson could not explain. (CHE 4, p. 172). Dr. Simpson raised concern for early CRPS, brachial plexitis or infection. *Id*. at pp. 172-173. He referred Claimant to Dr. Timothy Sandell for an EMG. *Id.* Claimant subsequently underwent an EMG/NCS study, which was purportedly within normal limits. *Id*. at p. 174.

11. On February 15, 2022, Claimant reported having persistent and "significant pain in her right shoulder and neck". (RHE C, p. 48).

12. On March 7, 2022, Claimant reported continued "diffuse shooting/stabbing pain" and decreased range of motion in the right shoulder. (CHE 4, p. 174) (See generally, CHE 4, pp. 174-178). Because Claimant was 4 months post-surgery, PA Eatough recommended and subsequently administered a corticosteroid injection. (CHE 4, p. 178).

13. Claimant was referred to Dr. Kenneth Finn for a chronic pain consultation. Dr. Finn evaluated Claimant on April 14, 2022. (CHE C, p. 152). During this encounter, Claimant *reported "[g]lobal and diffuse right shoulder pain with radiation into the entire right arm and to the scapula and neck". Id.* (emphasis added).

14. Given Claimant's complaints of persistent pain, Dr. Simpson recommended a repeat MRI with and without contrast. (CHE 4, p. 179). Repeat imaging was completed on April 27, 2022. Findings included "[p]rogressive and recurrent tearing and tendinosis of the previously repaired supraspinatus, near complete disruption of the biceps tendon-long head from its tenodesis anchor, postoperative changes of the AC interval with ongoing regional osseous and soft tissue edema suggesting inflammation/overuse and unchanged mild infraspinatus and subscapularis tendinosis. (CHE 4, p. 187). Dr. Simpson reviewed the MRI on April 27, 2022. *Id*. at p. 184. Regarding the above described MRI findings/impressions, Dr. Simpson noted:

> [Claimant's] MRI shows evidence of a progressive recurrent partial tear and tendinosis at the previously repaired supraspinatus tendon. While the report shows a near complete disruption of the

> biceps tendon long head from its tenodesis anchor, this was done as a loop and tack technique so the tendon is never attached to the tenodesis's anchor. I personally reviewed her MRI. Her biceps tendon is still in the groove so it has not retracted all the way. Therefore, I think her tenodesis is actually still intact despite the MRI reading. However, it is possible that her tenodesis has stretched some and the tension on the sutures into the tenodesis screw may be causing some of her inflammation that she has anteriorly. This would have to be evaluated arthroscopically if it remains symptomatic.
>
> Her MRI also shows postoperative changes of the acromioclavicular interval with regional osseous and soft tissue edema with evidence of inflammation. Nothing that appears worrisome for an infection.

Id.

15. As part of his April 27, 2022 follow-up examination, Dr. Simpson opined that Claimant's imaging and arthroscopic photos revealed that the supraspinatus tendon had not regenerated with "great healing tissue". (CHE 4, p. 184; RHE e, p. 58). He did not feel that additional surgery was required; however, he noted that if Claimant remained symptomatic, revision surgery with a bioaugmentation patch could be considered. *Id.*

16. Additional conservative care, including pain management failed to produce lasting pain relief. (See generally, CHE 2 & 3). Claimant was seen in follow-up by Dr. Simpson on May 18, 2022, during which he recommended additional surgery. (RHE C, p. 48). On May 25, 2022, Dr. Simpson requested pre-authorization to proceed with a "right shoulder arthroscopic distal clavicle excision, arthroscopic rotator cuff repair, [and] arthroscopy extensive debridement". (CHE 4, p. 196).

17. Respondents sought a second opinion regarding Claimant's need for revision surgery. Accordingly, Dr. Scott Primack evaluated Claimant on July 18, 2022. He subsequently issued a report outlining his findings/opinions. (RHE E). Although he was concerned that psychosocial factors could complicate Claimant's recovery and that, she appeared to have unreasonable expectations regarding the degree to which revision surgery would alleviate her symptoms, Dr. Primack concluded that if Claimant were fully educated about the "objectives and goals of the operation", then the proposed surgery would be "reasonable, appropriate and part of the injury". *Id.* at p. 59.

18. Claimant opted to move forward with revision surgery. Thus, on September 8, 2022, Dr. Simpson returned her to the operating room where he performed the following procedures:

1. Arthroscopic-assisted revision rotator cuff repair with two-suture transtendinous repair of the subscapularis tendon and single-suture transtendinous repair of the supraspinatus tendon with a medium-sized Regeneten bioaugmentation patch right shoulder.

2. Arthroscopy right shoulder with extensive debridement including anterior compartment debridement, debridement of superior labrum, debridement of bursal sided adhesions, and debridement of remainder of Loop "N" Tack Tenodesis Screw right shoulder.

3. Arthroscopic distal clavicle excision right shoulder.

(CHE 4, p. 197).

19. Claimant's post-surgical diagnoses included:

1. Tendinosis with a longitudinal split tear of the anterior subscapularis tendon right shoulder.

2. Recurrent rotator cuff tear with articular-sided tearing prior to repair of the supraspinatus tendon right shoulder.

3. Acromioclavcular joint arthrosis right shoulder.

4. Mild synovitis in the anterior compartment of the right shoulder.

Id.

20. Claimant noted some improvement post-surgery; however, she still had ongoing pain complaints. Dr. Johnson saw Claimant in follow-up on January 19, 2023. (RHE C, p. 46). He ordered massage therapy for Claimant's persistent pain. *Id*.

21. A repeat MRI performed on February 22, 2023, noted rotator cuff tendinitis with low-grade partial thickness tearing. (RHE C, p. 46).

22. Claimant continued to undergo physical therapy and was provided with a TENS unit for home use to alleviate her continued complaints of pain. Platelet Rich Plasma (PRP) injections were recommended and Dr. Johnson noted that authorization for these injections was pending approval during a follow-up visit with Claimant on April 6, 2023.

23. On May 3, 2023, Dr. Johnson noted that Claimant had been evaluated by the PA to orthopedic surgeon, Dr. Weinstein on April 19, 2023. (RHE C, p. 45). This

PA opined that neither additional surgery nor PRP injections would be helpful. *Id.* Dr. Johnson felt Claimant's recovery had plateaued and that no additional treatment was warranted. Accordingly, he placed Claimant at MMI. He assigned a 15% scheduled right upper extremity impairment rating. *Id.* He also opined that Claimant would need maintenance care in the form of pain management for 1-2 years post MMI. *Id.* at p. 52.

24. Claimant requested a DIME. Dr. Thomas Higginbotham was selected as the DIME examiner. Dr. Higginbotham evaluated Claimant on September 6, 2023. He subsequently issued a report outlining his opinions regarding MMI and impairment on September 13, 2023. (RHE B). As part of his DIME, Dr. Higginbotham took a history from Claimant. He also conducted an exhaustive review of the available medical records. *Id.*

25. Claimant advised Dr. Higginbotham that she continued to work after her injury but she "experienced progressive weakness and pain of her dominate right upper extremity along with tightness and tension up and into the right side of her neck". (RHE B, p. 15). Claimant also reported tightness in the scapulothoracic area of her upper back. *Id.*

26. Dr. Higginbotham agreed that Claimant had reached MMI on May 3, 2023. He assigned a 21% scheduled rating for the right upper extremity, consisting of 12% for right shoulder range of motion loss and 10% for the distal clavicle resection. (RHE B, p. 32).

27. Dr. Higginbotham also assigned 9% spinal impairment for cervical range of motion loss. He noted that Claimant had complained of ongoing neck pain since the date of injury, and identified instances in the medical records where treating providers opined that Claimant had myofascial involvement of the cervicoparaspinal and scapulothoracic musculature. Although the records were not provided to the ALJ for review, Dr. Higginbotham's DIME report supports a finding that he was supplied with Claimant's physical therapy records. After review of those records, Dr. Higginbotham noted that physical therapy had directed treatment to the cervical and scapulothoracic musculature. (RHE B, p. 33). The ALJ has no reason to doubt Dr. Higginbotham's veracity when he indicated that treatment was "directed" to Claimant's neck and upper back. Moreover, there is a dearth of persuasive evidence to suggest that such treatment was not provided. Finally, Dr. Higginbotham noted that his palpatory examination revealed "moderate tension and tenderness along the right upper trapezius and levator scapulae muscles" as well as "focal tenderness about the right rhomboid and middle trapezius musculature". (RHE B, p. 28). He also noted, "[t]rigger points about the right infraspinatus and supraspinatus musculature that reproduce the tingling and discomfort [Claimant] experiences about the right upper extremity and hand". *Id.* On the front aspect of the neck, Dr. Higginbotham appreciated "moderate tension and tenderness along the course of the right platysma and sternocleidomastoid musculature". *Id.*

28. In justifying his spinal impairment rating, despite there being no direct injury to the cervical spine, Dr. Higginbotham opined that the right shoulder injury "resulted in significant myofascial pain/strain about the right upper quadrant/cervical spine" and that his physical examination "corroborates involvement of a cervical myofascial pain state stemming from this right shoulder injury". (RHE B, p. 33). Citing Desk Aid #11, Impairment Rating Tips, promulgated by the Division of Workers' Compensation, Dr. Higginbotham concluded that Claimant's "cervical range of motion loss [was] related to [Claimant's] shoulder injury/condition." *Id.* Accordingly, he rated that range of motion loss.

29. Dr. Higginbotham opined that Claimant should engage in self-care with mindfulness on "appropriate posture and avoidance of teeth clenching" along with a "progressive and conservative stretching/strengthening exercise routine" as maintenance care. (RHE B, p. 34).

30. Respondents disagreed with Dr. Higginbotham's assignment of cervical range of motion loss and filed an application for hearing to overcome this aspect of his impairment rating. Claimant responded by endorsing conversion of her 21% scheduled upper extremity impairment to 13% whole person impairment as an issue for determination by the ALJ.

31. Claimant testified at hearing. She reported persistent neck pain and stiffness since her first surgery. According to Claimant, her pain runs from her neck down to her shoulder and under her shoulder blade. She reported taking medication for her pain. She has returned to work, but feels she cannot perform her job as she had prior to her injury, because she requires assistance to perform certain tasks. The ALJ finds Claimant's testimony regarding her persistent symptoms and continued need for medication credible and consistent with the medical record presented.

32. The ALJ credits the medical record as a whole, with special consideration given to Dr. Primack's description of Claimant's 10/3/2021 MRI findings, the imaging (MRI) studies themselves and the surgical reports of Dr. Simpson to find that Claimant suffered a serious injury to her right shoulder on September 14, 2021. The content of these reports convinces the ALJ that Claimant's injury probably caused severe pathology to the right shoulder joint[1] necessitating the above-described surgeries. Based upon the totality of the evidence presented, the ALJ is further persuaded that this pathology likely produced considerable neck and upper back pain resulting in Claimant's need for treatment[2], directed to the cervical and scapulothoracic musculature. Accordingly, the ALJ finds ample evidentiary support for Dr. Higginbotham's decision to use the Rating Tips to assign a separate impairment rating for cervical range of motion loss in this case. In so finding, the ALJ rejects Respondents assertion that "no" documentation exists to establish that Claimant's rotator tear was especially severe, or that there was significant damage to Claimant's shoulder. To the

[1] As documented in Dr. Scott Primack's July 18, 2022 IME report and the reports of Dr. Simpson. (RHE E, p. 57, CHE 4, pp. 166-168; pp. 184-187, 197).

[2] Specifically physical therapy and likely massage therapy.

contrary, Dr. Primack's description of Claimant's 10/3/2021 right shoulder MRI and the surgical reports of Dr. Simpson constitute substantial evidence from which Dr. Higginbotham could reasonably infer that Claimant's 9/14/2021 injury caused severe right shoulder pathology prompting her need for extensive treatment, including shoulder surgery and treatment (physical therapy) directed to the cervical and scapulothoracic musculature. Accordingly, Respondents' characterization of Claimant's right shoulder injury as "run-of-the mill" is unpersuasive.

33. As presented, the evidence persuades the ALJ that Respondents have failed to establish that Dr. Higginbotham erred when he assigned a separate 9% impairment for cervical range of motion loss in this case. Accordingly, the request to set-aside this aspect of Dr. Higginbotham's impairment rating must be denied and dismissed. Because Respondents have failed to establish that Dr. Higginbotham's assignment of impairment for cervical range of motion loss is highly probably incorrect, Claimant's request for conversion of his scheduled right upper extremity impairment rating need not be addressed.

34. Claimant has proven that she is entitled to maintenance care after maximum medical improvement.

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), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

C. In deciding whether a party has met their 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 Bodensecki v. ICAO*, 183 P.3d 684 (Colo. App. *2008).*

Assessing the 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's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is also a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). As found, the medical records, including Claimant's 10/3/2021 MRI and Dr. Primack's interpretation thereof, along with Dr. Simpson's surgical reports and Claimant's testimony supports a reasonable inference that Claimant's 9/14/2021 injury caused severe right shoulder pathology and persistent cervical and scapulothoracic myofascial symptoms. Moreover, the evidence presented supports a conclusion that Claimant's soft-tissue symptoms and myofascial complaints were treated with physical and massage therapy. Finally, the evidence supports a conclusion that Dr. Higginbotham carefully considered Claimant's verbal history, the content of Claimant's medical records and his physical examination findings when he concluded that the Impairment Rating Tips applied in this case to permit the assignment of additional spinal impairment for cervical range of motion loss. In short, the ALJ is convinced that Dr. Higginbotham sufficiently justified his decision to apply Desk Aid #11 when providing an isolated cervical range of motion impairment in this case.

Overcoming the Impairment Rating Opinion of Dr. Higginbotham

D. A DIME physician's findings concerning whole person impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). In other words, to overcome a DIME physician's opinion regarding MMI, the party challenging the DIME must demonstrate that the physicians determinations in this regard is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (October 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). In this regard, an ALJ can consider the Division of Workers' Compensation Impairment Rating Tips and draw reasonable inferences therefrom in determining whether a DIME physician's opinion on impairment has been overcome. *Capritta v. King Soopers, Inc.*, W.C. No. 4-772-353 (ICAO February 26, 2010) ("In our view, the ALJ, in determining whether the DIME physician's opinion had been overcome by clear and convincing evidence, properly considered the Division's rating tip from which a plausible inference may be drawn that the DIME physician's opinion was incorrect.").

F. Desk Aid #11- *Impairment Rating Tips*, as promulgated by the Division of Workers' Compensation provides that impairment ratings are "given when a specific diagnosis and objective pathology is identified". (RHE A).[3] This Desk Aid specifically addresses those cases involving shoulder injuries with accompanying neck pain. Generally, the assignment of a spinal rating requires the injured worker (patient) to have "objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53" of the AMA Guides to the Evaluation of Permanent Impairment. (Reference: Spine section of the AMA Guides, 3rd. Edition (rev.); Table 53 - Impairments Due to Specific Disorders of the Spine). Only after a Table 53 diagnosis has been established is spinal range of motion loss applied to the impairment rating. (Desk Aid #11, Table 53 and Application of Spinal Range of Motion, p. 4). The sole exception to the general rule surrounds cases of involving shoulder injury with associated neck pain. Regarding this situation, Desk Aid #11 provides:

> In unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature, an isolated cervical range of motion impairment is allowed if it is well justified by the clinician. Otherwise, there are no exceptions to the requirement for a corresponding Table 53 rating.

Id.

G. In concluding that Respondents have failed to overcome Dr. Higginbotham's 9% spinal impairment rating, the ALJ finds the case of *Gallegos v. Lineage Logistics Holdings LLC*, W.C. No. 5-054-538-002 (ICAO February 11, 2020) instructive. In *Gallegos*, the ALJ found, on the testimony of Dr. Burris, that respondents had overcome the spinal impairment rating that Dr. Higginbotham had assigned to Mr. Gallegos because there was "no spinal injury described in Table 53, the claimant did not have a severe shoulder pathology and there was no justification for the rating submitted

[3] Although updated since 2018 as provided by RHE A, the 2020 version of Desk Aid #11 is fundamentally unchanged as it pertains to the spinal impairment issues being determined by this order.

by Dr. Higginbotham". *Gallegos v. Lineage Logistics Holdings LLC, supra.* Claimant appealed the ALJs determination to the Industrial Claims Appeals Office (ICAO). While acknowledging that the Impairment Rating Tips are not part of the AMA Guides to the Evaluation of Permanent Impairment, a Panel of the ICAO noted that the rating tips "may be relevant to the impairment rating". *Id*. Accordingly, the Panel indicated: "a physician's application of [the] tips goes to the weight the ALJ gives an impairment rating". (Citations omitted).

H. Because Dr. Higginbotham had determined that Mr. Gallegos was without specific injury to the cervical spine and that his cervical pain/range of motion loss was emanating from "post-operative splintage" without treatment directed to the cervical musculature, the Panel determined that the AMA Guides did not support Dr. Higginbotham's assignment of a separate cervical spine impairment rating in the case. *Gallegos v. Lineage Logistics Holdings LLC, supra.* The Panel determined that Dr. Higginbotham failed to articulate any justification for the separate spinal impairment rating, noting instead that he simply allocated spinal impairment based "solely" on the cervical range of motion loss caused by Mr. Gallegos' bilateral shoulder conditions. *Id.* Noting that a DIME report that does not comply with the directives of the AMA Guides supports a conclusion that the DIME determinations had been overcome, the Panel affirmed the ALJs determination that Dr. Higginbotham erroneously rated Mr. Gallegos' cervical range of motion loss.

I. While the issues determined in *Gallegos* are akin to those presented in the instant case, the following evidence persuades the ALJ that Dr. Higginbotham properly applied the AMA Guides and the Division's Impairment Rating Tips when he assigned Claimant a separate 9% spinal impairment rating in this case:

- A medical provider, specifically Dr. L. Baron, documented that Claimant suffered an injury to her right shoulder and neck. (CHE 2, p. 41; RHE C, p. 50). Moreover, the medical record contains multiple references to the involvement of the cervicoparaspinal and scapulothoracic musculature in Claimant's persistent complaints of neck and upper back pain.

- The imaging (MRI) reports, the IME report of Dr. Primack interpreting the October 3, 2021 MRI and the surgical reports of Dr. Simpson support a reasonable inference that Claimant's 9/14/21 injury caused severe pathology in the right shoulder prompting the need for extensive right shoulder treatment, including two surgical procedures.

- When combined, the MOI, the medical records and the results of Dr. Higginbotham's physical examination of the cervical spine support a conclusion that Claimant's shoulder injury resulted in "significant" myofascial pain about the right upper quadrant/cervical spine and that these neck and upper back pain complaints were treated with physical and, more probably than not, massage therapy.

J. After considering the totality of the evidence presented, the ALJ is convinced that the Dr. Higginbotham properly applied the Division's Impairment Rating Tips when assigning an isolated cervical range of motion impairment in this case. As determined above, the persuasive medical evidence establishes that Dr. Higginbotham carefully considered Claimant's verbal history, the content of the medical records and the findings of his physical examination in reaching his conclusion that Claimant was entitled to a separate spinal impairment rating. Here the evidence supports a conclusion that after considering this information, Dr. Higginbotham reasonably inferred, as does the ALJ, that Claimant suffered severe pathology in the right shoulder accompanied by treatment of the cervical musculature. Accordingly, the ALJ is convinced that Dr. Higginbotham justified his assignment of an isolated spinal impairment rating in this case.

K. While Respondents' counsel disagrees and asserts that Dr. Higginbotham failed to properly follow the instructions of the Rating Tips when assigning isolated cervical range of motion impairment, the ALJ finds scant evidence for this assertion. Indeed, Respondents called no witnesses leaving Dr. Higginbotham's DIME opinions unrebutted. Because the evidence supports a conclusion that Dr. Higginbotham properly considered Desk Aid #11 and reasonably relied on Claimant's history, the content of the medical records and his physical examination as justification for assigning spinal impairment in this case, the ALJ concludes that Respondents have failed to establish that Dr. Higginbotham's spinal impairment rating is highly probably incorrect. Accordingly, Respondents request to set aside the impairment for cervical range of motion loss must be denied and dismissed. Because the request to set aside Dr. Higginbotham's spinal impairment is denied, Claimant's call for conversion of his scheduled impairment to impairment of the whole person is moot.

Claimant's Entitlement to Maintenance Medical Treatment

L. A claimant's need for medical treatment may extend beyond the point of maximum medical improvement (MMI) where he/she requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*."

M. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra.* Indeed, a claimant is only entitled to such future 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); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); C.R.S. § 8-41-301(1)(c). 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 employment. *Snyder v. Industrial Claim Appeals Office,* 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 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*.

N. Claimant testified that she continues to need and seek care due to her industrial injury. She takes medications and suffers from pain from the injury. Dr. George Johnson recommended treatment in his report of Maximum Medical Improvement to include pain management for 1-2 years (CHE B, p. 150). While Dr. Higginbotham simply opined that Claimant should engage in self-care with an emphasis on a "progressive and conservative stretching/strengthening exercise routine", the ALJ credits Claimant's testimony to find that her present condition will likely deteriorate further and she will experience greater functional decline without maintenance care to include ongoing pain management and prescription medication. Accordingly, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that she is entitled to a general award of maintenance medical care. Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for such future medical treatment is reasonable, necessary and related to Claimant's industrial injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

ORDER

It is therefore ordered that:

1. Respondent's request to set aside the cervical range of motion impairment of Dr. Higginbotham is denied and dismissed. Respondent shall pay permanent partial disability (PPD) benefits consistent with the overall impairment rating assigned by Dr. Higginbotham.

2. Claimant's request for conversion of her scheduled upper extremity impairment to impairment of the whole person is moot.

3. Claimant has proven that she is entitled to maintenance medical treatment in the form of ongoing pain management appointments and prescription medications to cure and relieve her of the effects of her 9/14/2021 industrial injury.

4. Any and all issues not determined herein are reserved for future decision.

DATED: March 15, 2024

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

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

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

ISSUES

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

13. Upon discharge, Claimant was prescribed various antibiotics, pain medication, and anti-inflammatory medications. According to Claimant, via his testimony, these medications made his nausea and other symptoms worse. Claimant also testified that the doctors "were trying to get things settled down for the repair" surgery and the various medications

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

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

15. Based on the perforated colon, the Claimant's ongoing symptoms, and the possibility of a recurrence of the perforation, the surgery is found to be reasonable, necessary, and related to the June 5, 2022, perforation.

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

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

18. Respondents retained Dr. Tashoff Bernton to perform an independent medical examination (IME) to assess the cause of the Claimant's diverticulitis and perforated colon. Dr. Burton issued two reports – one record review and one IME. He also testified at hearing. His testimony was consistent with his reports.

19. At hearing, Dr. Bernton was qualified as an expert in internal medicine and occupational medicine. Dr. Bernton explained that internal medicine involves the assessment, diagnosis, and treatment in the subspecialties of rheumatology, gastroenterology, cardiology, pulmonary, and neurology. Dr. Bernton also explained that occupational medicine involved, among other things, the assessment of causation of conditions in the

workplace. But he did admit that he has not treated a patient with a perforated bowel since about 1992.

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

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

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

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

24. Dr. Bernton noted that his review of the medical literature did include some isolated reports of external trauma resulting in diverticular perforation, but they were rare and involved significant trauma. In addition, Dr. Bernton explained that there were no reports of diverticular perforation involving the sigmoid colon, as was the case in this claim. Furthermore, Dr. Bernton concluded that the magnitude of trauma from bending over and pulling on protective gear was not anywhere near the level of trauma noted in the few cases in the medical literature of traumatic perforation. Dr. Bernton testified that he had Claimant demonstrate the movement of putting on his bunker pants and there was nothing about the motion that would reasonably relate to a rupture of a diverticulum. Thus,

Dr. Bernton concluded that it was not medically probable that pulling on bunker pants was the precipitant of Claimant's diverticular perforation. Dr. Bernton stated that the diverticular perforation was simply an event which happened while Claimant was at work but there was no indication that the activity he performed at the onset of symptoms was causal rather than coincidental. Dr. Bernton testified that it was not medically reasonable to regard the perforation of the diverticulum as a work- related event. Additionally, Dr. Bernton testified that Claimant continuing to work after the diverticular perforation did not accelerate or aggravate his condition.

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

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

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

28. On the other hand, the ALJ does not credit and find persuasive his ultimate conclusions – that the perforated colon is unrelated to Claimant's job duties – for several reasons. First, while Dr. Bernton has some training in gastroenterology-that is not his specialty. In fact, he has not treated someone with a perforated colon since before 1992. Second, since he is not a gastroenterologist, it is unlikely he keeps current with the literature regarding the cause, management, and treatment of perforated colons. Third, the research that he did perform to determine causation seemed subpar. For example, he performed a Google search to determine whether trauma can cause a perforated colon. In conducting his research, he found 4 abstracts that he included in his report. His

takeaway from reviewing the abstracts, but not the underlying articles, was that it requires a significant amount of trauma to cause a perforated colon. But Dr. Bernton did not review the actual articles, just the abstract for each article. He also indicated that he researched trauma – and yet this case does not involve external trauma – such as an automobile accident or getting hit by a soccer ball as described in some abstracts. Instead, this case involves the amount of intra-abdominal pressure that is exerted upon the colon when quickly bending over and lifting about 25 pounds. Plus, this case also involves someone who has diverticulitis, which Dr. Bernton said causes thinning of the intestinal wall. Thus, it would appear that the thinning of the intestinal wall, due to his preexisting diverticulitis, would have put Claimant in a weakened condition, and more susceptible to a perforated colon due to an increase in intra-abdominal pressure.

29. Based on the totality of the evidence, the ALJ finds that the June 5, 2022, work activities of bending over and putting on his 20–25-pound bunker pants proximately caused his colon to rupture and resulted in a perforated colon. In reaching this decision, the ALJ finds the temporal relationship to be highly persuasive. The ALJ is mindful that correlation does not equal causation, but yet in this case, the timing of Claimant' symptoms, combined with his preexisting diverticulitis that put him in a weakened condition, is found to be highly persuasive.

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

CONCLUSIONS OF LAW

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

General Provisions

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

than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

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

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

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

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

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

In this case, when considering the cause of Claimant's perforated colon, the temporal relationship of lifting and putting on his bunker pants becomes a crucial and persuasive piece of evidence. The immediate or near-immediate occurrence of pain, due to the perforated colon, following Claimant's lifting activity strongly suggests a causal connection.

As testified to by Dr. Bernton, bending over may increase abdominal pressure– which the court finds and concludes places stress or pressure on internal organs, such as the colon. The ALJ finds that this biomechanical stress or pressure of bending over, combined with lifting, more likely than not, caused Claimant's perforated colon, especially in light of the fact that Claimant's colon was already vulnerable to perforation due to his underlying diverticulitis. Thus, the temporal proximity of the perforated colon to the bending and lifting activity underscores the direct impact of bending and lifting on Claimant's colon, supporting the contention that bending and lifting caused the injury. In the absence of other persuasive evidence regarding the cause of Claimant's perforated colon, this temporal relationship assumes heightened significance, and provides a compelling basis for attributing causation to the lifting activity.

The ALJ is mindful of the logical fallacy of mistaking temporal proximity for a causal relationship and that correlation is not causation if there merely exists a coincidental correlation. But in this case, the ALJ finds that the temporal proximity combined with the Claimant's colon being in a weakened condition due to his diverticulitis, combined with the possible increase in abdominal pressure caused by bending and lifting while putting on his bunker pants leads this ALJ to find and conclude that Claimant putting on his bunker pants was the proximate cause of his perforated colon.

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

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

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

In this case, Claimant suffered a perforated colon due to his work activities of putting on his bunker pants on June 5, 2022. The same day, Claimant presented to the emergency room for treatment and was admitted into the hospital. Once admitted into the hospital, and diagnosed with a perforated colon, he was evaluated for surgery by Dr.

Pohlman. Dr. Pohlman met with Claimant to discuss the need for immediate surgery. Dr. Pohlman determined the perforation was relatively contained at the moment and that Claimant did not need emergency surgery.

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

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

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

Based on the perforated colon, the Claimant's ongoing symptoms, and the possibility of a recurrence of the perforation, and the decision of Dr. Pohlman to proceed with surgery, the ALJ finds and concludes Claimant established by a preponderance of the evidence that the surgery performed by Dr. Pohlman on July 19, 2022, to be reasonable, necessary, and related to the June 5, 2022, perforation.

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

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

ORDER

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

1. Claimant suffered a compensable injury on June 5, 2022.
2. Respondents shall pay for all reasonable and necessary medical treatment to cure and relieve Claimant from the effects of his colon perforation. This includes the initial hospitalization on June 5, 2022, as

well as the July 19, 2022, surgery and subsequent surgeries and hospitalization to treat Claimant from the complications of the July 19, 2022, surgery.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, 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: March 18, 2024

s/ Glen Goldman

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

ISSUES

1. Whether Respondent established by a preponderance of the evidence that Claimant's April 24, 2023 industrial injury resulted from Claimant's willful failure to obey a reasonable rule adopted by Employer for the safety of the employee, entitling Respondents to reduce Claimant's compensation by 50%.

2. Whether Respondents established by a preponderance of the evidence that Claimant's nonmedical benefits should be reduced by 50% pursuant to § 8-42-112.5, C.R.S.

3. Whether Respondents established by a preponderance of the evidence that Claimant was responsible for termination of his employment on or about June 13, 2023, and the resulting wage loss from his termination.

4. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability benefits after his date of termination.

FINDINGS OF FACT

1. Claimant worked for Employer as a plumber, and sustained admitted injuries arising out of the course of his employment with Employer on April 24, 2023. On April 24, 2023, Claimant was driving an Employer-owned van southbound on Interstate 25 in Douglas County, Colorado when he was involved in a one-car accident at approximately 10:45 a.m. (Ex. 8 & O). Claimant testified that he has no recollection of the accident, and only remembers driving the van and waking up in the hospital.

2. South Metro Fire Rescue arrived at the scene of the accident at 10:58 a.m., and extricated from the vehicle. Claimant sustained several injuries, including an open compound femur fracture of his left leg, right leg open tibial fracture, closed head injury, and fractures in the dorsal aspect of his right foot, among other injuries. Claimant was conscious at the scene, and able to respond to questions from paramedics, but it was noted that he was extremely anxious and in an excruciating amount of pain. (Ex. O).

3. On examination at the scene, Claimant was noted to have no observable memory loss, and no odor was noted on throat examination. Paramedics administered IV fentanyl and IV ketamine for pain control. At 11:25 a.m., Claimant was transported by ambulance to Sky Ridge Medical Center emergency department. (Ex. O).

4. Colorado State Patrol arrived at the accident scene at 11:41 a.m., approximately 20 minutes after Claimant was transported from the scene. According to the State of Colorado Traffic Crash Report for the accident, Claimant's vehicle went off the right side of the highway, struck two fence posts, before being launched into the air, and impacting an embankment with the front end of the vehicle. The section of highway on which

Claimant was driving was straight, level, and dry, with normal daylight driving conditions. The Crash Report does not attribute any cause to the Claimant's vehicle leaving the roadway or the accident, but cited Claimant for careless driving. (Ex. 8).

5. Claimant arrived at the Sky Ridge Medical Center emergency department at 11:36 a.m., where he was treated for his injuries. In the ER, Claimant was administered additional medications, including Fentanyl and Ketamine HCL, oxycodone and dilaudid. (Ex. 5, p. Claimant 000027-29 & 33). During the course of his examination at the ER, Claimant was noted to be alert, oriented, and following commands. (Ex. 5).

6. While in the ER, Claimant's treating provider, Jennifer Meador, M.D., ordered a series of tests, including a urine toxicology screen. (Ex. 5, Claimant000030). At 11:40 a.m., laboratory blood tests were performed. The toxicology report shows that Claimant's Plasma/Serum Alcohol level was < 3 mg/dL[1]. The laboratory reports for the 11:40 a.m. tests do not include levels of opiates or other substances, such as cocaine or marijuana. (Ex. 5, p. Claimant 000022).

7. At 2:50 p.m., on April 24, 2023, a urine sample was taken from Claimant and urinalysis testing performed. The toxicology report for the urine testing returned a positive finding for cocaine, marijuana, and opiates. The toxicology report is a "qualitative" rather than "quantitative" report, and does not indicate the concentration of the substances detected in Claimant's urine other than indicating they exceeded the negative threshold levels. The negative threshold level for negative cocaine is 300 ng/mL; and 50 ng/mL for marijuana (*i.e.*, a concentration level equal to or above the reference level results in a "positive" test. (Ex. 6). The toxicology report contains the following statement with respect to each of the positive tests: "Positive urine drug screen results are unconfirmed/presumptive and should be used only for medical (*i.e.*, treatment) purposes. If confirmation is desired, notify the clinical laboratory to obtain order information." No credible evidence was admitted at hearing explaining whether a "positive" test demonstrates any particular level of impairment. (Ex. 6).

8. Claimant went on to receive treatment for his injuries, including surgery. Claimant was admitted to Spalding Rehab Hospital on May 3, 2023, and discharged on May 17, 2023. (Ex. P). Claimant's medical records from Spalding Rehab Hospital indicate Claimant had history of polysubstance abuse, including alcohol abuse, cocaine, and marijuana; and a history of alcohol withdrawal seizures, reported by Claimant's wife. Claimant also reported using marijuana edibles "daily prior to the accident," and taking prescribed opiates. It was noted that Claimant's urine drug screen was positive for cocaine, but that Claimant "cannot recall use." (Ex. P, p. 196).

9. On May 17, 2023, Respondents filed a General Admission of Liability, admitting for medical benefits and temporary total disability benefits. The GAL includes the following notation under "Remarks": "Benefits reduced 50% due to intoxication violation per C.R.S. 8-42-112.5. Compensation reduced by 50% based upon positive drug or alcohol test. It

[1] Based on the reference levels listed on the toxicology testing, the ALJ infers that the threshold level for a "positive" alcohol test is = or > 10mg/dL.

is presumed that the employee was intoxicated, and the injury was due to the intoxication." (Ex. C).

10. Following discharge from Spalding Rehab Hospital, Claimant continued to require treatment for his injuries and was treated at Concentra. Claimant's diagnoses included closed head injury, acute anxiety, fracture of right tibia, fracture of right foot, left knee laceration, rupture of left quadriceps muscle, and lumbar sprain. (Ex. W, p. 552).

11. On June 9, 2023, Claimant had surgery to remove hardware from his right ankle, and for manipulation of his left knee. (Ex. U). Following surgery, Claimant was non-weightbearing and placed in a splint. (Ex. T). Claimant testified at hearing that he has undergone multiple surgeries as a result of his injuries.

12. On or about June 14, 2023, Employer received a copy of Claimant's April 24, 2023 toxicology report from Insurer. On June 16, 2023, Employer terminated Claimant's employment. Employer's termination letter to Claimant stated: "Having received your Lab Toxicology report yesterday afternoon, we are terminating your employment with [Employer] effective immediately." (Ex. 3). The letter offers no further explanation for the basis of Claimant's termination.

13. On June 20, 2023, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation with the Division, seeking to terminate Claimant's temporary total disability compensation beginning June 20, 2023. The Petition indicates that Claimant had been paid TTD at the rate of $300.31 per week through June 14, 2023. (Ex. 2). Claimant filed an objection to Respondents' Petition to Terminate TTD on July 10, 2023. (Ex. E). On July 18, 2023, the Division notified Respondents that the Petition to Modify was not approved, and if Respondents wished to pursue the issue, a hearing was required. (Ex. F).

14. After his June 16, 2023 termination, Claimant's providers at Concentra alternately released Claimant to modified duty, and assigned complete work restrictions. For example, from July 10, 2023, to August 21, 2023, Claimant providers, including Eric Chau, M.D., and Deana Halat, NP, indicated Claimant was able to return to modified duty on that date, with restrictions including use of a wheelchair, no weightbearing, and no driving. (Ex. W, p. 580, 585 & 594). On August 21, 2023, Deana Halat, NP, indicated Claimant was "unable to work do [sic] to medical and surgical conditions." (Ex. W, p. 595). During this time, Claimant was being treated for post-concussive symptoms, necrosis in his ankle, and multiple other issues with his lower extremities which prevented him from bearing weight. (See Ex. K, T, & W). On September 14, 2023, Claimant was released to modified duty, although he was restricted from driving and required the use of a wheel chair, it was indicated Claimant could work his entire shift. (Ex. W, p. 603).

15. Claimant began seeing Samuel Chan, M.D., a physiatrist, in August 2023, on referral from Dr. Chau. On August 1, 2023, Dr. Chan noted that Claimant had not returned to work because Claimant reported there was no modified work available. Dr. Chan did not otherwise address work restrictions. (Ex. W). Claimant returned to Dr. Chan several times over the following two months, at Claimant's September 11, 2023 visit, Dr. Chan

noted that Claimant was in no acute distress, and that his most significant issue was his right ankle, where he was experiencing avascular necrosis (AVN). At his October 26, 2023 visit, Dr. Chan noted that Claimant was allowed to do toe-touch weightbearing and increasing his activity. (Ex. V).

16. From May 30, 2023 through January 2, 2024, Claimant was also under the care of orthopedic surgeon Scott Resig, M.D., who performed several surgeries on Claimant's legs. During this time, Claimant had issues with AVN in his right ankle, and skin grafting procedures performed. On September 5, 2023, Dr. Resig noted that Claimant could bear weight on his left leg with no restrictions, and could bear weight on the right as limited by pain. Claimant's primary issue during this time was his right leg, and addressing would care and AVN. Claimant's left knee was non-tender with full range of motion, and his right tibia fracture had healed. Dr. Resig did not address work restrictions, but noted that Claimant may need surgery in the future for his right ankle AVN. (Ex. T).

17. On January 3, 2024, Claimant's work restrictions were modified to include no driving or operating heavy machinery, no weightbearing, required use of a walker, and limiting his work to seated duties. (Ex. W, p. 624). No credible evidence was admitted indicating Claimant has, to date, been released to full duty. Claimant has not returned to work in any capacity since April 24, 2023.

18. At hearing, Employer's regional asset manager and risk manager, Jason Rudnick, testified that had Claimant not been terminated, Employer could have offered Claimant modified duty to accommodate his restrictions. RK[Redacted] credibly testified that Employer could have accommodated a non-weightbearing work restriction, including many desk-related positions.

19. [Redacted, hereinafter RK] testified that Employer has a zero-tolerance policy with respect to drugs and alcohol, and that the policy is contained in the company handbook. RK[Redacted] testified that the handbook is given to all employees, including Claimant, and that copies of the handbook are kept in the company offices and breakroom. He also testified, credibly, that the zero-tolerance policy is communicated in new hire orientation, and through weekly training meetings. RK[Redacted] testified that the company policies were communicated to Claimant.

20. Employer's Company Handbook (Ex. J) that was in effect at the time of Claimant's injuries includes the following provisions:

EMPLOYEE CONDUCT

> The Company expects all employees to conduct themselves in a manner that will protect the interests and safety of fellow employees and the Company. To this end we have regulations, which employees must follow to assure orderly operations and provide the best possible work environment. In addition, employees are expected to conduct themselves in a professional manner at all times.
>
> Listing all forms of unacceptable behavior in the workplace is not possible. Management will investigate the conduct to determine proper course of action. As

a guide, the following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment: …

- Possession, distribution, sale, transfer, or use of alcohol or illegal drugs in the workplace, while on duty, or while operating employer-owned vehicles or equipment …" (Ex. J, p. 52-53).

* * *

"**DRUG AND ALCOHOL POLICY**

The Company's policy is to employ a work force free from the use of illegal drugs and abuse of alcohol. Any employee determined to be in violation of this policy may result in disciplinary action taken [sic] place and/or including termination of employment. It is the Company's standard of conduct that our employees shall not use illegal drugs or abuse alcohol. In order to maintain this standard, the Company shall establish and maintain the program and rules set forth below.

Pre-Employment Drug Abuse Screening

The Company will conduct pre-employment drug screen examinations designed to prevent hiring individuals who abuse drugs.

Current Employee Drug and Alcohol-Abuse Screening

The Company maintains screening practices to identify employees who use illegal drugs or abuse alcohol. It shall be a condition of continued employment for an employee to submit to a drug screen and breath-alcohol test:

- When there is a reasonable suspicion to believe that an employee is using or has used illegal drugs or is abusing or has abused alcohol.

- When the employee is involved in any mishap or accident in which injury to persons or damage to property has occurred, which will automatically raise a reasonable suspicion.

- Upon return from extended absences.

Grounds for Termination or Discipline

Any employee having possession of, being under the influence of, possessing in their body or bodily fluids in any detectable amount, using, consuming, transferring, selling or attempting to sell or transfer, any form of illegal drug (as defined above)[2], is guilty of misconduct and may result in disciplinary action taken [sic] place and/or including termination of employment. If they bring any form of illegal drug onto the Company's premises or property while on company business, or at any time during

[2]Despite this reference, Employer's Handbook does not define the term "illegal drug."

> the hours between the beginning and ending of the employee's workday, whether on duty or not and whether or not on company business or on company property may result in disciplinary action taken place and/or including termination of employment.
>
> An employee who is under the influence of alcohol at any time while on company business or at any time during the hours between the beginning and ending of the employee's workday, whether on company business or company property or not, shall be guilty of misconduct and may result in disciplinary action taken place and/or including termination of employment. An employee shall be determined to be under the influence of alcohol if the employee's normal faculties are impaired due to consumption of alcohol or if the employee has a blood-alcohol level of .08 or higher. Failure to submit to required medical or physical examination or tests is misconduct and is grounds for discharge from employment or suspension without pay."

(Ex. J, p. 59-60).

21. RK[Redacted] testified that Employer made the decision to terminate Claimant after receiving the Claimant's toxicology report. He testified that Employer did not receive the toxicology report until it received the report from Insurer on approximately June 14, 2023.

22. At hearing, Respondents offered the testimony of Scott Primack, D.O. Dr. Primack was admitted as an expert in occupational medicine and physiatry. Dr. Primack testified that he frequently reads and uses urine drug screens in his role as a physician, and is familiar with the effects of alcohol, marijuana, and cocaine. Dr. Primack testified that he believes Claimant has a poly-substance use disorder and alcoholism, and that these conditions, in and of themselves, can slow reaction time, both physically and cognitively. He further testified that use of alcohol, marijuana, and cocaine can impair an individual's ability to safely operate a motor vehicle, including adversely affecting reaction times and ability to concentrate.

23. Dr. Primack testified that the urine toxicology report from April 24, 2023 does not provide quantitative measurements of the substances in Claimant's urine at the time of his accident, but indicated that the tests indicates the presence of these substances in Claimant's system. Dr. Primack indicated he did not know what the reference to "< 3" on Claimant's alcohol toxicology report meant, but opined that it constituted a "positive" test because it did not say "negative" and that the result was greater than zero. Similarly, Dr. Primack was unable to state the amount of cocaine or marijuana in Claimant's system when the urine toxicology test was performed. Dr. Primack testified that marijuana can remain in a person's system for 14 days after ingestion, and that it is possible to have a positive test and not be "under the influence" of marijuana. He testified that cocaine's half-life is 14 hours, and that it is not possible to test positive for cocaine and not be "under the influence" of cocaine. Dr. Primack also testified that fentanyl and ketamine can result in a positive test for marijuana.

24. Claimant testified at hearing that he was hired by Employer in November 2022. Claimant testified that when he was hired he was not provided with any in-office training or orientation, and that he was not provided with any written materials. He testified that he did not recall Employer holding any safety meetings, that he had never seen Employer's Company Handbook, and that no one had ever discussed the Handbook with him. Claimant denied that Employer had a no-tolerance drug policy. Claimant testified that the only meetings held by Employer were only meetings in which the company would talk about "different ways how to rip off the customer and get more money out of them." Claimant's testimony on this issue was not credible.

25. Claimant asserted that the individual who hired him for Employer "didn't care about marijuana or any drug, he just wanted someone that's clean right now to start working." Claimant indicated that he voluntarily took a pre-hiring drug test so he could begin his employment sooner, but also testified that Employer "never really have urinalysis tests to anyone." Claimant's testimony on this issue was confusing, and not credible.

26. Claimant testified that he was on call for Employer the night before the accident (*i.e.*, April 23, 2023) and worked at a job in Castle Rock until approximately 11:45 p.m. The following day, April 24, 2023, Claimant went to Employer's office in Federal Heights to turn in checks received from customers from his prior shift, then received a call and drove to Employer's office in Castle Rock. He testified that he did not recall the accident, and only remembered waking up in the hospital. Claimant's testimony that he did not recall the accident is credible. His testimony that he worked until almost midnight the night before was inconsistent with his later testimony that he did not work the two days prior to his accident.

27. Claimant denied that he was under the influence of drugs or alcohol at the time of the accident, or that he had ever been under the influence of either while at work. Claimant testified that he had not ingested alcohol, cocaine, or marijuana on the date of the accident. Claimant testified that he had two days off prior to his accident, and last drank alcohol on Saturday, April 22, 2023. He testified that he did not recall the last time he used cocaine prior to April 24, 2023, and that he had used marijuana approximately one month before the accident. Claimant did admit to using cocaine in September 2023. Claimant denied any history of polysubstance abuse, or having seizures from alcohol withdrawal. Claimant's testimony on this issue was not credible.

28. Claimant further testified that he remains under work restrictions, including no weight bearing, and that he is unable to drive because he cannot move his right foot. Claimant's testimony in this regard was credible.

29. The ALJ finds that cocaine and marijuana were present in Claimant's system at the time of his injury in amounts exceeding the threshold for a positive test. The concentration of marijuana in Claimant's system was equal to or greater than 50 ng/mL. This finding is consistent with Claimant's report of daily marijuana use, and no other credible explanation for such a positive test was offered into evidence. The ALJ finds it

more likely than not Claimant's positive test was the result of his voluntary ingestion of marijuana.

30. With respect to cocaine, the ALJ finds that it is more likely than not that Claimant's urine toxicology test was positive due to his voluntary ingestion of cocaine. The concentration of cocaine in Claimant's system was equal to or greater than 300 ng/mL. No other credible explanation was offered for the positive test. The ALJ does not find Claimant's testimony that he had not used cocaine during the weekend before the accident credible. Although the evidence establishes it is more likely than not Claimant had cocaine and marijuana in his system of sufficient levels to result in a positive test at 2:50 p.m. on the date of the accident, there is insufficient evidence to establish that Claimant was impaired by either marijuana or cocaine at the time of the accident, or that his ingestion of cocaine caused or contributed to the motor vehicle accident on April 24, 2023.

31. That Claimant did not receive a citation for drug or alcohol-related offenses neither proves nor disproves that Claimant was impaired at the time of the accident. Colorado State Patrol arrived at the scene at 11:41 a.m., on April 24, 2023, 15 minutes after Claimant was transported from the scene, and five minutes after Claimant arrived at Sky Ridge. Thus, there is no credible evidence Claimant had direct interaction with law enforcement at the scene. (Ex. 4, 5 & 8).

32. With respect to alcohol, the ALJ finds that there is insufficient evidence to establish that Claimant was under the influence of alcohol at the time of the accident. The blood toxicology report indicates alcohol at a level of less than 3 ng/dL, a level that is less than 30% of the threshold level for a positive test (*i.e.*, 10 ng/dL). The EMT report from the accident indicated that Claimant's throat was examined, and no odor was detected. If, as Respondents contend Claimant was under the influence of or impaired by alcohol at 11:00 a.m., on a Monday morning, one would expect an EMT to detect the odor of alcohol on a throat examination, and include that in the Claimant's medical record. Moreover, although Claimant's medical providers indicated multiple times that Claimant's toxicology screens were positive for cocaine, marijuana, and opiates, none of the providers indicated that Claimant was positive for alcohol.

33. The parties stipulated that a duplicate sample of Claimant's April 24, 2023 urine toxicology tests was not preserved.

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).

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation "[w]here injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." "Under § 8-42-112(1)(b) it is the respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule." *Horton v. Swift and Company*, W.C. No. 4-779-078 (ICAO, Apr. 21, 2010). A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining v. Indus. Claim Appeals Office*, 907 P.2d 715 (Colo. 1995). However, where an employer does not consistently and sufficiently enforce the rule, the employer effectively acquiesces in employee non-compliance, and therefore may not rely on the rule as a basis for reducing benefits under § 8-42-112 (1)(b), C.R.S. *In re Burd v. Builder Services Group, Inc.*, W.C. No. 5-058-572-01 (ICAO Jul. 9, 2019). "The question of whether the employer permitted noncompliance with its own safety rule and acquiesced in the violation is one of fact for resolution by the ALJ, and her determination must be upheld if supported by substantial evidence in the record." *In re Claim of Ronzon*, W.C. No. 4-914-996-01 (ICAO Nov. 6, 2014).

Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alvarado*, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995).

Respondents have failed to establish that Claimant's injuries resulted from Claimant's failure to obey a safety rule. Although the evidence establishes that Claimant did violate a reasonable rule adopted by the employer for the employee's safety by operating a company vehicle with cocaine and marijuana in his system, Respondents have failed to establish that Claimant's injuries were caused by that violation.

No credible evidence was admitted establishing the cause of Claimant's motor vehicle accident. Claimant had no memory of the accident, and the Crash Report describing the accident does not explain the cause of the accident. Moreover, while the urine drug screens performed at Sky Ridge the day of the accident show the presence of cocaine, and marijuana in Claimant's urine, the levels of the substances shown on the test were not explained by the evidence. Dr. Primack testified that cocaine is detectable in urine up to 14 hours after ingestion, marijuana is detectable for 14 days after ingestion. Thus, while the urine toxicology report demonstrates the presence of the substances, there is insufficient evidence to establish that Claimant was impaired at the time of the accident.. To ascribe the cause of the accident to Claimant's the presence of an unknown concentration of illicit substances is speculative, and insufficient to establish causation. The ALJ concludes that Respondents have failed to establish Claimant's injuries resulted from a willful failure to obey a safety rule. Respondents' request to reduce Claimant's compensation by 50% for violation of a safety rule is denied.

Application of § 8-42-112.5, C.R.S.

Respondents have failed to establish that Claimant's nonmedical benefits should be reduced by 50% pursuant to 8-42-112.5, C.R.S. Section 8-42-112.5 (1), C.R.S. states:

> Nonmedical benefits otherwise payable to an injured worker are reduced fifty percent where the injury results from the presence in the worker's system, during working hours, of controlled substances, as defined in section 18-18-102 (5), C.R.S., that are not medically prescribed or of a blood alcohol level at or above 0.10 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests. A duplicate sample from any test conducted must be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense. If the test indicates the presence of such substances or of alcohol at such level, it is presumed that the employee was intoxicated and that the injury was due to the intoxication. This presumption may be overcome by clear and convincing evidence.

Respondents' position fails for two reasons. First, as discussed above, Respondents have failed to establish that Claimant's injuries "result[ed] from the presence in the worker's system" of alcohol or controlled substances, as required by 8-42-112.5."

Second, application of the intoxication presumption of section 8-42-112.5 requires that a duplicate sample of any test performed must be preserved and made available to the worker for the performance of a second test. Here, it is undisputed that no second sample was preserved. Where a duplicate sample is not preserved, toxicology results may not be used to reduce a claimant's benefits under 8-42-112.5, C.R.S. *Skywest Airlines, Inc. v. Indus. Claim Appeals Office*, 487 P3d 1267 (Colo. App. 2020). Accordingly, Respondents' request to reduce Claimant's non-medical benefits pursuant to 8-42-112.5, C.R.S., is denied.

Responsibility For Termination & Temporary Total Disability Benefits

The Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); The termination statutes -- §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. -- provide: "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." *See also In re of Davis*, W.C. No. 4-631-681 (ICAO Apr. 24, 2006).

"Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment." *Gilmore*, 187 P.3d at 1132. "Generally, the question of whether the claimant acted volitionally, and therefore is 'responsible' for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances." *Gonzales v. Indus. Comm'n*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Constr. Co.*, W.C. No. 4-487-966 (ICAO Nov. 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAO April 12, 2011). Implicit in the termination statutes is a requirement that Respondents prove Claimant committed an "act" which formed the basis for his termination. Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Trans., Inc. v. Indus. Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Respondents have established by a preponderance of the evidence that Claimant is responsible for his termination of employment. Employer has adopted and published policies in its Company Handbook, which identifies as grounds for termination, an employee "possessing in their body or body fluids any detectable amount …. Any form of illegal drug." Although Employer's policy does not define the term "illegal drug," any reasonable construction of the rule would include cocaine, as the substance is illegal in Colorado. Arguably, "illegal drug" may not include marijuana, due to its legal status in Colorado. As found, Claimant's testimony that he was not aware of Employer's "zero tolerance" policy is not credible. Given that Claimant submitted to a pre-employment drug screen, and the Employer's Drug and Alcohol policy is contained in the Employer's

Company Handbook, Claimant knew or should have known that a drug test revealing the presence in his system of cocaine while operating a company vehicle would result in termination of his employment.

Claimant's urine toxicology test established the presence in his body of cocaine (and marijuana). As such, the ALJ finds it was more likely than not Claimant ingested these substances at sufficiently close in time to his motor vehicle accident that the substances remained in his system at the time of the accident.

Claimant's denial of the use of these substances is not credible, and it is highly unlikely that Claimant would have false positive tests for two substances on the same day. As found, Claimant admitted to his medical providers daily use of marijuana, which would explain the presence of the drug in his system. Although Claimant denied use of cocaine the weekend before the injury, the ALJ does not find his testimony credible, and no other plausible explanation for the positive test was identified. That the urine drug screens performed at the hospital are identified by the hospital as "preliminary" is of no importance in the context of termination from employment, and Employer is not bound by the hospital's characterization of the tests as preliminary. Nor was employer obligated to obtain or maintain a second sample to terminate Claimant's employment.

The ALJ concludes that Claimant was responsible for his termination by ingesting cocaine and marijuana sufficiently close in time to being on-duty for Employer that the substances remained in his system, in violation of Employer's Drug and Alcohol Policy. Because Claimant's termination was not the result of his work injury, Claimant's TTD benefits may be terminated pursuant to § 8-42-105(4), C.R.S.

Notwithstanding Claimant's responsibility for his termination, Respondents ability to terminate Claimant's temporary total disability benefits is not absolute. To terminate TTD benefits under § 8-42-105 (4), C.R.S., an injured workers' wage loss must "result" from the termination, rather than the work-related injury. "[W]age loss does not 'result' from a termination if the injury had totally disabled the claimant such that he is not capable of performing any employment. In that situation, the wage loss stems entirely from the disability caused by the injury, not the claimant's conduct in causing the loss of prior employment." *Selvage v. Terrance Gardens*, W.C. No. 4-486-812 (ICAO Sep. 23, 2002). Thus, TTD benefits may not be terminated under 8-42-105 (4), C.R.S., until an injured worker is able to work in some capacity. *See Frisch v. Berwick Electric Co.*, W.C. No. 5-033-012-02 (ICAO Oct. 11, 2018).

Once an injured worker is released to modified duty, TTD benefits may properly be terminated under 8-42-105 (4). *See Gilmore*, 187 p.3d 1129. Claimant's case is factually similar to *Gilmore*. In that case, the claimant sustained admitted injuries while working as a carpenter. The claimant tested positive for marijuana on the date of his injuries, and was terminated pursuant to the employer's "no tolerance" drug policy. At the time of his termination, the claimant was unable to work due to his injuries. The ALJ awarded TTD benefits for the period of time claimant was unable to work. However, once the claimant was released to modified work, the ALJ ordered that TTD benefits stopped. In upholding the ALJ's decision, the Court of Appeals explained: "Had claimant not

precipitated is termination by engaging in activities that violated employer's no-tolerance drug policy, he could have been offered modified work by employer. The fact that he was not offered modified employment because he had been terminated has no bearing on the critical fact that he was physically able to work." *Gilmore*, 17 P.3d at 1132.

Claimant was physically unable to work following his accident until September 14, 2023. On that date, Claimant's treating providers released Claimant to modified duty, PA Anderson noted that Claimant could work his entire shift, but could not drive or bear weight. These restrictions were consistent with the findings of other providers around this time, including Dr. Chan and Dr. Resig. Dr. Resig's records demonstrate that Claimant's primary issue by September 2023 was addressing stiffness and AVN in his right ankle. Dr. Chan indicated on September 11, 2023, that Claimant's most significant issue was his right ankle, but noted no restrictions. After September 14, 2023, Claimant remained on the same work restrictions until January 3, 2024, when his restriction was modified to include seated duties, and use of a walker. The ALJ concludes that the restrictions of no driving, seated work, and no weightbearing do not rise to the level of a total disability which prevented the Claimant from working in any capacity. Thus, Claimant was able to perform work in some capacity as of September 14, 2023.

The ALJ concludes that Respondents must pay Claimant's temporary total disability benefits for the period of time he was unable to work due to his work injuries until Claimant was able to work in some capacity. Specifically, Claimant is entitled to temporary total disability benefits from April 24, 2023 to September 14, 2023. As of September 14, 2023, Claimant's physical condition permitted him to work in some capacity, and as such, his loss of income after that date was attributable to his termination, rather than his industrial injury.

ORDER

It is therefore ordered that:

1. Respondents' request to reduce Claimant's temporary benefits by 50% for violating a safety rule is DENIED.

2. Respondents' request to reduce Claimant's nonmedical benefits pursuant to § 8-42-112.5, C.R.S., is DENIED.

3. Respondents shall pay Claimant temporary total disability benefits for the period of April 24, 2023 through September 14, 2023, at which time Claimant's entitlement temporary total benefits terminates pursuant to § 8-42-105(4), C.R.S.

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

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

DATED: March 18, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-244-845-002

ISSUES

- Did Claimant prove she suffered a compensable injury on July 5, 2023 or July 6, 2023?

- If Claimant proved a compensable injury, the parties stipulated she is entitled to an unspecified period of temporary disability benefits, and agreed to reserve the issue for future determination.

- Dr. Ritch placed Claimant at MMI and Respondents initiated the DIME process. The DIME process was subsequently held in abeyance by a prehearing conference order, pending resolution of the threshold compensability issue.

FINDINGS OF FACT

1. Claimant is a Deputy Sheriff assigned to Floor Security at the [Redacted, hereinafter EJ]. On the morning of July 5, 2023, Claimant responded to a "Code Red" for a fight between inmates. Claimant ran up a flight of stairs to a jail cell where the fight was occurring. While running up the stairs, Claimant felt a "tweak" in her low back. Other deputies had already broken up the fight by the time she arrived.

2. Claimant advised a fellow Sergeant that she hurt her back and completed an incident report. She did not feel the symptoms were severe enough to warrant medical attention and finished her shift without difficulty.

3. At work the next day (July 6), Claimant was called to assist another deputy with removing an inmate from the medical ward. The inmate was suspected of pocketing medication with the intent to sell it to other inmates. The inmate was already in handcuffs when Claimant arrived to assist. Despite being handcuffed, the inmate remained combative and resisted being moved. Claimant put the inmate in a "M.A.C.H. 1" hold to maintain control. Two other deputies were present to help restrain and move the inmate to a solitary detention cell. They had to cut the inmate's shirt off and the inmate resisted during the entire episode.

4. Claimant's back symptoms immediately worsened after the July 6, 2023 incident. She did not file a second report, believing that the report filed for the July 5 incident was sufficient and that the pain was simply a continuation of the strain she suffered the day before. Claimant called off her next shift (Friday, July 7, 2023), as her pain had increased, particularly in the lower right back area with some radiation into the buttock area. Claimant was not scheduled to work on the weekend and assumed her symptoms would improve. Claimant tried to work on Monday, July 10, but requested an assignment to a non-responding ward because of her back pain. She could not finish her shift on that day because of pain.

5. Claimant requested treatment and was referred to Concentra. At her initial visit on July 14, 2023, Claimant said her pain began on July 5 while running up a flight of stairs to respond to a fight. She did not mention the July 6 incident. She reported right-side low back pain radiating to the right leg. The pain was worse with driving and prolonged sitting, standing, and walking. Examination showed soft-tissue tenderness to palpation around L4-5 on the right, and painful range of motion. Strength and sensation were normal. Claimant was diagnosed with a low back strain and referred to physical therapy. She was given work restrictions of no lifting over ten pounds and allowance for position changes every 15 minutes, including laying down as needed.

6. Claimant was seen at the UC Health Emergency Room on July 17, 2023 with complaints of severe right-sided low back pain radiating to her right leg. The symptoms were gradually worsening. The emergency room physician documented that the pain started after breaking up an altercation at the jail where she works. The examination findings were similar to the July 14 evaluation at Concentra, with right-sided lumbar paraspinal soft-tissue tenderness. A lumbar CT showed no acute pathology.

7. Claimant started seeing Dr. Erik Ritch on July 19, 2023. She reported "fairly significant pain," worsened by prolonged sitting and standing. Dr. Ritch observed that Claimant moved guardedly and had difficulty getting on the exam table. She was tender to palpation around the right paraspinous muscles from around L3 to S1, and over the right buttock. Claimant again related the onset of symptoms to running to an incident at work. Dr. Ritch opined, "the patient's injury was sustained during the normal course and scope of employment, and as such, should be considered a work-related injury." He referred Claimant to PT and took her off work.

8. Claimant followed up with Dr. Ritch on July 27, 2023. PT had helped her low back symptoms a bit, but the leg symptoms were unchanged. Claimant said she had neglected to tell Dr. Ritch at her prior visit "about a further altercation she was involved in the day after her 7/5/2023 injury. . . . [S]he was involved in forcibly removing an inmate from the medical area . . . . During this time, she was violently shaken and thrown up against the wall on multiple occasions. This worsened her symptoms." Dr. Ritch ordered a lumbar MRI.

9. The MRI was completed on August 2, 2023, and was initially interpreted as normal. However, the radiologist reviewed the images again on August 10 and noted annular tears at L4-5 and L5-S1, and mild facet joint arthritis on the right side at L4-5 and L5-S1.

10. Dr. Ritch released Claimant to part-time work on September 12, 2023.

11. On September 25, 2023, Claimant was evaluated by Dr. Scott Primack on referral from Dr. Ritch. Dr. Primack opined that the MRI findings were "classic beginnings of degenerative disc disease." He further opined that neither incident at work would have caused, aggravated, accelerated, or exacerbated the lumbar spondylosis/arthritis. He concluded Claimant's symptoms and resulting treatment were not work-related.

12. Dr. Ritch placed Claimant at MMI, effective September 28, 2023, with no impairment, no restrictions, and no maintenance care. Dr. Ritch opined any ongoing symptoms were unrelated to the work-related injury.

13. Dr. John Raschbacher conducted a record review for Respondents, and concluded that Claimant suffered no work-related injury. He stated the video surveillance from July 5, 2023 showed Claimant "certainly was not running" to the Code Red. Regardless, he opined that walking quickly or running would not cause a lumbar injury.

14. The surveillance footage of Claimant responding to the "Code Red" on July 5 is in the record as Exhibit 13. Contrary to Dr. Raschbacher's assertion, this video shows Claimant running across the ward floor and up the steps. It appears Dr. Raschbacher viewed a different video.

15. Dr. Miguel Castrejon performed an IME for Claimant on November 6, 2023. Comparing the July 5 and July 6 incidents, Dr. Castrejon opined that the forceful bending and rotational motions during the July 6 event were more significant and are consistent with the development/worsening of right low back and right leg pain, which came on immediately following the second event. Dr. Castrejon opined that Dr. Primack failed to adequately consider the annular tears at L4-5 and L5-S1, which Dr. Castrejon considered "key to this case." Dr. Castrejon explaimed that annular tear can produce localized pain or radicular symptoms related to irritation of the passing nerve root (chemical radiculitis). Such pain may be acute if the tear occurs suddenly. Dr. Castrejon emphasized the substantial physical exertion by Claimant as she was subjected to forceful movements from the inmate's resistance. This caused a significant increase in low back pain that radiated down the right leg. Dr. Castrejon concluded that Claimant injured her lumbar spine as a combined effect of the activities of July 5 and July 6, 2023.

16. Dr. Primack issued a report on December 11, 2023, disagreeing with Dr. Castrejon's opinions. Dr. Primack disputed Claimant's description of ascending the stairs in a "hurried/running fashion," and stated unequivocally "this did not occur." It is unclear how Dr. Primack reached this conclusion, but it was probably based on Dr. Raschbacher's report. Dr. Primack thought this alleged inconsistency compromised Claimant's credibility. Dr. Primack opined the annular tears are incidental and "a very common finding in asymptomatic people." Dr. Primack maintained his opinion that Claimant suffered no work-related injury on July 5 or July 6, 2023.

17. Dr. Castrejon's opinions are credible and more persuasive than the contrary opinions of Dr. Primack and Dr. Raschbacher.

18. Claimant's testimony is credible.

19. Claimant proved she suffered a compensable injury to her low back on July 6, 2023. Although the July 5 incident probably occurred and elicited symptoms as Claimant described, she sought no treatment and suffered no immediate disability. The July 6 accident aggravated the condition, proximately causing disability and a need for treatment.

CONCLUSIONS OF LAW

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

If an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). 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. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-91-616-03 (ICAO, September 9, 2016).

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

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

As found, Claimant proved she suffered a compensable injury to her low back on July 6, 2023. Claimant's testimony is credible. Dr. Castrejon's opinions are credible and more persuasive than any contrary opinions in the record. Multiple examinations after the accident revealed findings consistent with a soft-tissue strain affecting the right side of Claimant's low back. There is no persuasive evidence these areas were symptomatic or limited Claimant's ability to perform a physically demanding job as a Deputy Sheriff before July 2023. The argument that Claimant's pain is solely related to pre-existing mild degenerative changes that spontaneously and coincidentally became symptomatic at work is not persuasive. Claimant has consistently stated her back pain started on July 5 while running to the Code Red call and worsened over the next several days. Claimant did not initially emphasize the July 6 incident because, in her mind, the July 6 aggravation

and the subsequent progression of symptoms were all part and parcel of the initial event. Nevertheless, the July 6 incident is more appropriate with respect to determining a specific date of "injury." Although the July 5 incident probably occurred and elicited symptoms as Claimant described, she sought no treatment and suffered no immediate disability. The July 6 accident aggravated her condition, proximately causing disability and a need for treatment. Therefore, the preponderance of persuasive evidence shows that Claimant had a compensable "injury" on July 6, 2023.

ORDER

It is therefore ordered that:

1. Claimant's claim for a low back injury on July 6, 2023 is compensable.

2. The stay of the DIME process is lifted.

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

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

DATED: March 19, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-225-262-001

ISSUES

1. Whether Respondents established by clear and convincing evidence that the impairment rating assigned by Division Independent Medical Examination physician, Robert Mack, M.D., was incorrect.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on December 14, 2022, when he fell from a height of approximately four feet onto a steel crane track (similar to a train track), landing on his back. As a result of the incident, Claimant sustained fractures to his third and fourth lumbar spine transverse processes, and a fracture of the left 9th rib.

2. Claimant was initially seen at St. Joseph Hospital on December 14, 2022, where x-rays showed acute fractures of the left third and fourth lumbar spine (L3 and L4) transverse processes, with overlying subcutaneous edema. (Ex. 7). Claimant was released without treatment. (Ex. 9).

3. Claimant then initiated treatment at SCL Health Wheat Ridge with Hyeongdo Kim, D.O., (Claimant's primary ATP) and was provided muscle relaxers and taken off work. Claimant was later referred to Yusuke Wakeshima, a physical medicine and rehabilitation doctor on January 13, 2023. He was provided an electronic stimulation unit for symptomatic relief, and treated with conservative measures. (Ex. 9).

4. On March 3, 2023, Dr. Kim noted that Claimant had shown significant signs of improvement, with decreasing pain and improved mobility. Dr. Kim placed Claimant at maximum medical improvement (MMI), and assigned Claimant a permanent impairment rating. Dr. Kim assigned Claimant a 5% whole person impairment rating for fracture of the posterior elements of the lumbar spine under AM Guides Table 53, I.B. Dr. Kim also performed lumbar range of motion measurements which resulted in a 0% impairment rating under Table 60 of the AMA Guides. (Ex. 9).

5. At Claimant's On March 16, 2023 visit with Dr. Wakeshima, he noted that Claimant was working full-time without restrictions, and had no pain issues. Dr. Wakeshima discontinued the electronic stimulation unit, and noted that Clamant did not require further maintenance care. (Ex. C).

6. On April 18, 2023, Respondents filed a Final Admission of Liability, admitting for a 5% whole person impairment consistent with Dr. Kim's impairment rating. (Ex. 1). Claimant then requested a Division-sponsored Independent Medical Examination (DIME), which was performed by Robert Mack, M.D., on September 15, 2023. (Ex. 2).

7. In the interim, Claimant saw Dr. Wakeshima four additional times -- June, 12, 2023, July 10, 2023, August 7, 2023, and September 6, 2023. (Ex. 8). At these visits, Claimant

reported intermittent mild low back pain, with mild tenderness in the left lumbar paraspinal region. Claimant's highest reported low back pain level during this time was 2/10. At Claimant's September 6, 2023 visit, Dr. Wakeshima discharged Claimant from maintenance treatment. (Ex. 8).

8. On September 15, 2023, Dr. Mack performed the DIME examination. Dr. Mack assigned Claimant a 5% impairment under AMA Guides Table 53.I.B which provides for a 5% whole person impairment for "fracture of posterior elements (pedicles, laminae, articular processes, or transverse processes)." He also assigned Claimant a 10% permanent impairment rating for loss of range of motion of the lumbar spine (4% for lumbar flexion, 2% for lumbar extension, 2% each for right and left lumbar lateral flexion). Under the AMA Guides' combined values table, these impairment ratings combine for a 15% whole person impairment. (Ex. 5).

9. On September 26, 2023, the Division sent Dr. Mack an "Incomplete Notice-DIME Report," requesting that Dr. Mack correct or clarify his report to comply with Division Rules and guidance. In relevant part, the letter states:

> **Table 53 Impairments Due to Specific Disorders of the Spine:** A 5% was assigned for the IIB for Fracture of posterior elements. It appears from the narrative report that the patient had fractures to the L3 *and* L4 processes of the lumbar spine. Please note per the Level II Curriculum page 192: Posterior element fractures – Should be *combined* if multiple levels are involved. Thus in this case 5% for the L3 transverse processes combined with 5% for the L4 transverse processes should be 10% and not the 5% assigned.

(Ex. 4) (emphasis original).

10. On September 26, 2023, Dr. Mack responded to the Division by email, stating: "I disagree on the "Incomplete Notice" … The Table 53 sites [sic] I-B as Fractures of the posterior elements: pedicles, laminae, articular processes or transverse processes. It is my medical opinion that transverse process fractures are a significantly less injury then [sic] the other three listed. The clinical difference between one or two transverse process fractures at adjacent levels is clinically insignificant. Therefore, in my opinion, a 5% rating for [Claimant] is adequate." Dr. Mack refused to amend his report or change his assigned impairment rating, and requested that his email suffice to explain his rationale. (Ex. 5).

11. On October 5, 2023, the Division issued a notice that the DIME process had concluded, and that Dr. Mack had not provided a timely response to the September 23, 2023 Incomplete Notice. (Ex. 6).

12. Dr. Mack testified at hearing and was admitted as an expert in orthopedic surgery. Dr. Mack has performed DIME examinations for many years, but has not treated patients since 2010. Dr. Mack testified he evaluated Claimant's range of motion using an goniometer, and that in his opinion the Claimant's measurements were valid. He indicated he believed Claimant sustained soft tissue injuries in addition to the transverse process

fractures, which contributed to the loss of range of motion he found in Claimant's lumbar spine. He noted that Claimant's medical records documented edema, representing soft tissue injuries, and that scar tissue from the healing of these injuries would limit Claimant's range of motion. With respect to his assignment of an impairment rating for Claimant's transverse process fractures, Dr. Mack testified that he is not required to follow the AMA Guides, and is entitled to his opinion as the DIME physician.

13. On November 29, 2023, Allison Fall, M.D., performed an independent medical examination of Claimant at Respondents' request. Dr. Fall testified at hearing and was admitted as an expert in physical medicine and rehabilitation. She is level II accredited and familiar with the AMA Guides and its application. Dr. Fall testified that Dr. Mack erred in two respects. First, under the AMA Guides, Claimant should have received a 10% impairment rating for his two transverse process fractures (5% each).

14. Second, Dr. Fall testified that she believes Dr. Mack erred by attributing Claimant's lumbar range of motion deficits to his work-related transverse process fractures. Dr. Fall testified that after healing, a transverse process fracture would not be expected to result in lumbar flexion deficits, but could cause limitations in lumbar extension. She testified that on her examination, Claimant did not have lumbar extension deficits, and that the deficit she identified in extension could not be attributed to Claimant's work-related injury. However, in her examination report, Dr. Fall included a 4% impairment for loss of lumbar flexion in her impairment rating. (Ex. D). Dr. Fall's combined impairment rating was 14% -- 10% for two transverse process fractures, and 4% for lumbar range of motion deficits.

15. Dr. Fall opined that Claimant's lumbar range of motion limitations could pre-date his work injury and be attributable to other factors, including the Claimant's body habitus. Although, she acknowledged that she was not aware of evidence indicating Claimant had any prior back problems or treatment. In her report, Dr. Fall indicated that while it is possible Claimant did not have normal lumbar range of motion before his injury, that information is not known, and according to the AMA Guides, Claimant's whole person impairment would be 14%. (Ex. D). Dr. Fall's opinion that Claimant's may have had pre-existing range of motion deficits in his spine is speculative, and does not constitute clear and convincing evidence that Dr. Mack erred by assigning an impairment rating for lumbar range of motion deficits.

16. She also testified she did not believe Dr. Mack's range of motion measurements were correct, because Dr. Mack used a goniometer, rather than an inclinometer to assess Claimant's range of motion. She testified that a goniometer is used to measure range of motion for joints, and that spinal measurements should be performed using an inclinometer.

17. Under the AMA Guides, if Dr. Mack's 10% range of motion measurement is correct, combining it with a 10% impairment for two transverse process fractures results in a combined 19% whole person impairment under the AMA Guides.

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).

Overcoming DIME re: Whole Person Impairment Rating

A DIME physician's medical impairment rating may be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving &* Storage *Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship exists between an injury and a particular impairment must be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (Jan. 12, 2015). The rating physician's determination concerning the causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Indus. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

A DIME physician must rate a claimant's medical impairment in accordance with the AMA Guides. § 8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). However, deviation from the AMA Guides "does not compel automatically rejection of the DIME opinion." *In Re Gurrola*, W.C. No. 4-631-447 (ICAO Nov. 13, 2006). "Instead, the ALJ may consider a technical deviation from the AMA Guides in determining the weight to be given the DIME physician's findings…." *Id*. Whether the DIME physician properly applied the *AMA Guides*, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp., supra*; *Paredes v. ABM Indus.,* W.C. No. 4-862-312-02 (ICAO Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Indus. of Colo.*, W.C. No. 4-350-36 (ICAO Mar. 22, 2000).

The parties agree the DIME physician misapplied the AMA Guidelines in assigning Claimant a 5% impairment rating fractures of the L3 and L4 transverse processes. Under the AMA Guides, the Table 53.I.B., each transverse fracture constitutes a 5% whole person impairment rating. The note to Table 53.I.B., indicates that "When two or more vertebrae are compressed or fractured, combine all impairment values." Dr. Mack did not comply with the AMA Guides, and instead assigned a total 5% rating for the Claimant's transverse process fractures, reasoning that transverse process do not warrant a 5% rating per fracture, because did not deem them a significant enough injury to warrant the rating called for in the guide. Dr. Mack's rationale for deviation from the AMA Guides is unpersuasive, , and his impairment rating in this respect is clearly and convincingly incorrect. The ALJ finds Claimant's transverse process fractures should receive a 5% whole person impairment for each level.

With respect to the range of motion impairment rating, Respondents have failed to overcome the DIME physician's determination by clear and convincing evidence. Respondents' primary argument is that Claimant's lumbar spine range of motion deficits are unrelated to his work injury. Dr. Mack testified that he attributed Claimant's lumbar range of motion deficits to soft tissue injuries that occurred when Claimant fractured his transverse processes. The record does demonstrate that Claimant had edema in his lower back following his injury, which would be consistent with a soft tissue injury. Dr. Fall's testimony that Claimant's loss of lumbar range of motion was preexisting and

related to other causes, such as Claimant's body habitus, is speculative and not persuasive. Moreover, her opinion that Claimant's lumbar flexion deficit is unrelated to his work injury is inconsistent with the 14% impairment rating she assigned to Claimant in conjunction with her IME, which included a 4% impairment for lumbar extension deficits. The evidence does not demonstrate that it is highly probable that Dr. Mack erred in assigning Claimant a 10% impairment rating for lumbar range of motion deficits.

ORDER

It is therefore ordered that:

1. The DIME physician erred by assigning Claimant a 5% impairment rating for two transverse process fractures. Claimant is entitled to a 10% rating for these injuries.

2. Respondent has failed to establish by clear and convincing evidence that the DIME physician erred in assigning Claimant a 10% rating for lumbar range of motion deficits.

3. Under the AMA Guides, Claimant's 10% impairment his L3 and L4 transverse process fractures, and 10% impairment lumbar range of motion combine to result In a 19% whole person impairment rating.

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

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

DATED: March 19, 2024

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

ISSUES

1. Whether Claimant proved by clear and convincing evidence that the Division Independent Medical Examination (DIME) physician's opinion that Claimant is a maximum medical improvement (MMI) is incorrect.

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to medical maintenance benefits.

FINDINGS OF FACT

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

1. Claimant is a 33 year-old female who worked as a police officer for Employer.

2. On August 20, 2020, Claimant quickly exited her vehicle to arrest a suspect, and she felt a sharp pain in her left leg with a burning and pinching sensation. (Tr. 21:9-22:1).

3. Claimant reported the injury on August 21, 2020. She was assessed by a Registered Nurse who recommended Claimant be seen within the next four hours. Claimant selected Denver Health Center for Occupational Safety and Health (COSH), and was given their contact information. (Ex. A).

4. The first medical record from COSH admitted into evidence is from September 4, 2020. Kelsey Smithart, D.O., noted, however, that she had treated Claimant two weeks prior, and this was a follow-up appointment. (Ex. E). The ALJ infers Claimant first treated at COSH on or about August 21, 2020.

5. On September 4, 2020, Dr. Smithart noted Claimant injured herself two weeks prior when she jumped out of her squad car. Claimant's pain was initially in the posterior thigh, but she experienced increasing pain the following day. Several days after the visit, Claimant experienced increased swelling primarily in her popliteal fossa. Claimant had increased pain in her knee with a posterior pinch, and some pain in her left mid-hamstring. Claimant did not report hip pain. Claimant had begun physical therapy at the police academy, but was only able to get in one time per week. They reviewed Claimant's ultrasound and it showed a 20% rupture of her distal semimembranous. Dr. Smithart recommended physical therapy twice a week for four weeks. She also placed a referral to Michael Hewitt, M.D., an orthopedic specialist. (Ex. E).

6. Claimant attended eight physical therapy sessions between August 28, 2020 and October 16, 2020. At her October 9, 2020 visit, Claimant was feeling 80-90% better. (Ex. 10).

7. Claimant saw Dr. Hewitt on September 23, 2020, for an evaluation of her left knee. He noted she was exiting her vehicle, and felt a sudden onset of high hamstring and buttock pain in her left leg. She had been diagnosed with a hamstring tear. Claimant developed increased pain and weakness in her knee. Dr. Hewitt agreed that the MRI that had been ordered was medically appropriate. (Ex. H).

8. On October 16, 2020, Dr. Hewitt reviewed Claimant's MRI with her. He noted the MRI showed a small focal fluid signal with the posterior distal thigh, but there was no obvious mass. Claimant complained of intermittent posterior knee pain and occasional anterior knee popping. Dr. Hewitt noted that the focal fluid collection would be discussed with her radiologist. (*Id.*).

9. On November 16, 2020, Claimant had a follow-up appointment with Joan Mankowski, M.D. Claimant reported not limping, having no knee instability and no limited movement of the knee. She had no problems with on or off duty activities, although she had not resumed running. Dr. Mankowski released Claimant to full duty and instructed her to slowly resume running. (Ex. E).

10. Claimant testified that in December 2020 she called Dr. Mankowski's office and notified her that her knee had buckled and she needed an appointment. Claimant testified that she left voicemail messages for Dr. Mankowski and her nurse. (Tr. 50:12-51:2).

11. On January 28, 2021, Claimant had a follow-up appointment with Dr. Mankowski. According to the record, Claimant reported that her condition was worsening. She was working full duty. Claimant told Dr. Mankowski that the pain never fully resolved, but was getting worse and more intense. The record specifically states Claimant "reports no knee buckling or giving way, no catching or locking." Claimant did not feel any instability or looseness, and felt she could safely do her job. Dr. Mankowski referred Claimant to Dr. Hewitt for maintenance care. (Ex. E at 54-56).

12. There is nothing in the medical record to support Claimant's testimony that she left Dr. Mankowski voicemail messages regarding her knee buckling in December. Additionally, the January 28, 2021 medical record, directly contradicts Claimant's testimony. The ALJ does not find Claimant's testimony regarding her knee buckling to be credible.

13. On February 19, 2021, Claimant saw Dr. Hewitt for the final time. Claimant noted some improvement, but she still had left hamstring pain, which increased in December. She reported some intermittent left knee swelling. Claimant did not complain of left hip pain, nor did she report her left knee giving out any time previously. Dr. Hewitt noted Claimant had full range of motion of her left knee, and she was neurovascularly intact distally. Dr. Hewitt recommended a follow-up MRI. (Ex. 3 at 94).

14. Claimant had a follow-up appointment with Dr. Hewitt on March 8, 2021. Claimant still complained of pain in her hamstring. There is no indication in Dr. Hewitt's medical records that Claimant complained of any hip pain. They reviewed Claimant's recent MRI. Dr. Hewitt noted that the lesion was unchanged from her last visit, so he recommended she see Cynthia Kelly, M.D., an orthopedic oncologist. (*Id.* at 96).

15. Dr. Kelly evaluated Claimant on March 25, 2021. According to the medical record, Dr. Kelly was unclear whether the lesion itself was responsible for her pain. She told Claimant that vascular lesions can cause intermittent symptoms. Dr. Kelly recommended an interventional radiology schlerotherapy. On April 1, 2021, Dr. Kelly ordered a stat IR-embolization of left knee vascular lesion for Claimant. (Ex. 5 at 107-110). There is nothing in the medical record indicating Claimant complained of hip pain.

16. Claimant moved to Tennessee in late April 2021. She continued to follow-up with Dr. Mankowski via telephone. Dr. Mankowski referred Claimant for a second opinion from an orthopedic or vascular surgeon. She noted that Claimant had an appointment on August 19, 2021, with Lucas Richie, M.D., in Clarksville, Tennessee. (Ex. E at 83).

17. Dr. Richie evaluated Claimant on August 19, 2021. Claimant complained of left hamstring pain. She did not complain of hip pain. On examination, Claimant had full range of motion of the knee and hip. Dr. Richie referred Claimant to a vascular surgeon. (Ex. 5 at 111-112).

18. On November 9, 2021, Claimant saw Christopher J. Lucas D.O., a vascular surgeon, regarding the lesion behind her left knee. Dr. Lucas was very doubtful that the lesion, if it were a small AV malformation or varicose vein, would cause the constellation of symptoms Claimant was reporting. He recommended a CT angiogram of the left leg to evaluate for any significant vascular abnormality, and to reevaluate the muscles and other soft tissues in the thigh as well. (*Id.* at 114-116).

19. On December 9, 2021, Dr. Lucas reviewed the results of the angiogram with Claimant. Based upon his review of the images he found "no evidence of any type of vascular or other mass lesion as had been described on previous studies. All of the vascular structures appeared normal. Additionally, there [did] not appear to be any abnormality in the muscle or other soft tissues in the thigh." He opined that Claimant may have stretched and injured her sciatic nerve during the original incident. Dr. Lucas recommended Claimant see a neurologist. (*Id.* at 124-126).

20. On February 17, 2022, Claimant underwent a lumbar MRI. On March 2, 2022, Dr. Mankowski spoke with Claimant via telephone, and they discussed the lumbar MRI. Dr. Mankowski explained that the lumbar MRI findings did not correlate with Claimant's symptoms. She also told Claimant that the extensive medical evaluations Claimant underwent, failed to identify any specific lesions correlating with her symptoms. Dr. Mankowski advised Claimant she was medically discharged because she was at MMI. A renal lesion had been identified on the MRI, and Claimant was advised to follow up with her primary physician regarding this finding. Claimant was released to full-duty with no medical maintenance. (Ex. 2 at 82-85).

21. Respondent filed a Final Admission of Liability (FAL) on March 30, 2022, consistent with Dr. Mankowski's March 2, 2022 report. Respondent did not admit to maintenance medical care and noted Claimant had no permanent impairment. (Ex. C).

22. Claimant objected to the FAL and requested a DIME. Stephen D. Lindenbaum, M.D. was selected from the Panel as the DIME physician. He examined Claimant on August 19, 2022. Claimant told Dr. Lindenbaum that since her injury, the symptoms were not only in her lower leg on the left side, but also anteriorly on her knee as well as in the upper leg, radiating up to her hip region. Dr. Lindenbaum examined Claimant and noted she had no abnormalities on range of motion of either hip, and her left hip range of motion was comparable to the right hip. There were no sciatic symptoms or low back pain with bilateral straight leg raising. He further found "no evidence of any popliteal swelling. The vascular examination is normal. She has full flexion and extension and compared the same as the right lower extremity at the knee. There is no knee effusion. There is no pivot shift, Lachman or McMurray. Her left knee exam shows full extension and 150 degrees of flexion. It should also be noted that in reviewing the old records, there is no significant note of any type of hip dysplasia." (Ex. 6 at 134-135).

23. Dr. Lindenbaum opined that Claimant's injury in this claim was a hamstring rupture and he agreed with Dr. Mankowski that Claimant reached MMI on March 2, 2022. Dr. Lindenbaum opined "[b]ased on the fact that this claimant has had an extensive workup of the lower extremity, I would agree with Dr. Mankowski's date of MMI of 3/2/2022; however, . . . I do feel because there was a lesion noted on MRI, which was not seen on CT that she would probably still need, under maintenance, to have that repeat of the MRI of that lower extremity fromm (sic) hip to knee with IV contrast." Dr. Lindenbaum agreed with Dr. Mankowski and did not give Claimant an impairment rating. (*Id.* at 135).

24. Under the section "Rational for Your Decision," Dr. Lindenbaum noted his concern regarding the mass identified on two MRIs. He opined that this "indicates that there is no significant vascular abnormality, but yet there still could be a soft tissue mass, which would be better recognized." He continued to opine that Claimant was at MMI, "however based on the symptoms she continues to have I think that [it] would be better to repeat that under maintenance. If indeed the MRI is abnormal, I would have her definitely be seen by Dr. Kelly or another orthopedic oncologist (this recommendation) is just to be sure that this is nothing more than a hamstring rupture which requires no further treatment." (*Id.*).

25. Under the section "Maintenance Care," Dr. Lindenbaum wrote "I think it is important for her to have repeat MRI of the left lower extremity that would include from the hip down to the knee on the left side with contrast. If indeed the study is negative for any masses, then she would definitely be at MMI, but if she had any abnormality on that exam other than interpretation of a hamstring residual rupture, I would recommend that she be seen by Dr. Kelly or another orthopedic oncologist." (*Id.* at 136).

26. The ALJ finds that Dr. Lindenbaum's opinion Claimant was at MMI as of March 2, 2022, is clear and not ambiguous. Even though Dr. Lindenbaum recommended additional treatment under "maintenance care," this has no effect on the MMI date of March 2, 2022.

27. On November 9, 2022, Dr. Mankowski ordered an MRI of Claimant's left lower extremity from the hip to the knee with contrast. She specifically noted the referral was for an MRI of the left hip and an MRI of the left knee. Dr. Mankowski also asked the radiologist to compare the MRI to Claimant's prior left lower extremity MRI. (Ex. 2. at 88-89).

28. The ALJ finds that Dr. Mankowski ordered these MRIs based upon the recommendation of Dr. Lindenbaum.

29. Claimant had an MRI of her "left thigh" on December 19, 2022. The impression was "[n]o muscular or tendinous abnormality in the LEFT thigh. No space-occupying lesion identified at this time." (Ex. 4. at 103). There is no objective evidence that Claimant underwent an MRI of her hip on December 19, 2022.

30. Sometime in December 2022[1], Claimant fell down the stairs at her home. (Tr. 55:11-17). Claimant saw Kurtis Kowalski, M.D., at Tennessee Orthopaedic Alliance, on January 13, 2023. She told Dr. Kowalski that she slipped and fell on the stairs about four weeks prior, and her primary care provider diagnosed her with a coccyx fracture, so she was there for an evaluation. Dr. Kowalski took x-rays, and confirmed she had an oblique fracture of the distal sacrum/coccyx region. (Ex. 8).

31. Claimant continued to treat with Dr. Kowalski. At her February 10, 2023 appointment, she discussed her work injury and Dr. Kowalski note "[s]he apparently has some left nerve damage from a Workers' Comp related injury but this is outside of that realm currently." (*Id.* at 168).

32. On March 13, 2023, Claimant had an MRI of her left hip and an MRI of her left knee, both of which were ordered by Dr. Mankowski. Kevin Cunneely, M.D., interpreted the MRIs. His impression of the hip MRI was that Claimant had a suspected nondisplaced tear of the left anterior/superior acetabular labrum. (Ex. 4 at 104).

33. Shortly thereafter, on April 4, 2023, Claimant had a follow-up appointment with Dr. Kowalski for her coccyx fracture, and she reported "some left hip pain that has been going on for the past couple of years." (Ex. 8 at 176-177).

34. Dr. Kowalski referred Claimant to his partner Lucas Teske, M.D., for her left hip pain. Dr. Teske examined Claimant on July 24, 2023, and diagnosed her with left hip borderline dysplasia and a left hip labral tear. He recommended conservative treatment. (Ex. 8 at 201). Claimant saw Dr. Teske on September 25, 2023 for a follow-up appointment. He noted that she responded well to the cortisone injection, but the injection wore off, and Claimant wanted to proceed with surgery. (*Id.* at 237-238).

[1] Claimant testified she could not recall the exact date, but believed it was around December 9, 2022.

35. Claimant testified that she believes she tore her left labrum on August 20, 2020, when she was getting out of her police car. (Tr. 61:8-23). Claimant further testified that she had pain in her left hip consistently from the date of her injury to present. Claimant further testified that she reported her left hip pain to her medical providers at every visit. (Tr. 62: 4-10).

36. There is no objective evidence in the record that Claimant tore her left labrum on August 20, 2020 when getting out of the police car.

37. There is no objective evidence in the record that Claimant consistently reported hip pain to her providers. The ALJ does not find Claimant's testimony credible.

38. Dr. Teske's recommendation for surgical repair of Claimant's torn labrum is not evidence that Claimant is not at MMI.

39. Claimant has failed to prove by clear and convincing evidence that Dr. Lindenbaum's MMI date of March 2, 2022 is incorrect.

40. Claimant testified that in terms of maintenance care, she wants to see an interventional radiologist so she can receive a diagnosis of her knee injury and treatment plan. She also wants surgery to repair her torn labrum. (59:13-61:6).

41. Dr. Lindenbaum's recommendation for medical maintenance care was for Claimant to have a repeat MRI of her left lower extremity from the hip down to the knee to determine if there was a soft tissue mass. Claimant underwent the MRIs recommended by Dr. Lindenbaum.

42. Claimant failed to prove by a preponderance of the evidence that she is entitled to medical maintenance benefits.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in

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

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

DIME Opinion

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 Office,* 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,* WC 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

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 Office*, 487 P.3d 1007 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II), C.R.S. "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." *See Yeutter*, 487 P.3d at 1012. Accordingly, a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.*

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Indus. Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination

of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Eng'g v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). 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.*, WC 4-476-254 (ICAP, 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.*, WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002).

As found, Dr. Lindenbaum's opinion regarding MMI was not ambiguous. Dr. Lindenbaum recommended Claimant undergo an MRI of her left leg from hip to knee. An MRI is diagnostic, it is not medical treatment that would improve Claimant's condition. Moreover, Dr. Lindenbaum did not opine Claimant would not be at MMI if she obtained the MRI, nor did he opine Claimant would not be at MMI if the MRI showed an abnormality. He also did not opine Claimant would not be at MMI if Claimant was to see Dr. Kelly.

When Dr. Lindenbaum discussed the possible referral to an orthopedic oncologist, it was done explicitly in the Maintenance Care section of the DIME report. Dr. Lindenbaum's recommendations, if anything, would be expected to maintain MMI or to prevent a deterioration. In November 2022, Dr. Mankowski referred Claimant for the MRIs, but she did not take Claimant off MMI, or opine Claimant was no longer at MMI.

As found, Claimant's testimony that she consistently reported hip pain was not credible, and it is not supported by the medical records in evidence. There is no objective evidence in the record that Claimant's torn left labrum was caused by Claimant jumping

out of the police car on August 20, 2020. Thus, the recommended surgery to repair Claimant's torn labrum is not evidence that Claimant is not at MMI. Claimant has failed to establish by evidence that is unmistakable and free from serious or substantial doubt, that Dr. Lindenbaum's opinion she reached MMI as of March 20, 2022 is incorrect.

Medical Maintenance Treatment

The need for medical treatment may extend beyond the point of MMI where the Claimant requires periodic maintenance care to prevent further deterioration of his condition. *Grover v. Indus. Commission*, 759 P.2d 705 (Colo. 1988). The claimant must prove entitlement to Grover medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993). 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 (1979). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must show medical record evidence demonstrating the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1992). Such treatment becomes reasonably necessary where the evidence establishes that, but for a particular course of medical treatment, the claimant's condition can reasonably be expected to deteriorate, so that she will suffer a greater disability. *Id.*; *see also Hanna v, Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003).

Dr. Lindenbaum recommended Claimant have a repeat MRI of the left lower extremity from the hip down to the knee on the left side with contrast. If the study indicated any abnormality, he recommended Claimant be seen by Dr. Kelly or another orthopedic oncologist. As found, Claimant underwent the repeat MRIs, and there was not a need to refer her to Dr. Kelly. Claimant testified that she wants to see an interventional radiologist so she can receive a diagnosis of her knee injury and treatment plan. She also wants surgery to repair her torn labrum. There is no objective evidence in the record that a referral to an interventional radiologist will prevent a deterioration of her condition. As found, based on the totality of the evidence, Claimant's torn labrum is not related to this claim, and is not medical maintenance. Claimant has failed to prove by a preponderance of the evidence that she is entitled to medical maintenance treatment.

ORDER

It is therefore ordered that:

1. Claimant failed to prove by clear and convincing evidence that the DIME physician's opinion regarding MMI is incorrect.

2. Claimant failed to prove by a preponderance of the evidence that she is entitled to medical maintenance treatment.

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: March 19, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-211-157-002

ISSUE

- Did Respondents overcome the DIME's lower back rating of 23% by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant was employed as a journeyman millwright for the employer and sustained an admitted injury on July 11, 2022 when she was moving a heavy steel plate with another employee and the other employee let go of the plate unexpectedly. Claimant injured her low back as the other side of the plate fell.

2. Claimant treated at Midtown Occupational initially and later treated with Concentra. She was seen at Concentra on August 9, 2022 by Physician's Assistant Daniel Czarniawski. She was placed at maximum medical improvement (MMI) on August 9, 2022, at her request, with no impairment and no restrictions.

3. Respondents filed a Final Admission of Liability (FAL) on August 18, 2022 based on Dr. Bogart's report dated August 9, 2022. Claimant timely objected to the FAL and requested a DIME.

4. [Redacted, hereinafter DA], the employer's safety director testified that after Claimant was placed at MMI on August 9, 2022, she returned to her pre-injury employment and did not express any difficulty doing her regular work.

5. [Redacted, hereinafter TZ], a supervisor with the Employer, testified that on September 12, 2022 he observed Claimant moving a wagon full of heavy tools and equipment and told her that she was exceeding her restrictions by doing that.[1] TZ[Redacted] also disputed that Claimant injured herself on that same date while assisting pulling a three ton chain fall, contrary to the information she provided to her physicians at Parkview Medical Center.

6. Claimant returned to Concentra on September 22, 2022 for follow up of her low back strain. She told Mr. Madrid, the nurse practitioner, that she felt a pop in her low back area again one week ago while lifting a chain fall. Claimant was given work restrictions of no bending or lifting from the ground, no lifting, carrying, pushing or pulling over 25 pounds and no repetitive lifting.

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[1] This testimony is suspect since the Claimant was under no restrictions between August 9, 2022 and September 22, 2022, when the Claimant returned to Concentra and was given new restrictions apparently after the chain fall incident.

7. The Claimant returned to Concentra on December 27, 2022. The Claimant again complained of pain in her lower back and nausea related to the pain.

8. Dr. Jack Rook performed the DIME on January 23, 2023. Dr. Rook did not believe that Claimant was at MMI, but placed the Claimant at MMI, at her request. He determined that the Claimant had a 23% whole person impairment. Dr. Rook also recommended that the claim remain open so she could be seen at Concentra at three-month intervals to evaluate her physical status and comment on restrictions.

9. At the request of Respondents, Dr. Kumar performed an IME on June 29, 2023. Dr. Kumar reviewed the Claimant's medical records and performed an examination of the Claimant. Referring to the Claimant, Dr. Kumar stated "She has obtained an impairment rating of 23%based on her multiple subjective complaints and restricted lumbar spine motion and her non-dermatomal sensory loss." Dr. Kumar implies that the rating is undeserved since it is based on subjective complaints instead of objective finding and the dermatomal pattern does not make sense.

10. He goes on further to imply that Dr. Rook's rating defies explanation. (Hearing transcript p. 74). However Dr. Kumar does not state that Dr. Rook's impairment rating is clearly incorrect.

11. Dr. Rook testified that he strongly disagreed with Dr. Kumar's opinions. In response to Dr. Kumar's statement of Claimant's symptoms being "non-physiologic", Dr. Rook explained that there is significant pathology on the MRI of an annular tear with disc herniation migrating upwards. The July 26, 2023 MRI showed a "left foraminal disc extrusion extending cranially from the disc space measuring over a 1.2 cm dimension at the L2-L3 level with mild left foraminal stenosis, but no nerve compression. Dr. Rook explained that the disc has migrated in an area where it could be irritating the cauda equina which is consistent with Claimant's bilateral lower extremity neurological complaints due to irritation at that level.

CONCLUSIONS OF LAW

A. General Provisions

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

B. Burdens and standards of proof

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

Respondents challenge the impairment rating based on the testimony of their witnesses as to the lack of any objective loss of range of motion or pain behaviors subsequent to August 9, 2022. This testimony from the employer witnesses as to their casual observations is not persuasive. Nor does it rise to the level of clear and convincing evidence. Respondent failed to overcome the DIME's lumber rating by clear and convincing evidence. I further conclude that Dr. Kumar's opinions regarding the impairment rating given by Dr. Rook to be a mere difference of opinion. 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.*, WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004).

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME's 23% whole person lumbar rating is denied and dismissed.

2. Respondents shall pay interest at 8% for all compensation not paid when due.

3. All issues not decided in this order are reserved for future determination.

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

DATED: March 21, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-151-120-003

ISSUES

- Did Claimant prove she suffered a compensable injury to her left knee on August 7, 2020 arising out of and in the course of her employment with [Redacted, hereinafter CF]?
- Did Claimant prove [Redacted, hereinafter WM] is a statutory employer with respect to the left knee injury?
- Medical benefits.
- Average weekly wage.
- Temporary Total Disability benefits from February 4, 2021 through May 8, 2021.

PROCEDURAL ISSUES

During the January 26, 2023 hearing, it was learned that Claimant's actual employer, CF[Redacted], had an active bankruptcy case pending in the United States Bankruptcy Court for the District of Colorado, denominated Case No. 22-14958-MER. Pursuant to 11 U.S.C. § 362(a), filing a bankruptcy petition automatically stays the commencement or continuation of any judicial or administrative action against the debtor to recover a claim that arose before the commencement of the bankruptcy case. The ALJ agreed to receive the parties' evidence at the hearing, subject to further investigation into the status of the bankruptcy matter. At a post-hearing status conference on February 27, 2023, it was agreed that (1) the parties would forthwith file a motion for relief from the stay with the Bankruptcy Court, (2) no decision would be rendered regarding Claimant's workers' compensation claim without approval of the Bankruptcy Court.

Claimant filed a Motion for Relief from the Automatic Stay with the Bankruptcy Court on May 23, 2023. In her Motion, Claimant acknowledged that if the claim is found compensable only as to CF[Redacted], she is prevented from seeking to collect benefits from CF[Redacted]. However, "independently of recovering from [CF[Redacted]]," Claimant indicated her desire to pursue benefits from WM[Redacted] or the Colorado Uninsured Employer Fund

On October 11, 2023, the Bankruptcy Court entered an Order granting relief from the bankruptcy stay. Specifically, the court ordered:

> 1. [T]he automatic stay of 11 U.S.C. § 362(a) does not apply to the hearing in the workers' compensation claim . . . . and the Office of Administrative Hearings [sic] is free to issue an Order at its discretion and on whatever terms it deems appropriate without further notice or order of the Bankruptcy Court.

2. If following an Order from the Office of Administrative Hearings [Claimant] has a claim against [CF[Redacted]], the stay is in effect as to any collection efforts by [Claimant] against [CF[Redacted]].

FINDINGS OF FACT

1. CF[Redacted] was a mushroom farm that grew, harvested, and sold mushrooms to retailers, food distributors, and restaurants.

2. Claimant worked for CF[Redacted] as a mushroom harvester.

3. On August 7, 2020, Claimant injured her left knee at work when she lost her balance and twisted her knee.

4. There is no persuasive evidence that CF[Redacted] referred Claimant to any specific provider. Claimant saw Dr. Vaughn Jackson on August 12, 2020. Dr. Jackson diagnosed a knee strain and gave Claimant a cortisone injection.

5. An MRI on September 15, 2020 showed a lateral meniscus tear. Dr. Jackson referred Claimant to Dr. Jason Defee, an orthopedic surgeon. Dr. Defee recommended surgery.

6. Employer previously had workers' compensation coverage through [Redacted, hereinafter PL]. PL[Redacted] became involved in the claim, and Claimant was referred to Dr. Susan Geiger at the SLV Health occupational medicine clinic. On October 29, 2020, Dr. Geiger advised PL[Redacted] that Claimant's knee injury was work-related and that the recommended surgery was appropriate. Dr. Geiger gave Claimant work restrictions of no lifting over ten pounds, no standing or walking more than two hours per shift, no climbing ladders, no kneeling, crawling, or squatting, and no walking on uneven ground.

7. On further investigation, it was determined that CF's[Redacted] policy with PL[Redacted] had lapsed, and CF[Redacted] was uninsured on the date of Claimant's injury.

8. Dr. Defee performed an arthroscopic lateral meniscus repair on February 4, 2021.

9. There is no persuasive evidence that CF[Redacted] disputed its liability for Claimant's injury. CF[Redacted] directly paid $5,722.00 for medical bills, including the surgery.

10. Claimant's testimony is generally credible.

11. Claimant proved she suffered a compensable injury in the course and scope of her employment with CF[Redacted].

12. Claimant proved treatment she received from Dr. Jackson and San Luis Valley Health was reasonably needed and causally related to the compensable injury.

13. Claimant's earnings fluctuated from week to week, presumably depending on the available work. Claimant proposes calculating the average weekly wage based on her gross earnings in 2019, which is a reasonable approach. Claimant earned $31,231.22 in 2019, which equates to $600.60 per week. Claimant's average weekly wage is $600.60, with a corresponding TTD rate of $400.40 per week.

14. Claimant was off work for approximately three months after the February 4, 2021 surgery. Claimant is requesting TTD benefits from February 4, 2021 through May 8, 2021, which reasonably correlates to a 13-week gap on her earnings record. Claimant proved entitlement to TTD benefits from February 4, 2021 through May 8, 2021.

15. In August 2020, CF[Redacted] produced mushrooms for approximately 7 to 12 retailers and food distributors, including WM[Redacted], [Redacted, hereinafter SK], [Redacted, hereinafter FT], and several smaller companies. CF[Redacted] previously supplied mushrooms for [Redacted, hereinafter KR], although the contract ended sometime before 2020.

16. WM[Redacted] and CF[Redacted] executed a contract under which CF[Redacted] produced and packaged mushrooms for WM's[Redacted] "private label" brand, [Redacted, hereinafter TF]. The contract establishes standards for products sold to WM[Redacted], including allowed ingredients, a non-GMO requirement, product sustainability requirements, nutrition analysis, and taste standards.

17. The mushrooms CF[Redacted] sold to most customers were packaged in containers labeled with the CF[Redacted] company name and logo. However, mushrooms sold to WM[Redacted] were packaged in containers bearing the TF[Redacted] label. Similarly, mushrooms sold to KR[Redacted] during the pendency of its contract were labeled with KR's[Redacted] private brand name.

18. Claimant's supervisor instructed her to harvest certain types and sizes of mushrooms each day, based on orders CF[Redacted] received from its customers. The mushrooms were generally "picked to orders." Claimant had no control over the assignments and did not know which customers would be receiving the mushrooms she harvested on any given day. Claimant does not know whether the mushrooms she harvested on August 7, 2020 were shipped to WM[Redacted].

19. CF[Redacted] shipped mushrooms to WM[Redacted] under the TF[Redacted] label on August 10 and August 13, 2020. No mushrooms were shipped to WM[Redacted] on August 7, 2020.

20. There is no persuasive evidence that Claimant was harvesting mushrooms for WM's[Redacted] TF[Redacted] brand when the injury occurred. There is no persuasive evidence she harvested mushrooms destined for WM[Redacted] the day of—or even the week of—her injury. There is no persuasive evidence any mushrooms

harvested by any worker at CF[Redacted] on August 7, 2020 were shipped to WM[Redacted] under the TF[Redacted] label.

21. Claimant failed to prove WM[Redacted] is her statutory employer.

CONCLUSIONS OF LAW

A. Compensability

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

As found, Claimant proved she suffered a compensable injury in the course and scope of her employment with [Redacted, hereinafter CF]. Claimant's description of the accident is credible and consistent with her reports to multiple medical providers. A lateral meniscus tear was objectively verified by MRI and interoperative inspection. There is no persuasive evidence Claimant had any problems with her left knee before August 7, 2020, or of any alternate cause of the torn meniscus besides her work activities.

B. Medical benefits

The employer is liable for medical treatment from authorized providers reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a).

Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith" upon receiving notice of the injury, or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Providers also become authorized when the employer has expressly or impliedly conveyed to the employee that they are authorized to see a physician, or with full knowledge over a sustained period of time, has failed to object to a claimant's treatment with a physician. *E.g.*, *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Claimant proved treatment she received from Dr. Jackson and San Luis Valley Health was reasonably needed, causally related to the compensable injury, and authorized. No persuasive evidence was introduced that CF[Redacted] referred Claimant to any specific provider. Therefore, Claimant had the right to select her own physician. Claimant sought treatment at Jackson Medical Clinic and San Luis Valley Health after the injury. CF[Redacted] paid for treatment, including the surgery, with no indication it considered any of the providers to be unauthorized.

C. Average weekly wage

Section 8-42-102(2) provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Avalanche Industries v. Clark*, 198 P.3d 589 (Colo. 2008). The "entire objective" of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

Claimant's average weekly wage is $600.60. Her earnings fluctuated depending on the available work each week. Claimant's proposal to calculate the average weekly wage based on her gross earnings in 2019 is a reasonable approach. Claimant earned $31,231.22 in 2019, which equates to $600.60 per week, with a corresponding TTD rate of $400.40 per week.

D. TTD benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes them to leave work, and they miss more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions or limitations that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Claimant proved entitlement to TTD benefits from February 4, 2021 through May 8, 2021, when she was off work because of knee surgery.

E. Statutory employer

Under § 8-41-401(1)(a), a company that contracts out part or all its work to any subcontractor is considered the statutory employer of the subcontractor and the subcontractor's employees. If the subcontractor is uninsured, the subcontractor's employees may reach upstream to the statutory employer for workers' compensation benefits. *Finlay v. Storage Technology Corp*., 764 P.2d 62 (Colo. 1988). The purpose of the statutory employer provision is to prevent employers from avoiding liability for workers' compensation benefits by contracting out their regular business to uninsured independent contractors. *Id*.

The test for whether an employer is a "statutory employer" is whether the work contracted out is part of the employer's regular business as defined by its total business operation. *Finlay v. Storage Technology Corp., supra*; *Humphrey v. Whole Foods Market*, 250 P.3d 706 (Colo. App. 2010). In applying this test, courts should consider elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer. *Id*. The work must be "such a part of [its] regular business

operation as the statutory employer ordinarily would accomplish with [its] own employees." *Snook v. Joyce Homes, Inc*., 215 P.3d 1210, 1217 (Colo. App. 2009).

As found, Claimant failed to prove WM[Redacted] is a statutory employer with respect to her injury. Even if we accept, *arguendo*, the premise that growing, harvesting, and packaging produce is sufficiently integral to WM's[Redacted] regular business to render it a statutory employer, there is no persuasive evidence that Claimant was processing mushrooms bound for WM[Redacted] at the time of her injury.

This deficiency is fatal to the claim. Under the Act, a defining element of an individual's status as an "employee" is the performance of services "*for* another." Section 8-40-202(2)(a) (emphasis added). Although the statutory employer provision expands the pool of entities that can be deemed a claimant's "employer," the statute does not change the definition of an "employee," or obviate the fundamental requirement that an injury arise out of services performed "for" the putative employer. Uninsured subcontractors frequently provide services for multiple general contractors. But the fact that an uninsured subcontractor's employees are statutory employees of a general contractor on one job does not mean that same general contractor covers the employees universally on other jobs for other general contractors. The same logic applies in Claimant's situation.

F. Payment to the Division or a Bond

Claimant suffered a compensable injury and is entitled to benefits from an uninsured employer. Ordinarily, CF[Redacted] would be ordered to deposit funds with the Division or post a bond to guarantee the benefits awarded herein. Section 8-43-408(2). However, the bankruptcy stay bars any collection efforts against CF[Redacted]. Claimant requested relief from the bankruptcy stay for the "narrow" purpose of adjudicating compensability and eligibility for benefits in a manner that would not directly impact CF[Redacted]. Claimant did not request—and the Bankruptcy Court did not allow—relief from the stay that would allow any party to seek payment from CF[Redacted]. Therefore, no order will be issued requiring deposit with the Division or a bond pursuant to § 8-43-408(2).

ORDER

It is therefore ordered that:

1. Claimant's claim against CF[Redacted] for a left knee injury on August 7, 2020 is compensable.

2. Claimant is entitled to medical treatment from authorized providers reasonably needed to cure and relieve the effects of the compensable left knee injury, including charges from Jackson Medical Clinic and San Luis Valley Health.

3. Claimant's average weekly wage is $600.60, with a corresponding TTD rate of $400.40 per week.

4. Claimant is entitled to TTD benefits at the rate of $400.40 per week, from February 4, 2021 through May 8, 2021.

5. Claimant's claim for workers' compensation benefits from Whole Foods Market and American Zurich Insurance Company is denied and dismissed.

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

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

DATED: March 22, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-185-128-001

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 on or about February 22, 2021.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits to cure and relieve him of the effects of a February 22, 2021 injury.

3. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary disability benefits to compensate him for lost wages resulting from a February 22, 2021 injury.

4. Whether Claimant proved by a preponderance of the evidence that Respondents violated a statute, rule, or order justifying a penalty pursuant to § 8-43-304(1), C.R.S., for SL[Redacted] failure to carry workers' compensation insurance.

5. Which of Claimant's physicians are designated as authorized treating physicians.

6. What average weekly wage most fairly approximates Claimant's wage earning capacity.

FINDINGS OF FACT

1. This is a denied case involving an alleged date of injury of February 22, 2021. At the time of the alleged injury, Claimant was working for an uninsured employer who had been contracted to install doors in a construction project. Respondents are the statutory employer and its workers' compensation insurer.

2. On February 22, 2021, Claimant had been installing doors when he was allegedly injured. As he described it in his workers' compensation claim form, he was "[m]oving and lifting metal doors, installing door jams [sic], hanging doors. Drilling holes for closures on hardware. Change door openings to fit for jams for fire doors. Moving doors around according to fire ratings. Other duties, tile, painting." Claimant would later report to Dr. Tashof Bernton in a Respondents-sponsored independent medical examination that he stepped on plastic and fell onto his right elbow.

3. On February 22, 2021, Claimant saw his chiropractor Dr. Leah McAlpine complaining of aching discomfort in his neck and both shoulders. Dr. McAlpine noted that onset was "insidious" and "gradual and for the past month." The record does not document a work injury.

4. Claimant returned to the chiropractor for additional treatment several times over the next several months.

5. On April 5, 2021, Claimant underwent a cervical spine MRI. The results showed "multilevel degenerative disc disease greatest at C3-C4 level where there is severe facet arthropathy, severe facet stress response, and severe right foraminal stenosis."

6. After the April 28, 2021 appointment with Dr. Hoffman at Alpine Chiropractic, Claimant would not return to Alpine until November of that year, and Claimant pursued further treatment with his personal orthopedist in New York, Dr. Lou Rose. However, Dr. Rose referred Claimant for treatment with Dr. Jason Gallina.

7. On April 30, 2021, Claimant saw Dr. Gallina in New York. Dr. Gallina noted that Claimant had neck pain with associated numbness and paresthesias "down the arm." Dr. Gallina also reviewed the cervical spine MRI results. Dr. Gallina recommended a CT scan and X-rays of Claimant's cervical spine and suspected that Claimant may need a C3 through C5 anterior cervical discectomy and fusion (ACDF) surgery. The report did not address whether Claimant's condition was work-related.

8. Claimant underwent a CT scan of his head and neck several weeks later on May 15, 2021. The scan showed "moderate sized bridging anterolateral osteophytes at multiple levels in the mid to lower cervical spine. No evidence of fracture or subluxation. Mild multilevel degenerative changes."

9. Claimant returned to Dr. Gallina on May 28, 2021. Claimant's complaints remained unchanged. Dr. Gallina recommended Claimant proceed with an ACDF surgery. The report did not document any relationship between the condition and Claimant's work.

10. Claimant underwent the ACDF surgery on September 14, 2021.

11. On October 14, 2021, nearly six months after the alleged injury, Claimant filed a Worker's Claim for Compensation. Claimant indicated on the form that he sustained an injury on February 23, 2021. In the description of the injury, Claimant wrote, "Moving and lifting metal doors, installing door jams, hanging doors. Drilling holes for closures on hardware. Change door openings to fit for jams for fire doors. Moving doors around according to fire ratings. Other duties, tile, painting."

12. On November 10, 2021, Claimant underwent an MRI of the left shoulder. The MRI showed labral fraying and prior acromioplasty with what are described in the 2021 report as "postsurgical changes status post left shoulder rotator cuff repair with subscapularis and supraspinatus tendinopathy," as well as "chronically tom labrum" and the presence of a partial distal clavicle resection and acromioplasty.

13. On December 21, 2021, Dr. James Hoffman authored an e-mail that documented that Claimant first appeared in his office on February 22, 2021, complaining of left and right shoulder pain and neck pain with decreased range of motion of the cervical spine in all planes. Dr. Hoffman noted that Claimant's symptoms had worsened in April due in part to his work in the mountains doing construction. Dr. Hoffman also stated in the e-mail that he had reviewed an X-ray of Claimant's cervical spine and felt that the ACDF surgery seemed "excessive" based on the initial MRI impressions.

14. Claimant underwent a left shoulder MRI on January 25, 2023. The imaging was degraded due to motion artifact. Nevertheless, the radiologist noted postsurgical changes involving the posterior aspect of the glenoid with osteolysis around one of the suture anchors, supraspinatus tendinosis with low-grade partial-thickness articular sided tearing, infraspinatus tendinosis with postsurgical changes involving the posterior aspect of the glenoid, and degenerative changes of the acromioclavicular joint.

15. Claimant underwent an independent medical examination (IME) with Dr. Bernton on August 29, 2023, at Respondents' request. Dr. Bernton reviewed Claimant's medical records as well as several letters from Claimant's employer and statutory employer. One letter dated October 25, 2021, indicated that Claimant, at no point while working on site, reported having sustained an injury while working on site. To the contrary, the letter recounted that Claimant had injured his neck in a 2014 motorcycle accident and then reinjured his neck later while wrestling with a friend. In a separate letter, [Redacted, hereinafter CK], the project manager for what was presumably the project Claimant was working on, wrote that Claimant never reported having sustained an on-site injury. Instead, Claimant did mention that he had a bad neck from a motorcycle accident from prior to his work on site. Last, Dr. Bernton reviewed a letter from [Redacted, hereinafter SL], who stated in his letter that Claimant had been working for SL[Redacted] as a subcontractor and that Claimant reported to SL[Redacted] that he had injured his neck sometime around February 25, 2021, while roughhousing with roommates.

16. Dr. Bernton also took Claimant's medical history as reported by Claimant. Dr. Bernton noted in his report that Claimant denied any history of prior cervical complaints.

17. Dr. Bernton noted that Claimant had degenerative disc disease of the cervical spine at multiple levels, that Claimant had a disc osteophyte complex at C3-C4 resulting in severe right foraminal stenosis. Dr. Bernton noted that this could potentially be a cause of radiculopathy into the right arm, but that Claimant never had an EMG to confirm this. Dr. Bernton also reviewed the left shoulder MRI from 2021 showing labral fraying and prior acromioplasty. Dr. Bernton noted in his report that Claimant made no mention to Dr. Bernton of his history of a prior left shoulder surgery and that Claimant made no mention of any neck problems from

prior to February 2021. Additionally, Dr. Bernton observed that there was a chiropractor note from April 2021 documenting a worsening associated with further construction work performed in April 2021. Ultimately, Dr. Bernton concluded that it was unclear whether Claimant had sustained a work injury on February 22, 2021.

18. Dr. Bernton authored a supplemental IME report on October 31, 2023, based on review of additional records.

19. Dr. Bernton made reference to a letter from the employer dated October 25, 2021, that stated, "[Redacted, hereinafter FL] had explained to several [Redacted, hereinafter AT] staff that he had hurt his neck in a motorcycle accident prior to the project and later, he had re-injured himself while wrestling with a friend. . . . At no point did AT[Redacted] indicate that he had injured himself while working on the property."

20. Dr. Bernton also made reference to a statement by CK[Redacted] that stated, "I was project manager for AT[Redacted] for the Edison at Wheat Ridge project. Part of my duties was to interface with and direct [Redacted, hereinafter SM] and FL[Redacted] on a regular basis. At no time during the project did FL[Redacted] inform any of the AT[Redacted] management team of any injury sustained on site. He did, however, mention that he had a 'bad neck' from a motorcycle accident that happened prior to the period that he was on site at this project."

21. Last, Dr. Bernton made reference to a note from SL[Redacted], dated October 25, 2021, which stated, "FL[Redacted] worked for me as a 1099 subcontractor on a few jobs. We were working on the job on 38th and Wadsworth for AT[Redacted]. FL[Redacted] told me he had hurt his neck roughhousing with his roommates around the 25th of February."

22. Dr. Bernton's opinions remained largely unchanged, except that he opined that "with beyond a reasonable degree of medical probability" that Claimant did not sustain a work injury in February 2021 and that none of Claimant's medical treatment would therefore be related to a work injury.

23. Dr. Bernton later testified at hearing consistently with his reports. The Court finds Dr. Bernton's findings and opinions as expressed in his reports and testimony to be credible and persuasive.

Prior to Alleged Work Injury

24. On October 1, 2014, Claimant saw Dr. Paul Dicpinigaitis with complaints of left shoulder pain, stiffness, and weakness with overhead activity after injuring himself playing softball a year earlier. Claimant reported to Dr. Dicpinigaitis that he had a history of shoulder dislocation as well. The doctor noted "[p]ossible occupational use/overuse (construction." Dr. Dicpinigaitis reviewed a left-shoulder MRI from

December 2013 which, despite some motion artifact, showed a partial tear of the suprapinatus, a full thickness tear of the infraspinatus, small bursitis, possible nondisplaced greater tuberosity fracture, a Hills-Sachs deformity indicating prior dislocation, and "remodeling anterior inferior labrum suggesting remodeling from old injury."

25. Sometime in November 2014, Claimant underwent arthroscopic surgery of his left shoulder, which included subacromial decompression and rotator cuff repair. Claimant had a slow recovery over the next two months.

26. At a September 14, 2015 appointment with orthopedist Dr. Richard Seldes, Claimant complained of hip problems. Examination of Claimant's shoulders and neck showed full range of motion with no pain complaints

27. On April 28, 2016, Claimant saw Dr. Eugene Krauss. Dr. Krauss noted that since Claimant's left shoulder rotator cuff repair, Claimant had reinjured his left shoulder, resulting in a left clavicle fracture. Dr. Krauss noted that Claimant had undergone ORIF surgery to repair the fracture some seven months earlier. Claimant continued to complain of residual left shoulder pain with lifting and at the ends of Claimant's ranges of motion. Claimant was prescribed a bone stimulator to facilitate healing of his clavicle fracture. Claimant did eventually obtain the bone stimulator and reported significant improvement.

28. At some point, the hardware in Claimant's left clavicle from his ORIF surgery began to cause him pain. He underwent hardware removal surgery on January 3, 2017.

29. On February 18, 2020, Claimant underwent another left-shoulder MRI. The MRI noted moderate acromioclavicular joint arthrosis with mild subdeltoid/subacromial bursal edema but no discrete tendon tears.

The Hearing

30. At hearing, Claimant testified that on February 22, 2021, he was installing doors on a project when his injury occurred. Claimant was working six days a week for three or four months around the time of his alleged injury. Part of his job involved marking holes and pre-drilling the holes into porcelain. Claimant estimated that he would have to drill approximately twenty-four holes in each door and that he ultimately drilled what he estimated to be three thousand holes.

31. Claimant expressed during his testimony his frustration with the mismanagement of the project. He testified that inspectors were giving his employer a hard time and that the portion of the project he was working on had been poorly organized resulting in delays. Claimant testified that he worked alongside another employee, [Redacted, hereinafter JM], and that JM[Redacted] was present at all times, even when Claimant was on the phone for doctors' appointments.

32. Claimant testified that he saw Dr. Celia Hoffman on the date of injury and then later saw Dr. James Hoffman, both at Alpine Chiropractic. Claimant testified that he told Dr. Hoffman everything Dr. Hoffman needed to know. He also testified that he mentioned to Dr. Hoffman that he did not have insurance, and Dr. Hoffman inquired as to whether Claimant's symptoms were from a work injury.

33. Claimant testified that he underwent the ACDF neck surgeries on September 14 and 16, 2021 (back and then front). Claimant did not feel the surgery was elective since he felt things were getting worse. He testified that in the heat of June and July, he could not swallow. However, when he was on the job, he was in air conditioning. Claimant testified that the records showed there were bone spurs in his neck.

34. Regarding his history prior to the alleged injury, Claimant testified that he had worked as a stage hand. In that job, he had to put together structures for concerts and events. Claimant testified that around 1998 or 1999, he had a right shoulder surgery followed by left shoulder surgery six weeks later due to an injury sustained while playing softball. Claimant also denied having sustained any injury involving dirt bikes. He testified that when he met SL[Redacted] in January 2020, Claimant had been in a car accident but did not sustain any injuries as a result.

35. JM[Redacted] testified at hearing that he worked with Claimant on the project, including at the time of the alleged injury. He testified regarding the disorder and generally chaotic nature of the project. He testified that the plans were in shambles. He had been hired to install doors and jambs, all of which were scattered in the parking garage. He testified that it involved months of heavy lifting and that his own shoulders still hurt from taking doors apart and moving them to other buildings. Although their employer eventually obtained a door dolly for them, it was not until near the end of their job. JM[Redacted] also testified that the job was prolonged and the contract extended because trusses were not installed correctly.

36. Regarding the alleged injury itself, JM[Redacted] testified that he did not see the injury but only heard it and saw the "aftermath." He testified that the conditions were slippery, and that he could understand how Claimant would have slipped and hurt himself.

37. JM[Redacted]testified that after the alleged injury, Claimant had difficulty eating lunch and swallowing and that the employer brought on another employee because Claimant was not a full capacity. JM[Redacted] testified that a friend of JM[Redacted] provided Claimant with a referral for a chiropractor.

Ultimate Findings

38. The Court finds significant that early records make no reference to a work injury. For example, the report from Claimant's initial visit with Dr. McAlpine noted an insidious and gradual onset over the past month. Indeed, there is no medical record prior to Claimant's IME with Dr. Bernton that documented Claimant reporting his condition as being related to a work injury. The earliest written record of an injury is Claimant's October 2021 Worker's Claim for Compensation.

39. Further, the Court notes the inconsistency of Claimant's allegations even once he began reporting an injury. In the Worker's Claim for Compensation, Claimant made no reference to having fallen at the time of his alleged injury. It was not until the IME with Dr. Bernton that there is the first documentation of Claimant sustaining injuries from a fall.

40. The presence of other possible incidents near the time of his accident, including documentation from Claimant's employer that Claimant had been roughhousing with roommates or friends around the time of the alleged injury, also cast additional doubt as to what exactly caused Claimant to experience worsened pain.

41. The Court also finds significant that Claimant failed to mention to Dr. Bernton that he had prior neck problems and prior left shoulder surgery. In light of his inconsistent reports of how he was allegedly injured, the failure to mention these prior conditions cast doubt as to his reliability as a historian of his neck and shoulder conditions, and therefore very limited weight is afforded to his testimony.

42. Although Claimant presented the testimony of JM[Redacted] that Claimant in fact slipped and fell on the alleged date of injury, the quantity and quality of evidence to the contrary is significant. Furthermore, given that nearly three years had passed between the alleged injury and JM[Redacted] testimony, the Court infers that JM[Redacted] recollection of events have likely degraded or evolved to some extent with time, resulting in partially reconstructed memories—imperfect facsimiles of the original. While his testimony appears somewhat credible when taken at face value, the Court finds that contemporaneous records from near the alleged date of injury, by their contemporaneous nature, are not subject to the same degradation or evolution over time, and are therefore afforded greater weight in this case. To the extent that JM[Redacted] testimony conflicts with the medical records or the Worker's Claim for Compensation, the Court does not find JM[Redacted] testimony credible.

43. Ultimately, whether Claimant in fact sustained a workplace injury on February 22, 2021, or not, the evidence to support a finding in the affirmative is tenuous. Claimant has not proved by a preponderance of the evidence that he sustained a work injury on or about February 22, 2021.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

An injury must "arise out of and occur in the course of" employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. 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. *Popovich*, 811 P.2d at 383.

As found above, the preponderance of the evidence does not support a finding that Claimant sustained an injury arising out of and in the course of his employment on or about February 22, 2021.

Penalties

Section 8-43-304(1), C.R.S., provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S., is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005).

Whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo.App.2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo.App.1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo.App.2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo.App.2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital*, 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Claimant's argument for penalties appears to be based on either the failure of SL[Redacted] to maintain workers' compensation insurance or the failure of Employer AT[Redacted] to ensure that its subcontractor, SL[Redacted], carried insurance.

Regarding the first possible basis of Claimant's claim for penalties, the Court notes that SL[Redacted] was not a named party on Claimant's Application for Hearing, nor do the Application for Hearing nor the Notice of Hearing list SL[Redacted] on their certificates of service, and therefore SL[Redacted] did not have sufficient notice or the opportunity to be heard regarding Claimant's claim for penalties against him. The fundamental requisites of due process are notice and the opportunity to be heard. *See Nesbit v. Industrial Commission*, 607 P.2d 1024 (Colo. 1979). If an administrative adjudication turns on questions of fact, due process requires that parties be afforded a reasonable opportunity in which to confront adverse witnesses and to present evidence and argument in support of their position. *Puncec v. Denver*, 475 P.2d 359 (Colo.App.1970). Therefore, in the interest of protecting SL[Redacted] due process rights, the Court declines to address the issue of penalties against SL[Redacted].

Regarding the second possible basis for Claimant's claim for penalties, Claimant does not identify a specific provision of the Workers' Compensation Act that requires a party to ensure that its contractors carry workers' compensation insurance. The Court is not aware of any such provision. Furthermore, where a statutory employer becomes the employer for purposes of the workers' compensation claim by virtue of the employer-in-fact failing to carry workers' compensation insurance coverage, there is no uninsured employer for purposes of the workers' compensation claim, only an insured statutory employer. *Herriott v. Stevenson*, 473 P.2d 720, 722 (Colo. 1970)("Under [these] circumstances the subcontractor who has failed to keep his liability insured is an employee and the contractor-out is the only employer contemplated under the act."). In this case, Respondent AT[Redacted] did carry workers' compensation insurance and therefore did not violate that provision of the Act.

Because Claimant has not identified a cognizable basis for penalties against Respondents and has not provided sufficient notice to SL[Redacted], the Court declines to impose penalties.

ORDER

It is therefore ordered that:

1. Claimant did not sustain a compensable work injury on or about February 22, 2024.

2. Claimant has not proved entitlement to an award of penalties against SL[Redacted] or Respondent-Employer.

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: March 22, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-132-390-002

ISSUES

1. Whether Respondent established by clear and convincing evidence that the DIME physician's thoracic spine rating was incorrect.

2. Whether Respondent established by clear and convincing evidence that the DIME physician's lumbar spine rating was incorrect.

3. Whether Respondent established by a preponderance of the evidence that the DIME physician's right knee rating was incorrect.

4. Whether Respondent established by a preponderance of the evidence grounds for termination of medical maintenance care for Claimant's thoracic spine, lumbar spine, and right knee.

FINDINGS OF FACT

1. Claimant worked for Employer as a seasonal laborer. On October 11, 2019, Claimant was working in Washington Park in Denver, carrying bags of ice melt on his right shoulder and a 5-gallon bucket of ice melt in his left hand. Claimant slipped on ice and landed on a concrete surface. Claimant testified that while attempting to get up he fell two or three additional times, landing on his back and buttocks. Claimant reported the incident to Employer' "Ouch Line" and indicated he was experiencing pain in his buttocks, right elbow, "whole back," right knee, and that he may have hit his head. (Ex. A).

2. Claimant first sought medical treatment for his injuries with Joan Mankowski, M.D., at the Denver Health Occupational Clinic. Claimant reported pain in his right knee, right groin, right shoulder, and "a little" in his mid-back. Claimant reported that he had no prior right shoulder or back injury, but did have a neck injury approximately seven years earlier, that was treated with radiofrequency ablation. On examination, Dr. Mankowski noted mild tenderness to palpation of the thoracic spine, with full range of motion, and strength. Examination of Claimant's right knee was normal, with the exception of crepitus, and mild tenderness to palpation of the patellar tendon. Based on her examination, Dr. Mankowski assessed Claimant with thoracic spine pain, right knee pain, lower abdominal pain, and right shoulder pain. On November 4, 2019, Dr. Mankowski referred Claimant for physical therapy. On November 14, 2019, Claimant began reporting pain in his lower back, and intermittently reported it throughout the remainder of his treatment. (Ex. H)

3. Dr. Mankowski served as Claimant's authorized treating physician (ATP), and referred Claimant to different providers for treatment to various areas of injury. Physiatrist Robert Kawaski, M.D., orthopedic surgeon Andrew Parker, M.D., chiropractor Jason Gridley, D.C., Denver Health Physical Therapy, and ProActive Physical Therapy, and Winter Massage were each in the chain of referrals from Dr. Mankowski. Claimant's

treatment included treatment for his right shoulder, and a hernia, which are not at issue in this matter. Claimant also underwent treatment for a heart condition, including surgery, which affected his recovery from his work-related injuries.

4. At Claimant's January 6, 2020 appointment with Dr. Mankowski, he reported that his knee pain was better, and that he only had right knee pain in the anteromedial knee, without buckling, catching, or locking. Claimant had no limping or problems with stairs, and his examination was normal. (Ex. H).

5. On January 21, 2020, Claimant returned to Dr. Mankowski reporting that he had "hurt his right knee the last week while standing from a seated position at home and stepping back." Claimant reported pain in the below his patella, and was tender to palpation at the patella tendon and medial joint line. Dr. Mankowski characterized this incident as Claimant "tweak[ing] his right knee" and also noted his exam was "unchanged except for some tenderness to palpation." (Ex. H).

6. Thereafter, Claimant received treatment for his right knee through Dr. Parker, who diagnosed Claimant with arthritis of the right knee. Dr. Parker's treatment included an exercise program, physical therapy and visco-supplementation injections, which Claimant reported were only partially helpful. (Ex. J). At several of Claimant's visits, Dr. Parker noted mild effusion of the right knee with tenderness to palpation. (Ex. J & 6). On March 11, 2020, Dr. Parker performed a right shoulder arthroscopy. (Ex. H).

7. In June 2020, Dr. Mankowski referred Claimant to Dr. Kawasaki for back pain. Claimant's saw Dr. Kawasaki 23 times between September 2020 and October 2023. During these visits, Claimant consistently reported thoracic spine pain and lower back pain. Dr. Kawasaki referred Claimant for thoracic and lumbar MRIs which did not show acute pathology, but did demonstrate varying degrees of degenerative disc disease. (Ex. H).

8. During the course of his treatment, Dr. Kawasaki referred Claimant for chiropractic care with Jason Gridley, D.C. The admitted records include records of 40 chiropractic visits with Dr. Gridley from April 2022, through December 2023. On July 21, 2022, Dr. Gridley indicated that Claimant had reached maximum therapeutic benefit from his treatment, and that no further treatment was requested. Claimant returned three months later for additional treatment, and continued to see Dr. Gridley through December 2023. The vast majority of Dr. Gridley's reports include notation under "assessment" that Claimant had decreased pain, decreased range of motion and improved function after each visit. Dr. Gridley's records provide no credible objective information from which the accuracy of his assessments can be determined. Given that the assessments appear to be boilerplate language, the ALJ does not find Dr. Gridley's assessments credible. (Ex. 7). Claimant testified at hearing that he continues to see Dr. Gridley weekly for various modalities, and that he believes the treatment "helps a lot," but provided no credible testimony as to how his function improved or pain alleviated by these treatments.

9. Claimant also underwent several courses of physical therapy with Denver Health's Occupational Health Clinic, attending approximately 70 visits over a three-year time

period. Claimant attended 14 sessions of physical therapy from November 12, 209 through January 28, 2020. At these visits, Claimant reported thoracic and lumbar pain, right knee pain, and right shoulder pain. (Ex. H). Claimant attended 29 sessions of physical therapy between April 21, 2020 and August 18, 2020, which primarily focused on recovery from shoulder surgery performed by Dr. Parker in March 2020, although Claimant's reported back pain was addressed in physical therapy as well. Claimant returned to physical therapy again in April 2021, and completed 12 visits through July 26, 2021 focused primarily on his right shoulder. From March 30, 2022 through August 31, 2022, Claimant attended an additional 15 sessions of physical therapy at Denver Health. Finally, from December 2022 through January 2023, Claimant received physical therapy at ProActive Physical Therapy, which included treatment for his shoulder and back. (Ex. H & J).

10. On July 13, 2022, Claimant underwent an independent medical examination with Lawrence Lesnak, D.O., at Respondent's request. Based on his review of records and examination, Dr. Lesnak opined that Claimant likely sustained mild soft tissue injury to his lower thoracic paraspinal musculature and potentially a right shoulder strain/sprain. He also opined that Claimant may have potentially sustained a right knee sprain, but that the knee condition had "essentially resolved" by early January 2020, and that Claimant injured his knee at home in January 2020. He further opined that Claimant's right knee symptoms significantly worsened after injuring his knee at home, and that Claimant's right knee symptoms documented by Dr. Mankowski and subsequent treatment for Claimant's right knee were unrelated to the October 11, 2029 work-incident. Dr. Lesnak further opined that Claimant had reached maximum medical improvement (MMI), and that he required no further medical care for his lower thoracic spine, or right shoulder. He further indicated Claimant would qualify for a 3% impairment rating for his right shoulder, and no other impairment rating. (Ex. G).

11. On August 30, 2022, Dr. Mankowski indicated that Claimant was approaching MMI for all of the injuries he sustained on October 11, 2019, and indicated that any further knee treatment was likely due to degenerative changes in Claimant's knee. She referred Claimant to Dr. Kawasaki for an impairment rating. (ex. J).

12. On September 2, 2022, Dr. Kawasaki saw Claimant for an impairment rating. Dr. Kawasaki assigned impairment ratings for Claimant's right shoulder, right knee, thoracic spine, and lumbar spine. With respect to Claimant's right knee, Dr. Kawasaki indicated Claimant had underlying age-related arthritis and degeneration, which was aggravated by a knee strain causing ongoing symptoms which were treated through physical therapy and injections. He also diagnosed Claimant with thoracic and lumbar strains. He place Claimant at (MMI) effective September 2, 2022, and Dr. Kawasaki recommended maintenance care to include six chiropractic visits, and follow up with Dr. Parker over the following 12 months, which could include repeat knee injections. (Ex. J).

13. After Dr. Kawasaki placed Claimant at MMI, the Division-sponsored independent medical examination (DIME) process was initiated.

14. On April 7, 2023, Yusuke Wakeshima, M.D., performed the DIME, and issued a 36-page report with his findings. Dr. Wakeshima opined that Claimant reached MMI on October 6, 2022, and that Claimant warranted impairment ratings of the right shoulder, right knee, thoracic spine, and lumbar spine. He assigned Claimant a right shoulder impairment of 5%; a right knee impairment rating of 3%; a thoracic spine impairment rating of 2%, and a lumbar spine impairment rating of 10%. Claimant's combined impairment rating corresponds to a 17% whole person impairment rating.

15. In explaining his rationale, Dr. Wakeshima indicated that he had reviewed Dr. Lesnak's July 2022 report, and disagreed that only Claimant's right shoulder warranted an impairment rating. Dr. Wakeshima explained his rationale as follows:

> Upon my medical record review, the notes provided to review did clearly document that the patient was having right knee pain, right groin pain, and thoracic spine pain at the time of injury when he was initially assessed by Dr. Mankowski. In terms of mechanism of injury, the patient did slip on ice while carrying a significant weight load of 2 bags ice melt weighing approximately 65 to 80 pounds on his right shoulder in addition to a 5-gallon bucket filled with ice melt in his left hand. This additional weight could potentially exacerbate, and cause recurrent inguinal hernia as this added weight could potentially put a significant and profound strain to the inguinal region as he fell backwards. This added weight could also add to the injury to the patient's shoulder as he fell. The patient did land and impacted his mid to low back region on the edge of a sidewalk which could contribute to [his] thoracic and lumbar strain /sprain condition. The slip on the ice could certainly have twisted his knee and made a previous asymptomatic arthritic knee condition to become symptomatic. Therefore, I would conclude [sic] with Dr. Kawasaki's conclusions that the thoracic spine, lumbar spine, right shoulder, right knee all warranting an impairment rating. (Ex. H).

16. Dr. Wakeshima indicated that because Claimant was at MMI, further chiropractic or physical therapy would not be warranted. He recommended that Claimant concentrate on an independent home exercise program. He also recommend that Claimant follow up for one additional visit with Dr. Parker before October 2023. (Ex. H).

17. On December 12, 2023, Dr. Lesnak issued an addendum to his initial report, after reviewing additional records, and surveillance video. Dr. Lesnak again opined that no medical basis existed for Claimant receiving impairment ratings for his lumbar spine, thoracic spine, or right knee. In Dr. Lesnak's view, the surveillance video showed that Claimant had no impairment of any kind. (Ex. J). After viewing the video admitted as Exhibit M, which includes only one of the three surveillance videos apparently viewed by Dr. Lesnak, the ALJ finds that while the video surveillance admitted into evidence does not appear to demonstrate any impairment, the video surveillance does not show enough activity to demonstrate that Claimant has no impairment of any kind, as Dr. Lesnak opined.

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).

OVERCOMING DIME ON IMPAIRMENT RATING

Respondent contends the DIME physician incorrectly assigned impairment ratings for Claimant's right knee, thoracic spine, and lumbar spine, arguing that the conditions are not causally-related to Claimant's industrial injury.

Thoracic and Lumbar Spine Impairment Ratings

The finding of a DIME physician concerning a claimant's medical impairment rating

must be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and* Storage *Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v.* Industrial *Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

Respondent has failed to establish that the DIME physician erred in assigning Claimant impairment ratings for her thoracic and lumbar spine. Dr. Wakeshima's DIME report shows he conducted an extensive review of Claimant's medical records, and considered Dr. Lesnak's opinions in reaching his conclusions. Claimant's medical records demonstrate continuous reports of thoracic spine symptoms from the outset of his injuries, and intermittent lumbar spine symptoms beginning approximately one month after the initial injury. Dr. Wakeshima directly addressed the issue of the delay in reports of lumbar spine symptoms in his report, and opined that Claimant's symptoms were causally related to his October 11, 2019 fall at work. Dr. Kawasaki's determination of the body parts injured as a result of the October 11, 2019 fall is consistent with Dr. Wakeshima. Dr. Lesnak's opinions to the contrary reflect a difference of opinion with Dr. Wakeshima and Dr. Kawasaki, and do not rise to the level of clear and convincing evidence that the DIME physician's opinion that these conditions are work-related is incorrect.

Right Knee Impairment Rating

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries, such as Claimant's right knee. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of § 8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Indus. Claim Appeals Office*,

971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018).

Respondent contends Claimant sustained an intervening injury to his right knee in January 2020 which severed the causal connection between Claimant's industrial injury, and thus, the DIME physician incorrectly assigned a permanent impairment rating for Claimant's right knee. Respondents are only liable for the "direct and natural" consequences of the work-related injury. *Reynal v. Home Depot USA, Inc.*, WC 4-585-674-05 (ICAO, Dec. 10, 2012). An intervening injury may sever the causal connection between the injury and the claimant's temporary disability if the claimant's disability is triggered by the intervening injury. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Respondent has failed to establish that the DIME physician erred in assigning Claimant an impairment rating for Claimant's right knee. The record contains minimal evidence regarding Claimant's January 2020 non-work-related incident involving his knee. The medical records demonstrate that Claimant's right knee symptoms had improved by January 2020, and that his symptoms increased after an incident at his home where he "tweaked" his knee. Significantly, when Dr. Mankowski examined Claimant's right knee on January 21, 2020, she noted that his examination was unchanged from prior knee examinations, except for some tenderness to palpation. The only physician who has opined that Claimant sustained an injury to his right knee in January 2020 is Dr. Lesnak. However, Dr. Lesnak provided no cogent explanation of the new injury Claimant allegedly sustained, other than his understanding of Dr. Mankowski's description of Claimant's knee pain. Dr. Wakeshima reviewed Dr. Lesnak's report in conjunction with his DIME and obviously disagreed with Dr. Lesak's opinion that Claimant sustained a new injury to his knee in January 2020. While Dr. Lesnak's opinion is supported by medical records which demonstrate Claimant's pain and complaints increased after the incident in his home, the evidence is insufficient to establish that it is more likely than not Claimant sustained a new injury, rather than aggravating his work-related knee injury.

MEDICAL MAINTENANCE BENEFITS

Respondent requests that Claimant's maintenance care related to his thoracic spine, lumbar spine, and right knee be terminated. Respondent contends that Claimant sustained an intervening injury to his right knee, rendering his condition unrelated to his work-related injury of October 11, 2019, and that based on the opinions of Dr. Lesnak, Claimant requires no further treatment for his thoracic or lumbar spine. Respondent has not established a basis for the ALJ to terminate Claimant's right to reasonable, necessary, and related medical maintenance care for Claimant's knee, thoracic spine, or lumbar spine.

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the

reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). "An award of Grover medical benefits is typically general in nature and is subject to the respondent's subsequent right to challenge particular treatment." *Trujillo v. State of Colorado*, W.C. 4-668-613-03 (ICAO Aug. 21, 2021).

As noted above, Respondent has not established that Claimant's right knee, thoracic spine and lumbar spine conditions are unrelated to his work injury, and have therefore failed to establish that Claimant is not entitled to reasonable and necessary medical maintenance care to relieve the effects of his injury or prevent deterioration of his injury.

The issue of whether any specific care Claimant continues to receive is reasonable and necessary to relieve the effects of his injury or prevent deterioration of his condition is not before the ALJ. Accordingly, the ALJ makes no findings or conclusions as to the propriety of any specific treatment. Respondent retains the right to challenge whether any particular treatment Claimant may receive is appropriate medical maintenance care.

ORDER

It is therefore ordered that:

1. Respondent has failed to establish that the DIME physician erred in assigning permanent impairment ratings for Claimant's right knee, lumbar spine, and thoracic spine.

2. Respondent has not established grounds for terminating Claimant's right to receive reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition.

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: March 22, 2024

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she sustained compensable injuries on April 13, 2023 in the course and scope of her employment, specifically a closed head injury and a cervical spine injury.

IF THE CLAIM IS DEEMED COMPENSABLE, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to reasonably necessary and related medical benefits.

III. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning April 18, 2023 through November 5, 2023.

IV. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination from employment.

FINDINGS OF FACT

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

1. Claimant was involved in an incident on April 13, 2023 during her employment at an assisted living facility. She had been working for Employer for approximately four months and she called herself a business office manager. She would walk around the facility, check residents in and out, and make sure the residents were well, in addition to other activities.

2. On April 13, 2023, there was a 3' by 3' wood dolly out in the hallway and Claimant went to put it away in the housekeeping area, setting it up on its side, against a shelving unit with the wheels off the ground. The cart tipped over, hitting the left side of her head. Claimant continued to work that day. She stated that she reported the incident to her supervisor on the same day by text.

3. The following day, April 14, 2023, Claimant reported to work. She was asked to go to Workwell with her supervisor for a breathalyzer test. She stated that she cooperated with the test but they needed her to breathe harder and Claimant could not do it, so the test was inconclusive and the Workwell staff did not ask her to perform a blood or urine test.

4. On Monday, April 18, 2023, Claimant was on a call with her supervisor and other facility management, when they terminated her. They explained to her that she was a risk to the residents.

5. She went for medical care on April 20, 2023 because her head was hurting and she was not feeling right, for example she was off balance and dizzy going up and

down the stairs, she had continual headaches, and felt nauseous. She stated that her anxiety and depression had increased since the accident happened.

6. Claimant's symptoms included headaches, problems sleeping not being able to stand the brightness, feeling tired all the time, being off balance and dizzy, feeling depressed and anxious all the time. She used to be an active person that would exercise, hike and bike all the time and now she hides in the basement a lot. Now she does not wish to be around people, and it affected her marriage, she felt she did not care if her kids came to visit, which was not like her. She also forgot she was doing things, like cooking. She had previously felt anxiety because she felt that she had to always be perfect for everybody. Claimant testified that she was previously depressed because she had moved away from all her kids to Colorado. As found, Claimant had been seeing a chiropractor in Colorado from at least January 25, 2021, so Claimant had been in Colorado for at least two years before the incident in question so the depression and anxiety was likely present during that time to some extent.

7. Claimant admitted she had a history of alcohol abuse and that she initially refused to take the breath alcohol test on April 14, 2023 when she was taken by her supervisor to Workwell. She changed her mind, since she was advised that she could not drive home in her own vehicle unless she took the test and that she would be suspended. She went back inside and proceeded to the back with the medical assistant. She stated that the test was inconclusive. She vehemently denied having had anything to drink either on April 13, 2023 or April 14, 2023.

8. She denied having problems with her neck prior to this April 13, 2023 incident despite chiropractic records prior to April 13, 2023, ranging from January 2021 through December 2022 that specifically documented that Claimant had ongoing neck tightness, tenderness and issues as well as chiropractic adjustments throughout the time she was treated for the full two years.

9. Claimant stated that she was sent home on April 14, 2023 and terminated on April 18, 2023 but found new full time employment as a business office manager on November 6, 2023, which paid her in excess of her wages at Employer of injury.

10. On February 2, 2023, Claimant reported multiple symptoms to her provider at Peak Wellness Center. She stated that she had then or in the past, low back pain, hip pain, ankle/foot pain, generalized fatigue and loss of balance. While the remaining typewritten records are hard to read, the handwritten ones indicated that Claimant had poor balance, other than lumbar spine problems and other non-relevant issues.

11. Claimant was attended by Mona Brower, RN in the triage, emergency room at UCHealth West Greeley. Claimant reported that "she was putting a push cart dolly back into the storage room when it tipped over and struck her in the front of her head on the left-hand side." Claimant did not feel right ever since, she had been attended by her chiropractor who recommended Claimant obtain an MRI. She was alert and oriented to person, place, time and event. Her Glasgow Coma Scale was normal at 15. They noted that she was not confused, disoriented, irritable or boisterous; neither was she intoxicated, sedated, unsteady when walking or needing assistance when walking, did not feel light headed or dizzy. At the time her heart rate was somewhat high, and her

blood pressure was initially high at 135/89, and taken thirty minutes later was very high at 143/94.

12. They ordered a brain CT, which was normal. The CT of cervical spine read by Jeffrey Weissmann, MD showed that there was a 1.5 mm retrolisthesis of C5 with respect to C6, which is very mild and not even of the lowest grade. Dr. Weissmann did not visualize any acute cervical pathology and described other changes as degenerative in nature.

13. Dr. Keasha Kuhnen noted that Claimant disclosed an injury a week prior, with symptoms that "sound like she has concussive symptoms." Dr. Kuhnen remarked that Claimant declined any medication for her headache, was neurologically intact, and had a mild midline cervical spine tenderness, more left paraspinal muscle tenderness. Claimant disclosed that she had had multiple concussions in the past, that she had vomited once the day of the alleged incident but not since, had had no nausea, but felt fatigued, had no numbness or tingling other than baseline, her coordination was intact (no balance problems), and strength was intact. Dr. Kuhnen diagnosed a concussion and a cervical spine strain, took her off work, provided her literature regarding traumatic brain injury and coping with concussion and referred her for a work clearance for concussion.

14. The Workers' Compensation Specialist (WCS) for Employer completed a First Report of Injury (FROI) on May 2, 2023, stating that Employer was notified of the April 13, 2023 incident on May 1, 2023 and her last day of work was the same day. It reported Claimant was injured at approximately 1 p.m. injuring her head and scalp and was seen at UCHealth by Keasha Kuhnen, M.D.

15. On May 8, 2023 Claimant completed a Workers' Claim for Compensation noting a work injury on April 13, 2023 at 2 p.m., injuring her head at work moving a dolly that was left out in the hallway.

16. A Notice of Contest was filed on June 30, 2023 for further investigation.

17. Claimant was evaluated by Sander Orent, M.D. for a virtual independent medical examination on October 19, 2023. He obtained a significant history from Claimant including a description of the alleged events of April 13, 2023, the events of the following day as well as the breath alcohol test that was inconclusive. She reported a history of alcohol issues for which she went to an intensive outpatient program in 2022. She reported she continued to use alcohol with her husband but not as she did previously. He mentioned that Claimant was seeing the chiropractor for adjustments after the work injury which provided relief for three to four days at a time.

18. When describing Claimant's past medical history Dr. Orent stated "[T]he patient is quite clear that she never had a problem with her neck prior to this injury." She also stated that she never had prior problems, yet she had a longstanding low back condition eight years prior and more recently. No physical exam was conducted but Claimant demonstrated her motion on video. Medical records including the ER record and CT reports.

19. Dr. Orent opined that Claimant had profound anemia, which he deemed not occupational, but was an urgent matter than required medical attention. He opined that the event of April 13, 2023 caused another concussion that resulted in substantial

postconcussive symptoms and an associated depression. He also opined that the incident caused an injury to the cervical spine. He also determined that the headaches were either post-concussive or cervicogenic or a combination of both. He specifically stated that "[T]here are no other confounders here. There are no other explanations for her symptoms. She was terminated as best as I can tell due to postconcussive type symptomology and certainly not due to any substance abuse."

20. Fredrick Mark Paz, M.D. performed an independent medical examination of the claimant on October 12, 2023 and issued a report on November 3, 2023. Dr. Paz took a history, including a past medical history and a subsequent and significant medical history that was not in evidence, Dr. Paz described the event as related to him by the Claimant and described the subjective complaints that the claimant complained of when he saw her as having headaches, nausea, dizziness, photophobia along with neck pain tinnitus, balance issues, along with loss of sleep and depression. She explained that some of these symptoms came on progressively following the April 13, 2023 incident. He diagnosed lumbar radiculopathy, lumbar degenerative disc disease, hypertension, anemia, depression, and head contusion.

21. Dr. Paz opined that based on the physical examination he completed, there were no objective findings on examination, only subjective complaints. He further opined that based on the information obtained both during the evaluation and from the medical records, it was not medically probably that Claimant sustained a postconcussive syndrome causally related to the April 13, 2023 incident. He stated that it was more likely that the subjective complaints were attributable to anemia, or a non organic etiology.

22. Sander Orent, M.D., a Board Certified expert in Occupational and Environmental Medicine as well as Internal Medicine and a Level II accredited physician, testified on behalf of Claimant at the time of the hearing. Dr. Orent personally examined Claimant after receiving Dr. Paz's report. He noted that Claimant had quite serious anemia that could cause fatigue, lack of energy, lightheadedness, postural hypotension or drop in blood pressure, nausea, headaches.

23. Based on the information he had at his disposal, Dr. Orent opined that Claimant sustained a closed-head injury on April 13, 2023 with post-concussive symptoms. The opinion was based on Claimant's description of cognitive issues, balance issues, headaches with photophobia and throbbing that sounded like post-traumatic migrainous. He also opined that the way Claimant lost focus during the hearing and her confusion and well as her difficulty in understanding questions could be part of a post-concussive syndrome, though he definitely thought the anemia was contributing to those symptoms as well.

24. Dr. Orent recommended that Claimant have the profound anemia addressed outside of the workers' compensation system. Within the context of the alleged workers' compensation injury, he recommended multiple evaluations: First, a neuropsychological evaluation to assess the extent of the brain fog, the cognitive function and difficulties with memory. Secondly, a flexion/extension x-rays of her neck as he opined she may have retrolisthesis as the vertebras were not lined up, an MRI of the cervical spine if needed as she may have an element of facet syndrome and that she refrain from seeing her chiropractor until this was done. Third, a physiatrist specialist to

perform interventional medicine such as facet blocks and diagnostic injections and a headache clinic specialist to sort out whether she has post-concussive, post-traumatic migrainous headaches or cervicogenic headaches.

25. When Dr. Orent examined Claimant a few days before the hearing, Claimant was pretty intolerant to movement of the neck, there was paraspinous spasm and spasm of the trapezii. He noted that the chiropractic medical records prior to April 13, 2023 mentioned mobilizing her cervical spine/neck. Dr. Orent opined that Claimant was not at MMI.

26. Dr. Orent agreed that Claimant was incorrect when she provided the history that she had never had neck pain prior to April 13, 2023 as the chiropractic records from 2021 and 2022 show otherwise. He also made observations while conducting his video interview of Claimant as well as relying on the records that were available to him.

27. He explained that a CT and an MRI of the head, while negative, were not specifically sensitive to closed-head injuries unless there had been actual bleeding or substantial swelling of the brain and shifting of the brain tissues such as a subdural hematoma.

28. Dr. Fredrick Mark Paz testified at hearing on behalf of Respondents as an expert in Occupational Medicine and Internal Medicine as well as a Level II accredited physician. Dr. Paz, took a history from Claimant which was roughly consistent with her testimony at hearing, examined her, and reviewed the medical records including Dr. Orent's report and the chiropractor's records. Claimant provided a list of multiple subjective complaints but Dr. Paz found no subjective or objective findings on physical examination that supported the subjective complaints.

29. Dr. Paz opined that when considering the mechanism of injury Claimant may have contused her head, but the reported event didn't pair up with the subjective symptoms that were present immediately after and that continued to evolve. He stated that typically, symptoms do not evolve after several days, five at the most, but that Claimant explained that she continued to notice increasing symptoms for several weeks.

30. He explained that when looking at a 5'5" person and a 3'x3' dolly, the mechanism of injury simply did not make sense him. So when looking at the overall facts, whether there was a sufficient traumatic event to have caused a mild traumatic brain injury, whether there was a resultant post-concussive syndrome and whether the symptoms reported were consistent with the pattern of symptoms typically seen. He emphasized that the three things needed to be evaluated together. But evolving development of new symptoms was not part of a mild traumatic brain injury, as patients typically get better, not worse.

31. Dr. Paz explained that there were multiple other confounding factors in this case. He noted that anemia may be contributing to some of her subjective complaints. The alcohol-use disorder that continues, as she is not abstinent and is not participating in any group therapy, may be the cause of multiple subjective symptoms that look "just like the symptoms of post-concussive disorders." Then there was depression that may cause subjective symptoms such as headaches, dizziness and nausea, as well as hypertension that can cause headaches. Dr. Paz recommended that these be addressed in a

comprehensive evaluation by per personal primary care physician to determine the cause of her symptoms, because they were more likely factors causing the subjective complaints Claimant was reporting, not the minor incident which occurred on April 13, 2023.

32. Dr. Paz remarked that on examination of the cervical spine, he found no particular objective findings as Claimant had full range of motion (ROM) without associated symptoms of pain, pain behaviors or symptoms associated with ROM testing. He also indicated that there was a huge disparity between how articulate, organized and responsive Claimant's was during his examination and how she presented during the hearing with a significant loss of focus, and scattered responses.

33. Finally, Dr. Paz opined that it was not medically probably that Claimant sustained a mild traumatic brain injury on April 13, 2023, but only a mild head contusion for which she reached MMI on April 20, 2023 despite the fact that the ER providers stated on April 20, 2023 that Claimant did not state Claimant was at MMI and that she required further evaluation and clearance for concussion.

34. The Executive Director (ED) for Employer testified that she oversaw operations of the community and everyone reported to her. She had worked for Employer for 19 years. She supervised Claimant, who she called a business office coordinator. They frequently communicated via text.

35. The ED noted that it was hard to train Claimant for her job because she lacked focus and was always forgetting her zoom call meetings. She would always be everywhere and not where she was expected to be.

36. On April 12, 2023 Claimant had discussed with the ED that she had not been feeling very well. She advised Claimant that she could take the next day off but Claimant declined stating that she took a COVID test which came back negative.

37. On April 13, 20223 Claimant texted the ED noting that she felt great, had gotten a good night's sleep and would be at work. Some of her supervisors, staff called her about Claimant. The ED contacted Claimant but was advised that she felt fine that day.

38. On April 14, 2023 the ED spoke directly with Claimant. She noted that Claimant was off, her eyes were glossed over, she was flushed, she was talking very slowly, and she was off in her walk. She asked Claimant if she had been drinking and Claimant said no. The ED asked Claimant to submit to an alcohol test to which Claimant agreed. The ED drove Claimant to Workwell, but that the breathalyzer test was not completed and they left Workwell. The ED stated that the Employer had a policy stating when there was a reasonable suspicion of alcohol consumption that an employee was to be suspended. Claimant met someone at Workwell to drive her away, and the ED noted that Claimant immediately thereafter, stopped at the property to pick up her car and drive it home despite instructions that she was suspended and was not to drive.

39. The ED conducted an investigation following taking Claimant to Workwell. She found out that Claimant had not cooperated with the breathalyzer test, which was why they were unable to get any conclusive result. The Employer policy required employees to cooperate, and after speaking with the HR specialist, they came to the

decision to terminate Claimant. Claimant was relieved of her job on either April 18 or 19, 2023. It was not until April 23 or April 24, 2023 when Claimant returned to Employer's property to retrieve her possessions and deliver a document from the hospital, which was when the ED learned of the April 13, 2023 incident.

40. The ED stated she had provided multiple pictures of texts to Employer's attorney, which were included in the exhibit packet. The one which was admitted, Exhibit I, Bates 137, identified a conversation between ED and Claimant as follows:[1]

> ED: Yes please stop by and I do believe that I have to go through HR and get permission to release copies of your file
>
> Claimant: I did not know I needed to file a formal chain of command when I hit my head. I did tell you that it was last Thursday. I thought it would go away which is what I told you. If I needed to… you should have told me. Or maybe people should put their own crap away since we are assisted living.
>
> Thursday 1:43 PM
>
> Claimant: Red platter in the office is also mine. That small thing you gave me belongs to [Redacted, hereinafter MM]. She had 2 and wanted to share.

Since the second part of the text chain stated Thursday, and the first part of the chain of text indicated information relating to having advised the ED of the accident the prior Thursday, this ALJ infers that the subsequent Thursday was the Thursday after her termination, on April 20, 2023. Claimant was referencing the prior Thursday that would have been the date of the injury on April 13, 2023.

41. The Maintenance Supervisor (MS) for Employer testified at hearing that he worked for Employer and worked at the same time as Claimant and knew her. He stated that he also performed duties covering transportation. His statement of November 7, 2023 was admitted, which stated that Claimant never informed him that the moving cart fell and hit her on the head. He stated that in the afternoon on April 13, 2023 he went into Claimant's office to ask her for a document or form from the computer. He noted that she seemed spacy or out of it. He asked her if everything was okay and Claimant did not answer, just stared at him, as if the question did not register with her, so he simply left.

42. The Health and Wellness Director (HWD) for Employer testified at hearing, stating she was a nurse. She was familiar with Claimant and worked with her. She wrote a statement on November 6, 2023 that Claimant had never reported to her that she had hit her head. The HWD noted that Claimant went out to her car and got into her back seat, then she went out again to her car. The first time Claimant returned to the building with some fountain drink with a straw, she smelled of alcohol, possibly vodka. Claimant went into her office and the HWD went into her own. The staff came in to get her because of what they had seen, and the HWD saw Claimant come in a second time and followed her.

43. The HWD had reason to believe that Claimant was intoxicated on April 14, 2023 because she was slurring her words, wasn't walking right, she was swerving, and other staff and residents had made comments to her about Claimant. Claimant made

[1] This is the best this ALJ can read the text that is of poor quality.

popcorn for no reason, in the large machine that was reserved for the residents when they had activities and this was not normal. Claimant was acting elated. That is when she contacted the ED to come in. They had a meeting with the ED and herself in either her office or the ED's office, where they discussed that there was a reasonable suspicion of alcohol consumption and the ED asked her whether she would agree to go to the clinic for a breathalyzer test. Claimant agreed and they both left. The HWD did not see Claimant again.

44. The Sales and Marketing Manager (SMM) also testified at hearing that he was familiar with Claimant who was the BOC the prior year. He identified a statement he wrote that Claimant never told him she had hit her head and that to his knowledge she never did hit her head. He had interactions with Claimant on a daily basis because their office areas were shared. He had to pass through Claimant's area, which was a reception type area, in order to reach his office. On April 13, 2023 he noticed a smell of alcohol in her room. He had smelled alcohol on her on another occasion too. But on April 14, 2023, after lunch he thought he smelled alcohol on her breath and spoke of it to the ED, which was one of the reasons why they went forward with the breathalyzer test. SMM

45. Claimant's husband testified in rebuttal, stating that when he got home on April 13, 2023 Claimant told him about the accident of the dolly hitting her on the head. He did not observe Claimant drinking the evening of April 13, 2023 nor on the morning of April 14, 2023 before going to work. The left the house at the same time. Since the accident, Claimant was a different person than the one he had married approximately seven years prior. They would normally go for walk, hikes, and go to the pool and other normal everyday things on a daily basis. He stated that she had changed because she just does not feel good, she no longer had the balance to go for walks unless it was slow and he had his arm out for her. He would regularly find her in the basement sleeping in the dark. She consistently complained of headaches to him on a weekly basis, showing visible signs of pain like holding her head, and she would also lose things or not remember what he had told her. She also complained of being nauseous and she rarely slept well.

46. As found, this ALJ has not found any of the witnesses' full and complete testimony credible, including the experts' opinions. However, based on the partial testimony and opinions of the majority of the witnesses that this ALJ did find credible and persuasive, this ALJ's ultimate findings are as follows:

47. As found, Claimant proved by a preponderance of the evidence that on April 13, 2023 a wooden moving cart or dolly tipped over and hit Claimant on the left side of her head. Also as found, Claimant sustained a contusion on her the left side of her head, which caused a concussion and post concussive syndrome or a traumatic brain injury. This is supported by Claimant's credible testimony in this regard, as well as Dr. Orent's testimony and opinion in reference to the mechanism of injury and the consequences of the mechanism of injury, which were found to be credible and persuasive over the contrary opinion of Dr. Paz.

48. As found, Claimant failed to show that she sustained a cervical spine injury. Claimant has a long history of cervical spine stiffness, pain, loss of range of motion as shown in the chiropractic records that span from January 2021 through December 2022. Further, the CT performed on April 20, 2023 showed significant degenerative changes, a

very slight retrolisthesis and no acute findings. While the opinions of Dr. Orent regarding the cervical spine are credible, they are not persuasive, as Dr. Orent was not provided with the full record and information by Claimant, which he required to make a fully informed determination in this matter.

49. The extent the closed head injury requires further testing regarding the extent of the concussion, post-concussive symptoms and sequelae symptoms from the concussion including but not limited to the headaches, the significant fatigue, dizziness and balance problems, as well as anxiety and depression, and further evaluation of the head injury is reasonably necessary and related to the April 13, 2023 work related injury.

50. As found, it is clear that the Claimant did not have any preexisting problems with sleep disturbances or visual disturbances or sensitivity to light and these conditions are found to be proximally caused by the April 13, 2023 work related accident and any treatment for those conditions would be reasonably necessary and related to the accident as well.

51. As found, a neuropsychological and psychological evaluation would be reasonably necessary to determine the extent of the closed head injury as well as to determine if the ongoing depression and anxiety continues to be a consequence of an aggravation of her preexisting condition caused by the April 13, 2023 occupational injury or the natural progression of the preexisting condition.[2] If the anxiety and depression continued to be aggravated by the post-concussive symptoms, including but not limited to the sleep disturbance and visual disturbances, then any treatment related to the depression and anxiety is related to the April 13, 2023 occupational injury. This finding is supported by both Dr. Orent's report and testimony at trial which was credible and persuasive.

52. As found, a headache clinic specialist evaluation would be reasonably necessary and related to the injury to sort out whether Claimant has post-concussive, post-traumatic migrainous headaches or cervicogenic headaches and problems with balance. This finding is supported by Dr. Orent's report and testimony at trial which was credible and persuasive. If Claimant has cervicogenic headaches, then they are not work related. If they are post-concussive, post-traumatic migrainous headaches, or headaches otherwise caused by the closed head injury, then the treatment for the headaches would be reasonably necessary and related to the injury. If the balance problems are caused by the head injury, and not the preexisting anemia or other personal health challenges independent of work-related occupational injuries, then the treatment for the balance problems are reasonably necessary and related to the April 13, 2023 work injury.

53. As found, Claimant has proven by a preponderance of the evidence that she was unable to work from April 15, 2023 through November 5, 2023 as Claimant was sent home after April 14, 2023 and on April 20, 2023 she was taken off all work by Dr. Kuhnen at UCHealth. No evidence in the record showed that Claimant had been release to return to employment.

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[2] In this ALJ's opinion, prior records, including the records from the 2022 detox treatment might be vital to this determination.

54. Also as found, Respondents have shown by a preponderance of the evidence that Claimant failed to follow Employer's policy, which required her to cooperate with testing during a breathalyzer test. Claimant was required to blow hard into the apparatus in order for the breathalyzer test to work. She failed to do so. Her testimony that she could not do so was not credible. As found, Claimant violated the company's policy and was responsible for her termination. Respondents have shown that Claimant was terminated for cause and no temporary total disability benefits are due, due to the termination for cause.

55. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). 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.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See Industrial Commission v. Riley, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See Bodensieck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. Arenas v. ICAO, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. University Park Care Center v. Industrial

Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. Cordova v. ICAO, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See Burnham v. Grant, 24 Colo. App. 131, 134 P. 254 (1913); see also Heinicke v. ICAO, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. Colorado Springs Motors, Ltd. v. Industrial Commission, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See Prudential Ins. Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); Kroupa v. Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

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

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

Causation may be established entirely through circumstantial evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Medical evidence is neither required nor determinative of causation. A claimant's testimony, if credited, may alone constitute substantial evidence to support an ALJ's determination concerning the cause of the claimant's condition. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997); *Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986); *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983).

As found, Claimant has credibly and persuasively shown that she was in the course and scope of her employment as the business office coordinator on April 13, 2023 when she was putting away the dolly against the shelving unit. Despite Dr. Paz's testimony that the mechanism of injury did not make sense, it did make sense to this ALJ. Claimant was placing a dolly that was 3' by 3' with wheels against something, so she had to be holding it on both sides in order to hold it in place and lean it against the shelves. When she was about to straighten up, the cart fell onto her, hitting her head on the left side, which caused her head injury on the left temple, and consequently caused headache, later caused her to vomit and not feel right or herself. These are typical symptoms of a concussion. The diagnosis first made by Dr. Kuhnen and her opinions were credible and persuasive. Claimant also developed problems with sleep disturbances, visual disturbances and sensitivity to light, significant fatigue, and balance problems, all of which are also a consequence of post concussive syndrome pursuant to the Medical Treatment Guidelines and also explained by both experts. In this matter, Dr. Orent was credible and persuasive over the contrary opinion of Dr. Paz. The closed head injury and subsequent post-concussive syndrome was proximally and causally related to the April 13, 2023 work injury.

As found, the cervical spine injury was not causally related to the April 13, 2023 work related injury. In this matter, Dr. Paz was credible and persuasive. Claimant had a long history of cervical spine complaints, which she did not disclose to either the UCHealth staff nor to Dr. Orent, in order for them to analyze the information, make a full causation determination and come to conclusions based on a full history and records.

C. Reasonably Necessary and Related Medical Benefits

The Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio*, *supra* at 716 (Colo. 1994). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for medical treatment. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

As found, Claimant has shown that Claimant requires reasonably necessary medical care related to the April 13, 2023 work related closed head injury. This is supported by Claimant's testimony as well as Dr. Orent's report and testimony at hearing, which was credible and persuasive in this matter. As found, it is clear that the Claimant did not have any preexisting problems with sleep disturbances or visual disturbances or sensitivity to light and these conditions are found to be proximally caused by the April 13, 2023 work related accident and any treatment for those conditions would be reasonably necessary and related to the accident. The closed head injury requires further testing regarding the extent of the concussion, post-concussive symptoms and sequelae symptoms from the concussion including but not limited to the headaches, the significant fatigue, dizziness and balance problems, as well as anxiety and depression, and further

evaluation of the head injury is reasonably necessary and related to the April 13, 2023 work related injury.

As found, a neuropsychological and psychological evaluation is reasonably necessary to determine the extent of the closed head injury as well as to determine if the ongoing depression and anxiety continues to be a consequence of an aggravation of her preexisting condition caused by the April 13, 2023 occupational injury or the natural progression of the preexisting condition. If the anxiety and depression continued to be aggravated by the post-concussive symptoms, including but not limited to the sleep disturbance and visual disturbances, then any treatment related to the depression and anxiety is related to the April 13, 2023 occupational injury. This finding is supported by both Dr. Orent's report and testimony at trial which was credible and persuasive.

As found, a headache clinic specialist evaluation is be reasonably necessary and related to the injury to sort out whether Claimant has post-concussive, post-traumatic migrainous headaches or cervicogenic headaches and problems with balance. This finding is supported by Dr. Orent's report and testimony at trial which was credible and persuasive. If Claimant has cervicogenic headaches, then they are not work related. If they are post-concussive, post-traumatic migrainous headaches, or headaches otherwise caused by the closed head injury, then the treatment for the headaches would be reasonably necessary and related to the injury. If the balance problems are caused by the head injury, and not the preexisting anemia or other personal health challenges independent of work-related occupational injuries, then the treatment for the balance problems are reasonably necessary and related to the April 13, 2023 work injury.

D. Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 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.* There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

As found, Claimant has proven by a preponderance of the evidence that as of April 14, 2023, Claimant was sent home by the Executive Director. Claimant testified that she was kind of out of it, not herself and spacy on April 13 after the accident, with a headache. The Maintenance Supervisor had witnessed that she was non responsive to his request for her to provide him with some forms from the computer and failed to answer his question, so he simply left. On April 14, 2023, she was just not herself, doing things she did not normally do. This was also confirmed by the Health and Wellness Director. On April 20, 2023 she was taken off work by Dr. Kuhnen of UCHealth, who diagnosed a concussion. As found, Claimant has proven that she is entitled to temporary total disability beginning April 14, 20223.

E. Termination for Cause

Under the termination statutes in Sections 8-42-105(4), C.R.S. and 8-42-103(1)(g), C.R.S., which contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). "Fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

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

As found, Respondents have shown by a preponderance of the evidence that Employer had a policy that required employees to comply requested testing. Employer established that they had a reasonable suspicion that Claimant was not acting well and several employees reported that they perceived alcohol on Claimant. Whether there was an actual reasonable suspicion of alcohol consumption during working hours, or if

Claimant's strange or weird behavior was caused by the consequences of the head injury, the employer had the right to request the breathalyzer testing pursuant to their policy manual when they suspected the possibility of alcohol on the job. Based on the reasonable suspicion, Claimant was required submit to testing. Claimant agreed to the testing and went with the Executive Director to Workwell in order to proceed with a breathalyzer test. Once there, and after they had waited some time, Claimant decided to forgo the testing. When informed by the ED that she would be suspended for her refusal and that she would not be allowed to drive herself home, she agreed to go forward with the test. Claimant went into the back with the medical assistant who was conducting the test. Claimant failed to follow Employer's policy, which required her to cooperate with the testing during a breathalyzer test. Claimant was required to blow hard into the apparatus in order for the breathalyzer test to work. She failed to do so. Her testimony that she could not do so was not credible and because of this, the test was inconclusive. As found, Claimant violated the company's policy and was responsible for her termination. Respondents have shown that Claimant was terminated for cause on April 18, 2023 and no temporary total disability benefits are due, due to the termination for cause.

ORDER

IT IS THEREFORE ORDERED:

1. The Claimant was injured on the job, within the course and scope of her employment on April 13, 2023 and sustained a closed head injury, which caused a concussion.

2. Respondents shall pay for the reasonably necessary medical benefits for the closed head injury and the sequelae of the concussion related to the April 13, 2023 work related injury including but not limited to the benefits stated above.

3. Claimant was responsible for her termination, therefore, no indemnity benefits are due at this time. Claimant's claim for temporary total disability benefits from April 15, 2023 through November 5, 2023 are *denied* and *dismissed*.

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

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

DATED this 27th day of March 2024.

Digital Signature

By: _____
ELSA MARTINEZ TENREIRO
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she suffered a compensable injury on February 2, 2023.

2. Whether Claimant proved by a preponderance of the evidence that further medical treatment is reasonable, necessary, and related to her alleged work injury on February 2, 2023.

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

FINDINGS OF FACT

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

1. Claimant is a 50 year-old woman who worked for Employer as a cashier. She began working for Employer on November 17, 2022. Claimant's duties included taking money from customers, wiping down tables, mopping, customer service, and drive- thru window duties. Claimant testified that on February 2, 2023, she was working, and in addition to her regular duties, she helped unload some boxes from "the truck." (Tr. 13:1-22).

2. Claimant testified she unloaded four to five boxes. Most of the boxes weighed about 20 pounds, but one of the boxes weighed 40-50 pounds. (*Id.* at 14:19-15:5). Claimant testified that when she lifted the box, she experienced immediate pain in her stomach and low back. Claimant testified she bent over and recuperated a bit, then resumed her duties as cashier. (*Id.* at 14:8-18). Claimant testified she did not notify Employer of her injury because it was just pain and she thought it would go away. (*Id.* at 15:8-14).

3. Claimant testified she worked half a shift on February 4, 2022. Claimant testified that after her February 4, 2023 shift, she laid in bed the rest of the weekend, through Monday, February 6, 2023, because her back pain was so bad. (*Id.* at 15:20-16:14).

4. Claimant testified her back was really hurting on Monday, February 6, 2023, so she called her supervisor, [Redacted, hereinafter SS], and told her that she injured her back on February 2, 2023, while lifting the boxes from the truck. (*Id.* at Tr. 17:1-21). SS[Redacted] advised Claimant to seek medical treatment for her injury (*Id.* at 18:1-4).

5. On February 6, 2023, Claimant had a telephonic visit with Georgina Bustmante-Coffey, M.D. at Concentra. Claimant reported she was "mopping and lifting," and this is how she injured her middle-back/spine area. Dr. Bustamnte-Coffey noted in the history of

present illness section, that Claimant reported she was unloading a truck full of condiments on February 2, 2023, and at the end of her shift she noticed she was hurting. Claimant also reported that a few days before February 2, 2023, her back was hurting after mopping. (Ex. at 41).

6. Later that day, Claimant went to Concentra, and Nathan Adams PA-C evaluated and treated her. Claimant's chief complaint was injuring her back from "mopping and lifting." Claimant said she did a lot of mopping and unloaded a truck a few days before experiencing back pain. Claimant, however, also reported that on February 2, 2023, she unloaded a truck, and lifted a heavy box from floor level. When she did this, she noticed bilateral low back and mid-thoracic pain that had not improved. On examination, Claimant had tenderness in the lumbar spine and right paraspinal muscles with mildly decreased range of motion. Palpation revealed no muscle spasms. Mr. Adams diagnosed Claimant with a lumbar strain and thoracic myofascial strain. He referred Claimant to a physiatrist, and gave her restrictions of no bending, squatting, or kneeling, no lifting more than five pounds, 90% seated work, changing positions periodically to relieve discomfort, and a five to ten minute rest break every one or two hours as needed. (Ex. E at 36-38).

7. Employer was unable to accommodate Claimant's work restrictions. (Ex. G). Claimant has not returned to work.

8. Claimant returned to Concentra on February 8, 2023, for a follow-up appointment, and she reported worsening pain. Mr. Adams ordered x-rays and an MRI for Claimant that same day. (Ex. E at 45-48).

9. Claimant's x-ray of the lumber spine showed no acute fracture or subluxation, but degenerative disc disease at L3-4. (*Id.* at 44). Claimant underwent an MRI at Health Images at North Denver, and the MRI was read by Kevin Kelly, M.D. His findings indicated L2-L3 mild spondylotic changes. Dr. Kelly noted Claimant had minimal disc bulging at L2-L3, with some encroachment upon the right neural foramen that was suggestive of a small annular tear at that level. (Ex. 3).

10. On February 13, 2023, Claimant returned to Concentra for a follow-up appointment with Mr. Adams. Claimant reported new symptoms involving her bilateral anterior thighs and hands. Claimant also had a new complaint of neck pain located in the cervical spine midline. He referred Claimant for physical therapy and ordered x-rays of her cervical and thoracic spine. She was referred for physical therapy and continued with the same work restrictions. (Ex. E at 51-53).

11. Claimant had x-rays of her cervical spine taken on February 13, 2023. The x-rays showed no fracture or subluxation, with mild degenerative disc disease at C5-6 and C6-7. (*Id.* at 55).

12. Nicholas Olsen, M.D., a physiatrist, saw Claimant for a consult on February 15, 2023. Claimant reported injuring herself on February 2, 2023. She reported mopping for several days, and [un]loading boxes from a truck. Claimant reported that after a few days, she was not able to move due to spasms between her shoulder blades and middle back.

Claimant's greatest pain was at the left interscapular area. She also had pain in her left lower back. Claimant denied symptoms in her right thoracic area and right lower back. Dr. Olsen evaluated Claimant and reviewed her imaging. Dr. Olsen opined Claimant had somatic dysfunction in her thoracic spine, and mild somatic dysfunction in her lumbar spine. Claimant noted her greatest pain was in her thoracic spine. Dr. Olsen opined this corresponded to somatic dysfunction in her sublaxation. Dr. Olsen also recorded that Claimant had "no suggestion of radiculopathy to correlate with the MRI findings. . . . the mild disc bulging and annular fissure are likely asymptomatic." He recommended Claimant consider chiropractic care. (*Id.* at 59-61).

13. Claimant was evaluated by Michelle Viola-Lewis, M.D., at Concentra on February 22, 2023. Claimant reported some improvement. Dr. Viola-Lewis reassured Claimant, who was anxious, of the efficacy of the chiropractic care recommended by Dr. Olsen. Dr. Viola-Lewis also referred Claimant for acupuncture and massage treatment. (Ex. 2 at 58-61).

14. Dr. Viola-Lewis saw Claimant again on March 8, 2023. She noted in the record that Claimant was seen by the physiatrist, who opined Claimant's issues with movement were related to fear of increased pain with movement. She also noted Claimant developed a stiff posture in an effort to not move her back, leading to difficulty with simple tasks. Dr. Viola-Lewis recommended physical therapy and reordered chiropractic care. (*Id.* at 64-69).

15. Respondents filed a Notice of Contest on March 14, 2023. (Ex. C).

16. Claimant testified she learned her claim was denied, so she sought care through her primary care physician (PCP) at Kaiser-Permanente (Kaiser) for continued treatment. (Tr. 20:4-9).

17. Some of Claimant's past medical records from Kaiser were admitted into evidence. Claimant went to Kaiser urgent care on March 31, 2019. Her chief complaint was "medication issues" and she wanted an increase in her dose of gabapentin. The provider noted Claimant had a history of drug seeking behavior since June 2018, but nonetheless, increased Claimant's dosage of gabapentin. Claimant was encouraged to follow up with her PCP. A few months later in July, the Kaiser records indicate Claimant was doubling the dose of gabapentin she was supposed to be taking, and her refills were denied. (Ex. F. at 72-81).

18. Claimant was seen at Kaiser on July 24, 2019, for lower back pain following a motor vehicle accident that occurred four days prior. She was diagnosed with a lumbar muscle strain. According to the medical record, Claimant was "very upset" at the end of the visit because she had not scheduled the visit because of her motor vehicle accident, but because she wanted to refill her gabapentin. Claimant was referred for physical and massage therapy. (*Id.* at 84-91).

19. On April 13, 2023, Claimant saw Spencer Del Moral, M.D., at Kaiser for a "well visit." He noted this was a "routine adult health check up exam." According to the medical

record, Claimant reported lumbar muscle and thoracic spine strains, two months out from the initial injury. Claimant also complained of right sacroiliac joint pain. Dr. Del Moral recorded that Claimant was overall not improving, and he recommended physical therapy and to continue muscle relaxers. Claimant was given various vaccines, and referred for a colonoscopy. Dr. Del Moral recorded, under Claimant's "HPI" section, that Claimant has had a bulging disc and she thought it happened at work on February 2, 2023. He notes she was diagnosed with a thoracic myofascial strain, lumbar strain, and degenerative arthritis of the cervical spine. Dr. Del Moral noted she "has MRI confirming findings." There is no indication, however, that Dr. Del Moral reviewed any MRIs or findings at this appointment. (*Id.* at 104-113).

20. Claimant returned to Kaiser and was evaluated by Dr. Del Moral on June 2, 2023. He indicated in the record that a "L2-L3 herniation [was] seen on MRI done in March 2023 at Thornton Spine Center, patient will bring in CD with images." Dr. Del Moral diagnosed Claimant with lumbar disc herniation with myelopathy. He noted that her pain was poorly controlled with ibuprofen, tizanidine, and gabapentin. Dr. Del Moral increased Claimant's gabapentin dosage. He also referred Claimant for a neurosurgical evaluation to discuss injections, radiofrequency ablation, and surgical options. (*Id*. at 120-124).

21. On June 15, 2023, Claimant had a follow-up appointment with Dr. Del Moral. He noted Claimant brought in the March 2023 MRI she underwent at the Thornton Spine Center, and it was given to radiology to upload into her chart. There is no indication in the record that Dr. Del Moral reviewed the MRI. Claimant was scheduled to see a neurosurgeon on August 9, 2023. (*Id.* at 125-136)

22. Claimant testified that she saw neurosurgeon, Dr. Kudron, in August 2023, and Dr. Kudron recommended continued physical therapy to see if she could get stronger before any additional treatment would be recommended. Claimant testified she had a few physical therapy visits, and some follow-up visits with her PCP, Dr. Del Moral. (Tr. 20:15-22:2).

23. The March 2023 MRI from Thornton Spine Center was not admitted into evidence.

24. Claimant testified she still has lower back pain that is aggravated when she bends to do things like tie her shoes, brush her teeth, and other everyday activities. (Tr. 20:7-16).

25. At the request of Respondents, Claimant attended an Independent Medical Examination (IME) with Mark Paz, M.D., on June 20, 2023. Claimant told Dr. Paz that February 2, 2023, was the date of injury assigned by Employer. He asked when she was injured and Claimant said "I don't know." Claimant reported unloading a truck between 1:00 and 2:00 p.m. She lifted one box that weighed approximately 50 pounds, resting it on top of other boxes just above waist level. Claimant told Dr. Paz she had no immediate symptoms, and did not feel the symptoms until the next day. Claimant said her low back was painful the following morning when she woke up. Claimant confirmed the pain was in her lower lumbar region, above the belt line – midline and to the right. Claimant denied

any prior history of interscapular or low back pain symptoms prior to February 2, 2023. She also stated that a physiatry consultation was not completed.

26. As found, on July 24, 2019, Claimant was seen at Kaiser following a motor vehicle accident for lower back pain. Additionally, Claimant was evaluated by physiatrist, Dr. Olsen, on February 15, 2023.

27. Dr. Paz conducted a physical examination of Claimant. He opined that the "subjective symptoms reported by [Claimant], during this IME and in the record, are not supported by objective findings on physical examination. Therefore, based on [a] reasonable medical probability, it is not medically probable that the subjective symptoms are causally related to the referenced February 2, 2023, date of injury." He also opined that Claimant's pain that developed in her neck and hip, and the paresthesias in the upper and lower extremities, are absent diagnoses and lack a physiological temporal relationship to the February 2, 2023 incident. (Ex. D at 22).

28. Dr. Paz testified via post-hearing deposition on September 26, 2023. He confirmed reviewing the February 8, 2023 MRI imaging from Health Images, even though this was not indicated in his IME report. (Dep. Tr. 7:23-8:12). Dr. Paz also testified that he reviewed new records from Kaiser in preparation for the deposition. (*Id*. at 12:6-13:6).

29. Dr. Paz testified that the findings on the MRI were suggestive of an annular tear, which he explained was a fibrous tear in the material surrounding the jelly-like nucleus pulposus within the spinal disc. Dr. Paz opined that, based on the radiologist's report, it was not clear that there was a tear and this was consistent with Dr. Olsen's opinion that there was a disc bulge, which is not the same as a herniation. Dr. Paz testified that a bulge versus a herniation was an objective matter based on measurements of the size of a protrusion, and that the finding on the MRI was consistent with a bulge, which is a degenerative change, not a traumatic injury. (*Id.* at 7:23-10:2).

30. Dr. Paz agreed with Dr. Olsen that the bulge was asymptomatic and an incidental finding not consistent with an acute injury. Dr. Paz testified that, if the findings at L2-3 were symptomatic, then Claimant would exhibit symptoms at that level of the lumbar spine, and based on his examination, Claimant instead exhibited symptoms throughout the lumbar spine from the L1 level through S1. (*Id.* at 10:9-11:24).

31. Dr. Paz further testified that he did not see the alleged March 2023 MRI, from Thornton Spine Center, as referenced in the Kaiser records, and Claimant never indicated during the IME that she had a separate MRI from this clinic. (*Id.* at 12:22-13:15). Dr. Paz testified that he disagreed with Dr. Del Moral that there was a disc herniation evident on imaging in February 2023, and also testified his opinion was consistent with the opinions of the radiologists and other providers who had viewed the imaging. (*Id*. at 14:4-15).

32. Dr. Paz testified that Dr. Del Moral's diagnosis of myopathy, which would cause motor function loss and would include limitation of movement in the lower extremities and ankle or knee, was inconsistent with the physical examination findings and the February 8, 2023 MRI. (*Id.* at 14:16-15:12).

33. The ALJ finds Dr. Paz's opinions and testimony credible and persuasive.

34. Based on the totality of the evidence, the ALJ finds that Claimant did not prove by a preponderance of the evidence that she suffered a work-related injury on February 2, 2023.

35. Based on the totality of the evidence, the ALJ finds that Claimant did not prove by a preponderance of the evidence that further medical treatment is reasonable, necessary, or related to her alleged work injury on February 2, 2023.

36. Based on the totality of the evidence, the ALJ finds that Claimant did not prove by a preponderance of the evidence that she is entitled to TTD benefits.

CONCLUSIONS OF LAW

Generally

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

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

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

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

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

The mere occurrence of symptoms at work, however, does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of, or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 at 791; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant's testimony regarding her alleged injury was inconsistent and lacked credibility. Claimant testified that she had an ***immediate*** onset of pain in her ***stomach and low back*** when she lifted the box on February 2, 2023. She initially thought the pain was from a hernia. Claimant testified the initial pain was excruciating and fast, then it started throbbing. (Tr. 26:12-25). She further testified that she felt the pain while lifting

"but as [she] was mopping it kind of made it worse." (*Id*. at 27:8-13). During Claimant's telemedicine visit with Dr. Bustamante-Coffey on February 6, 2023, Claimant reported injuring her ***middle-back/spine area*** mopping and lifting. She also reported unloading boxes, but stated that ***at the end of her shift*** noticed she was hurting. (Finding of Fact ¶ 5). When Claimant saw Mr. Adams on February 6, 2023, she reported mopping and unloading a truck ***a few days before*** experiencing back pain. Claimant also told Mr. Adams that when she lifted the box on February 2, 2023, she noticed that her bilateral low back and mid-thoracic pain ***had not improved***, implying she was experiencing back pain prior to February 2, 2023. (*Id.* at ¶ 6). When Claimant saw Dr. Olsen on February 15, 2023, she told him she injured herself on February 2, 2023. Claimant reported mopping for several days and unloading boxes on February 2, 2023, and ***a few days later*** she was unable to move because of spasms between her ***shoulder blades and middle back,*** with the greatest pain at the ***left interscapular area***. (*Id.* at ¶ 12). During the IME, Claimant told Dr. Paz that she did not know when she was injured, but Employer assigned a date of February 2, 2023, to her injury. She reported unloading a truck and lifting a heavy box. Claimant told Dr. Paz she had ***no immediate symptoms*** but her ***lower lumbar region above the belt line–midline and to the right*** was painful ***the following morning***, February 3, 2023. (*Id.* at ¶ 25). Claimant worked half a shift on February 4, 2023, and never reported any pain that day. Claimant did not report the alleged injury until Monday, February 6, 2023. Claimant's testimony is contradictory and not credible.

Furthermore, while Claimant relates the lumbar MRI findings to a work injury with an indistinct date and mechanism, the preponderance of the medical opinion reflects that the findings are incidental and unrelated. The physiatrist, Dr. Olsen indicated the MRI findings were inconsistent with the pattern of symptoms. The radiologist, Dr. Kelly, did not indicate Claimant had a disc herniation. Dr. Paz agreed with Dr. Kelly that there was an annular tear and bulge but no herniation. Dr. Paz credibly opined that Claimant's complaints and physical examination were inconsistent with symptoms that would have been exhibited with a lumbar herniation at L2-3. The only physician who indicated Claimant had a herniation with radicular symptoms, was Dr. Del Moral. But there is no objective evidence in the record that Dr. Del Moral reviewed the MRI films, or had access to Claimant's prior records and history of complaints, at the time he made these diagnoses. Dr. Del Moral's opinion contradicts the preponderance of the medical opinion concerning the diagnoses and causation. His opinion appears to be based on Claimant's own representations rather than the medical documentation and imaging. Dr. Del Moral's opinion is not credible or persuasive.

As found, the ALJ finds the opinions of Dr. Paz credible and persuasive. Claimant failed to prove by a preponderance of the evidence that she suffered a work-related injury on February 2, 2023.

Medical Benefits

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs Sch. District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012). For a service to be considered a "medical benefit" it must be provided as medical or nursing treatment or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, WC 4-517-537 (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* WC 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *see Taravella v. US Bancorp,* WC 4-797-901 (ICAO, July 15, 2020) (concluding that respondents are liable for the cost of prescriptions, as long as the cost complies with the Fee Schedule, regardless of where the claimant fills them).

Treatment for a work injury must not only be reasonable and necessary but must also be causally related to that injury. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Respondents are permitted to challenge causation and relatedness of the need for any treatment, despite having admitted liability for a claim. *Hanna v. Print Expediters, Inc*. 77 P.3d 863 (Colo. App. 2003); *Snyder v. Indus. Claim Appeals Office of the State of Colo*., 942 P.2d 1337 (Colo. App. 1997). In a dispute over medical benefits that arises after filing an admission of liability, Respondents may assert, based upon subsequent medical reports, that a workers' compensation claimant did not establish a threshold requirement of direct causal relationship between the on-the-job injury and need for medical treatment. *Snyder,* 942 at 1339. Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Id*.; *see also Grover v. Indus. Commission of Colorado*, 759 P.2d 705 (Colo. 1988). Causation is a question of fact for resolution by the ALJ. *F.R. Orr Const. v. Rint*, 717 P.2d 965 (Colo. App. 1985).

As found, Claimant failed to prove by a preponderance of the evidence that she suffered a work-related injury, so she is not entitled to medical benefits.

TTD Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *Colo. Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-

103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). As found, Claimant failed to prove by a preponderance of the evidence that she suffered a work-related injury, so Claimant is not entitled to TTD benefits.

ORDER

It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence that she suffered a work-related injury on February 2, 2023, and her claim for compensability is denied.

2. Claimant failed to prove by a preponderance of the evidence that any medical treatment is reasonable necessary and related to a work-related injury that occurred on February 2, 2023, and her claim for medical benefits is denied.

3. Claimant failed to prove by a preponderance of the evidence that she suffered a work-related disability on February 2, 2023, and her claim for TTD benefits is denied.

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

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

DATED: March 27, 2024

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the surgery performed by Dr. Stephen Thon on October 23, 2023 for rotator cuff repair, arthroscopic tenodesis of biceps tendon at the shoulder and subacromial decompression was reasonably necessary and related to the admitted May 8, 2023 work injury as well as authorization of the surgery.

FINDINGS OF FACT

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

1. Claimant was 48 years old at the time of the hearing. She was working for Employer as a janitor for approximately 19 years. She had worked initially in one building for 11 years and then was transferred to the building where she was injured approximately 8 years prior to her injury.

2. This is an admitted claim for date of injury of May 8, 2023. On that date, Claimant was advised to clean an office space that was still under construction. Claimant had taken off the chain from the doors, and entered the space to count the trash containers. The door was very tall, twice as tall as she was, had very thick glass, and had large metal pieces at the top and at the bottom and approximately four and a half feet wide. Claimant believed that the metal pieces weighed about 65 lbs.

3. As she was leaving the office space, she opened one side of the double doors, when she heard a very loud sound, then she felt the glass and metal from the door hit her from above, hitting her neck, shoulder all the way down her right side including down to her foot. The broken glass covered her with cuts, causing a lot of blood all over her arm and hand. She started by taking some of the pieces of glass out of her hand, standing in place, in shock, until an ambulance arrived about five minutes later. She was in shock because she had been hit by a door that was twice the size as she was. She felt the metal piece of the door strike her on the shoulder, which was thick and heavy.

4. Two paramedics came to assist her, one helped her walk and the other held up her arm. Once she arrived at the hospital emergency room (ER), they took as much of the glass out as they could find and sent her for imaging to make sure there was no more glass embedded. They also stitched up the arm laceration. Claimant reported that she had told the ER staff that her shoulder and neck were hurting and burning but they were concentrating on the small glass pieces. She was in pain all over including her neck and shoulder down to her hand, but they could not differentiate between the pain caused by the cuts and other pain. After they stitched and bandaged her up, provided her with some ice, they released her with restrictions, pain medication (oxycodone) and an appointment to go to Concentra for follow-up treatment.

5. She was treated at Concentra, where they provided her with physical therapy, massage therapy and acupuncture but the shoulder pain kept getting worse with the treatment they were giving her. It reached a point where she was on too much medication because of the pain and she was not getting better. Claimant's pain was from the base of her neck to her shoulder and going down her arm. That was when she was told she likely needed surgery because she had a torn tendon in her shoulder. Once she had the surgery she improved.

6. Claimant had never felt the kind of pain she had following her injury at any time prior to her injury of May 8, 2023. She had been at the job for many years and would occasionally feel tired and sore, but she never had any treatment for the right shoulder discomfort, though she did report some pain and soreness to her PCP on several occasions about a year before the accident.

7. Claimant was taken to the emergency room at Saint Joseph Hospital on May 8, 2023 following her injury. Claimant provided a history that she was working at the building she was cleaning when a glass door she was passing through broke and she was struck by the door's falling glass as well as the frame of the door. Claimant was evaluated for a right forearm laceration and multiple superficial lacerations on her right forearm and the one laceration that required sutures. X-rays of the right elbow, right forearm and right ankle were obtained to rule out any foreign objects or fractures. There were multiple strange notations in the record, such as that Claimant had "no deformity or open wounds" but clearly Claimant had a laceration, which should be considered an open wound. Hospital staff documented that prior to her admission she was provided Oxycodone for the pain.

8. Claimant was first seen at Concentra on May 10, 2023 by Kathy Okamatsu FNP, where when provided a mechanism of injury roughly consistent with the one provided at hearing. She stated that pieces of the shattered door struck her on her right trapezius, right deltoid, right forearm which caused a 2.5 cm laceration on the mid dorsoradial aspect, right mid back, and right lateral ankle. She provided a pain diagram that indicated she had pain on all of her right side. She complained of soreness of the healing sutured wound of the forearm laceration, constant soreness of the right trapezius, of the right deltoid, constant muscular pain on the right mid back and achiness on the lateral aspect of the right ankle. Nurse Okamatsu specifically mentioned under the examination of the right shoulder that Claimant had tenderness in the deltoid and in the trapezius muscle. Nurse Okamatsu found no notable findings or abnormalities during exam other than multiple findings of abnormal range of motion (AROM) in multiple body parts. She noted Claimant was given Oxycodone at the hospital and continued to take the medication every 6 hours as needed. She diagnosed right arm laceration, right trapezius strain, acute thoracic myofascial strain, acute right ankle pain, and strain of the right deltoid muscle. She prescribed oxycodone and Tylenol, hot/cold packs, interpreter services, and physical therapy for the acute right ankle pain, acute thoracic myofascial strain, strain of the right deltoid muscle and the right trapezius strain.[1]

[1] This ALJ takes notice that the trapezius is a very large muscle that runs from the spine at the base of the occiput and C7, in a triangle to the tip of the shoulder over the medial margin of the acromion process of

9. Claimant returned to Concentra two days later on May 12, 2023 complaining of a lot of pain at 8/10 on a pain scale, with right arm pain, numbness and tingling in the right hand, pain going up the arm, into the shoulder and the back. This time Claimant was examined by Erick Chau, M.D. Dr. Chau found tenderness in the anterior shoulder, in the superior shoulder and in the posterior shoulder, and limited range of motion (ROM) in all planes. He tested the rotator cuff and found a positive painful arc, an equivocal empty can test, and an equivocal Speed's test. She also had limited ROM of the wrist, tenderness of the right paraspinal and right rhomboid muscle of the thoracic spine. Dr. Chau noted that the objective findings were consistent with the work related mechanism of injury. He added diclofenac and Tizanadine to her medicines. He provided a 5 lb. work restriction.

10. On May 23, 2023 Claimant continued to complain of right shoulder pain and numbness/tingling throughout the upper extremity with exquisite tenderness to palpation in the right deltoid and right anterior shoulder. On June 8, 2023 Dr. Chau continued to find tenderness in the lateral right shoulder, in the superior shoulder and in the posterior with limited ROM in all planes and a positive empty can test. She also had tenderness in the right paraspinal and right trapezius muscles and a positive Spurling's maneuver. Dr. Chau diagnosed right shoulder strain at this point in addition to the right deltoid and trapezius strains. At that time he ordered more physical therapy and an MRI of the right shoulder and the cervical spine.

11. On June 27, 2023 Claimant had a right shoulder MRI at Health Images. The films were evaluated by Dr. Seth Andrews as showing the following:

1. Full-thickness, full width retracted supraspinatus tendon tear.
2. Infraspinatus tendinopathy and interstitial delaminating tearing.
3. Subscapularis tendinopathy.
4. Mild to moderate acromioclavicular joint osteoarthritis.
5. Mild irregularity along the posterior superior aspect labrum extending from 11:00 to 10:00 likely representing tearing/ fraying.

12. Claimant was evaluated by Valerie Skvarca PA-C on July 5, 2023 as a walk in because her work was not respecting her work restrictions, she was working full duty. She stated that objective findings were consistent with the history and work-related mechanism of injury. She diagnosed right rotator cuff tear and trapezius strain. She limited Claimant from repetitive motion of the right shoulder and neck, lifting and carrying up only 5 lbs., pushing/pulling to 10 lbs.

13. Mark Failinger, an orthopedic surgeon, evaluated Claimant on July 13, 2023 at the Concentra offices. He took a history that a glass door exploded and a piece of the door fell on her right shoulder and she had cuts in her arm. She had significant pain and discomfort. She stated she was unsure of the weight of the metal that fell on her shoulder. She did not fall, but she did get pushed up against a wall with her arms forward and braced. She had neck and shoulder pain right away. She stated she went to the emergency room at Saint Joseph Hospital, underwent some suturing, x-rays, and was

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the scapula and also the posterior border of the clavicle and then goes all the way down to the lowest vertebra of the thoracic spine.

told there were no fractures. She was then referred to Concentra and underwent 12 sessions of physical therapy with little progress. Acupuncture was also tried but did not help her pain. She denies any prior history of injury. On exam she was positive for shoulder pain and numbness. She had discomfort at AC joint, some mild left paracervical and left trapezial discomfort. Dr. Failinger noted that given the finding on exam and the MRI most orthopedic shoulder surgeons would recommend surgery when considering Claimant's age. He recommended she see Dr. Thon who was in the clinic for further evaluation and consideration of surgery.

14. Claimant was first evaluated by Dr. Stephen Thon, an orthopedic surgeon from Orthopedic Centers of Colorado on July 21, 2023. She presented with right shoulder pain that was gradual in onset and her symptoms were moderate to severe. She described a deep ache, shooting throbbing, sharp and stabbing pain that were constant. Her symptoms were exacerbated by any motion and she reported a clicking with movement. She had stiffness. He noted that Claimant had been previously evaluated by a colleague, Dr. Failinger. He diagnosed right shoulder pain and right neck pain/radicular pain. Her symptoms were affecting her daily activities, quality of life, ability to participate in sports and perform her job. She also had also had radicular symptoms radiating from the C-spine to her hand/wrist with shooting pains from neck to hand/wrist. He noted that she had previous treatment consisting of rest, activity modification, activity cessation icing, heat, NSAID's, home exercise program, physical therapy at Concentra. She was referred by Dr. Failinger. He noted on exam that she had no deformity, atrophy or erythema, a positive Champagne test, 4/5 Empty Can, positive for Grove Pain, Upper Cut, and positive Speeds and Hawkins tests but otherwise negative.

15. Dr. Thon opined that Claimant presented with right shoulder pain consistent with full thickness rotator cuff pathology. Dr. Thon recommended surgical repair of the rotator cuff tear as well as subacromial decompression and bicep tenodesis. He explained the risks of surgery as well as the process of recovery, which could take an extensive amount of time. He ordered PT for three to 14 days after surgery, a cold therapy pad with pump, a pillow sling, prescribed her doxycycline, oxycodone, omeprazole, Methocarbamol, meloxicam, ketorolac and acetaminophen to be started at different times.

16. Dr. Thon submitted a request for prior authorization on July 24, 2023 for a right rotator cuff repair, subacromial decompression, with an arthroscopic bicep tenodesis surgery. The request specifically noted that "[s]urgery cannot be scheduled <u>without written</u> Authorization Approval. Please fax back written approval to the provided fax." He attached the clinical records and surgery order. Dr. Thon's office confirmed the fax was sent at 3:14 p.m. MST and Respondents noted that they received it at 5:14 EDT.

17. Respondents filed an Admission of Liability on September 15, 2023 admitting for medical benefits and indemnity benefits.

18. There was confirmation that the surgical procedure, including rotator cuff repair bicep tenodesis, and arthroscopy of the shoulder with coracoacromial ligament repair was performed on October 23, 2023 and was paid by Respondents in two different payments, November 22, 2023 and December 20, 2023 based on the payment log (account inquiry).

19. Dr. William Ciccone issued an independent medical evaluation report on November 29, 2023, which was consistent with his testimony at trial. He testified on behalf of Respondents as a Board Certified expert in Orthopedic Surgery as well as Orthopedic Sports Medicine and as a Level II accredited provider. He opined that Claimant did suffer a minor sprain of the right shoulder, but did not think the rotator cuff pathology was related to the accident. He was uncertain of the mechanism but believe a part of the door had fallen and struck her on the right side. Dr. Ciccone explained that an object falling and striking the shoulder may aggravate a preexisting condition, but not likely affecting the rotator cuff. He agreed that the MRI did not show any atrophy or any indication that there was any long term chronic condition. Dr. Ciccone evaluated Claimant post-surgery only, and did not perform an examination. Dr. Ciccone opined that the mechanism of injury was not associated with a rotator cuff injury.

20. As found, the evidence showed that Dr. Thon would not proceed with the surgery without written authorization. As found, Dr. Thon proceeded with the surgery on October 23, 2023. As further found, Respondents paid for the surgery shortly thereafter. There was no persuasive evidence that a denial letter was sent to Claimant or the ATP in accordance with the rules. This ALJ concludes that Dr. Thon obtain prior authorization. As found, Claimant has shown by a preponderance of the evidence that Dr. Thon had prior authorization to proceed with the surgery.

21. As found, Claimant has shown that the May 8, 2023 accident where pieces of a door fell onto Claimant's trapezius and right shoulder caused either the rotator cuff tear or aggravated the preexisting condition to an extent that caused the need for treatment including the surgery proposed by Dr. Thon.

22. As found, while there is some evidence that the ER report of May 8, 2023 failed to mention complaints of shoulder pain, Claimant was given oxycodone prior to arriving at the hospital as she was in significant pain due to the multiple pieces of glass she had embedded on her right side, and especially the bleeding laceration she sustained on the right forearm, which likely were Claimant's more immediate concerns when she was taken to the hospital. As found, Claimant also indicated that she had reported to the ER staff that her shoulder was hurting but they failed to address that complaint.

23. As found, on May 10, 2023 when Nurse Okimatsu examined Claimant, she examined the right shoulder and specifically noted that Claimant had tenderness over the trapezius and deltoid muscles of the right shoulder. At that time Claimant continued to be under the influence of oxycodone. As found, there are multiple contradictions in this report as well and only parts of it are found credible.

24. As found, the opinions of Dr. Thon, Dr. Failinger, PA Skvarca and Dr. Chau were found more credible and persuasive than the contrary opinion of Dr. Ciccone. As found, the surgery that took place on October 23, 2023 for the right rotator cuff repair, subacromial decompression, with an arthroscopic bicep tenodesis surgery was reasonably necessary and proximately caused by the May 8 2023 occupational injury.

25. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2023). 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.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or

interest. *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Reasonably Necessary and Related Medical Benefits

Claimant argued that the issue of whether the surgery performed by Dr. Thon on October 23, 2023 was reasonably necessary and related is a moot issue as the surgery was approved and paid for by Respondents. As found, the evidence showed that Dr. Thon would not proceed with the surgery without written authorization. As found, Dr. Thon proceeded with the surgery on October 23, 2023. As further found, Respondents paid for the surgery shortly thereafter. There was no persuasive evidence that a denial letter was sent to Claimant or the ATP in accordance with the rules. This ALJ concludes that Dr. Thon obtain prior authorization. As found, Claimant has shown by a preponderance of the evidence that Dr. Thon had prior authorization to proceed with the surgery.

While this ALJ found that these fact are true, that Respondents approved the surgery and paid for it, this ALJ is not persuaded that the issue before this ALJ is moot. The issue for hearing was not solely whether the surgery was authorized but whether the condition for which the surgery took place was related to the admitted May 8, 2023 occupational injury, which is a condition precedent to addressing whether the surgery was reasonably necessary. Therefore, this ALJ will proceed with this analysis.

Respondents argue that the right shoulder strain was part of the admitted May 8, 2023 work injury but that the rotator cuff injury was not. They rely on some discrepancies in the record and Dr. Ciccone's opinion that the rotator cuff tear was not likely caused by the falling door pieces nor the bracing against the wall when she was hit by the pieces, and therefore not causally related to the May 8, 2023 admitted occupational injury.

The Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio*, *supra* at 716 (Colo. 1994). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for medical treatment. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The issue of whether medical treatment is necessary for a compensable aggravation or a worsening of Claimant's pre-existing condition is also one of fact for resolution by the ALJ based upon the evidentiary record. See *University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The Act places full responsibility on the employer for benefits as a result of a work injury when there is an aggravation of an underlying dormant condition. *United Airlines, Inc. v. ICAO*, 993 P.2d 1152 (Colo. 2000). Expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition. *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). When expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992).

Here, Claimant was injured in the course and scope of her employment on May 8, 2023 when a glass door shattered and the glass and metal frame pieces fell on her right side, including on her neck, shoulder, arm, hand, leg, ankle and foot. Respondents admitted to this injury on September 15, 2023. As found, the pieces of the door fell onto Claimant’s trapezius and right shoulder causing either the rotator cuff tear or aggravated the preexisting condition to an extent that caused the need for treatment including the surgery proposed by Dr. Thon. While there was some evidence that the ER report of May 8, 2023 failed to mention complaints of shoulder pain, Claimant credibly explained that she was in so much pain that she was given oxycodone prior to arriving at the hospital due to the embedded glass pieces on her right side, and especially the bleeding laceration she sustained on the right forearm. Claimant credibly and persuasively explained that she reported she had pain in her neck and her shoulder but the more immediate concern when she was taken to the hospital was making sure that she was free of any remaining glass and that she was stitched up. Further, the MRI showed a tendon tear and retraction according to Dr. Thon as well as Dr. Ciccone. Dr. Ciccone even agreed that there was no sign on diagnostic testing, the MRI, that showed any atrophy or any indication that there was any long term chronic condition. He also agreed that the surgery itself was reasonable and necessary given the resultant finding on MRI, just not related. Dr. Chau examined Claimant multiple times and determined to both order the MRI and refer Claimant to an orthopedic surgeon. He determined that the objective findings were consistent with the mechanism of injury and so did PA Skvarca. Dr. Failinger opined that Claimant’s work injury caused findings consistent with rotator cuff pathology which required surgical intervention and made the referral to Dr. Thon. Dr. Thon agreed with Dr. Failinger’s assessment and recommended the surgery, requesting prior authorization and eventually, proceeding with the surgery.

Respondents argue that multiple slight differences in the medical record indicate that Claimant was not being truthful. However, it is common to see these kind of

discrepancies when different interpreters are involved in a matter that have different levels of interpreting skills. Respondents also argued that the discrepancy in the interrogatories indicated that she was not reliable. However, this ALJ, upon review of the response, noted that the response is in the third person, as if Claimant had not really been the one to respond to this particular question. As found, Respondents arguments with regard to Claimant's honesty has little merit and were not persuasive. Further the argument that Claimant was dishonest because Ms. Okamatsu sited to "no significant past history," Dr. Failinger stated "denies prior history of injury to the left shoulder," and Dr. Ciccone stated Claimant had "denied prior history of shoulder injuries," was not persuasive. Claimant stated she did not have any injuries to her right shoulder in the past. The record from Kaiser simply indicated that Claimant complained about right shoulder joint pain in January and May 2022. There were no other indications that Claimant was seen or treated for right shoulder complaints following this. There was no credible evidence that Claimant had any significant continuing symptoms. As found, they were temporary in nature, in no way significant and certainly did not rise to the level of an injury.

As found, the opinions of Dr. Thon, Dr. Failinger, PA Skvarca and Dr. Chau were found more credible and persuasive over the contrary opinion of Dr. Ciccone. As found and concluded, the hit on the right shoulder either caused or aggravated an underlying condition of the rotator cuff that caused the need for treatment. As found, the surgery that took place on October 23, 2023 for the right rotator cuff repair, subacromial decompression, with an arthroscopic bicep tenodesis surgery was reasonably necessary and proximately caused by the May 8 2023 occupational injury. Claimant has proven that the rotator cuff injury was caused by the May 8, 2023 occupational accident and the surgery was reasonably necessary and related to the May 8, 2023 work related injury.

ORDER

IT IS THEREFORE ORDERED:

1. The rotator cuff tear was proximately caused by the admitted work related injury and the surgery performed by Dr. Thon on October 23, 2023 was reasonably necessary and related to the May 8, 2023 work injury.

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

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

DATED this 28th day of March, 2024.

Digital Signature

By: _____
ELSA MARTINEZ TENREIRO
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that her claim for workers' compensation benefits should be reopened.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury to her right knee when she fell twice while walking up a set of stairs at Employer's premises on February 22, 2022. Claimant was 65 years of age at the time of the injury.
2. Claimant sought treatment from Concentra Medical Centers on March 1, 2022, where she was seen by Jeffrey T. Baker, M.D. Dr. Baker documented Claimant had no prior history of knee complaints. Claimant's symptoms were documented as located on the inside of her knee. Dr. Baker assessed Claimant with a knee strain, referred Claimant for physical therapy and x-rays, and assigned work restrictions.
3. Claimant returned to Concentra on March 18, 2022, where she was seen by Linda Young, M.D., who documented that Claimant had completed PT and was making progress but yet the physical therapy notes indicate that Claimant would benefit from additional therapy. As a result, Dr. Young referred Claimant for additional physical therapy.
4. The Concentra note on March 30, 2022, indicates Claimant had completed the additional PT and was "improved. Cleared by PT." [Ex. C, p. 125]. Elva Saint, NP, removed the weight restrictions and recommended Claimant return in 1-2 weeks.
5. On April 6, 2022, X-rays of Claimant's bilateral knees were taken at Orthopaedic & Spine Center of the Rockies and interpreted by Richard H. Morgan, M.D. [Exhibit E, p. 202]. Bilateral AP and PA views of the knees showed relatively well-maintained weightbearing spaces, no real significant marginal osteophytes, and no obvious loose bodies. Single view lateral x-ray of the right knee showed overall normal contours and minimal degenerative findings. Bilateral Merchan view showed a relatively well-maintained patellofemoral space with normal anatomic lie of the patella, a tiny medial osteophyte on the medial femoral condyle, otherwise grossly normal views of the knees. The radiology report did not indicate whether the x-rays were weight-bearing or supine.
6. Claimant returned to Concentra on April 8, 2022. Ms. Saint documented that Claimant continued to complain of pain and swelling in the joint and was interested in obtaining a referral to a specialist. [Ex. C, p. 116]. Ms. Saint referred Claimant for additional physical therapy and a right knee MRI. [Ex. C, p. 118].

7. On April 12, 2022, Claimant underwent a right knee MRI, which was interpreted by Seth Andrews, D.O., which showed:
    - There is tearing along the medial meniscal body undersurface which appears irregular, and a horizontal degenerative tear extends into the posterior horn.
    - Low-grade medial collateral ligament sprain.
    - Patellar chondromalacia with full-thickness fissuring.
    - Moderate joint effusion.
8. On April 14, 2022, Dr. Baker referred Claimant to Lucas Schnell, D.O., an orthopedic surgeon. [Ex. C, p. 98].
9. After examining Claimant and discussing the MRI report and the MRI images, Dr. Schnell diagnosed Claimant with a right knee posterior horn medial meniscus tear, right knee acute patellar contusion, and mild patellofemoral osteoarthritis. [Ex. D, p. 154]. He concluded that "I do think her meniscus tear is causing her symptoms at this point." [Ex. D, p. 155]. Dr. Schnell further documented that "[r]egarding causation, I think it is reasonable to correlate meniscus injury with a fall on some stairs at work as well as the low-grade MCL strain that she suffered. I do think she also had a contusion of her patella with her fall, which does correlate with the acute edema noted on her MRI." [Id.]. Dr. Schnell performed a right knee intra-articular steroid injection and recommended additional physical therapy for gentle range of motion and strengthening. [Ex. D, p. 154].
10. On May 23, 2022, Claimant returned to Dr. Schnell and informed Dr. Schell that "[t]he steroid injection gave her no relief for her symptoms." [Ex. D, p. 160]. Dr. Schnell's impression was right knee posterior medial meniscus tear, right knee mild patellofemoral osteoarthritis, right knee acute patellar contusion, right knee low grade medial collateral ligament strain. [Id.] He recommended a right arthroscopic partial medial meniscectomy and chondroplasty. [Id.].
11. Dr. Schnell's report dated June 6, 2022, indicates that his impression remained unchanged: right knee posterior medial meniscus tear, right knee mild patellofemoral osteoarthritis, right knee acute patellar contusion, right knee low grade medial collateral ligament strain. [Id.] [Ex. D, pp. 162]. Dr. Schnell performed another intra-articular steroid injection. [Id.].
12. Dr. Schnell's report dated July 5, 2022, does not indicate whether Claimant had any pain relief from the second steroid injection on June 6, 2022. However, Claimant testified that she experienced no pain relief from that second steroid injection. [Hearing Transcript, p. 15:12].
13. On July 12, 2022, Board Certified occupational medicine physician John R. Burris, M.D., performed an Independent Medical Examination of Claimant at the request of Respondent. Dr. Burris opined that "Dr. Schnell believes [Redacted, hereinafter MG] meniscus tear is symptomatic and that she will benefit from right knee arthroscopic partial medial meniscectomy and chondroplasty surgery to improve her function." Dr. Burris testified that Claimant's report that she had no pain relief from the steroid

injections on May 2, 2022, and June 6, 2022, supported Dr. Schnell's opinion that Claimant's knee pain was coming from her meniscus tear, because the steroid injection is a potent anti-inflammatory which likely would have alleviated Claimant's pain if it were coming from inflammation, but is much less likely to alleviate pain coming from a meniscus tear. [Hearing Transcript, p. 30:2-16]. In his report dated July 12, 2022, Dr. Burris concluded that the partial medial meniscectomy recommended by Dr. Schnell was reasonable and necessary and related to the work injury.

14. On September 23, 2022, Dr. Schnell performed right knee surgery on Claimant. Despite repeatedly diagnosing Claimant with mild patellofemoral osteoarthritis and recommending a partial medial meniscectomy prior to the surgery, Dr. Schnell's operative note indicates that, in addition to performing the right knee partial medial meniscectomy, he also performed a 2 compartment chondroplasty. The operative report Pre-Procedure diagnosis is listed as "Right knee posterior horn multidirectional medial meniscus tear[,] right knee grade III chondromalacia patellofemoral joint space[,] right knee grade III chondromalacia medial femoral condyle." [Ex. D, p. 173]. As testified to by Dr. Burris, the Pre-Procedure diagnosis in the operative note is not consistent with Dr. Schnell's prior records, as Dr. Schnell made no mention of grade III chondromalacia patellofemoral joint space or grade III chondromalacia medial femoral condyle in any of his reports prior to the September 23, 2022, operative note, and repeatedly assessed Claimant with mild patellofemoral osteoarthritis. In addition, the context of the operative report indicates that Dr. Schnell did not realize Claimant had grade III chondromalacia of the patellofemoral joint space or grade III chondromalacia of the medial femoral condyle until he was looking at the knee compartments through the arthroscope, as the operative note indicates "[d]iagnostic arthroscopy revealed grade 3 chondral malacia [sic] of the patellofemoral joint space involving both the trochlea and patella ... Assessment of the medial compartment demonstrated some grade III chondromalacia weightbearing surface the medial femoral condyle." [Ex. D, p. 173]. Thus, Dr. Schnell decided to perform a 2-compartment chondroplasty only upon learning during the surgery that Claimant did not have mild patellofemoral osteoarthritis and instead had grade III osteoarthritis of both the patellofemoral joint space and the medial compartment at the weightbearing surface of the medial femoral condyle.

15. Importantly, none of Dr. Schnell's reports, either pre-surgery or post-surgery, ever indicated that he believed that Claimant's pain was coming from Claimant's pre-existing osteoarthritis. Instead, he explicitly concluded that Claimant's pain was caused by her medial meniscus tear. Dr. Burris testified that Dr. Schnell's opinion that Claimant's pain pre-surgery was caused by the meniscus tear is supported by Claimant's lack of pain relief from the two steroid injections prior to the surgery:

> Q. Now, if the claimant's pain prior to the surgery were coming from her -- this chondromalacia, what would you expect when she was given the steroid injections?
>
> A. That's usually more of an inflammatory process that causes that pain. When you get acute pain, and so you would expect some relief from that.

[Hearing Transcript, p. 38:6-11].

16. Furthermore, Dr. Burris testified that Dr. Schnell's diagnosis of mild patellofemoral chondromalacia starting in May 2022 (4 months prior to the surgery) did not worsen to become grade III chondromalacia by the time of the surgery:

> Q: Okay. Now, you talked about how it wasn't graded in the MRI, the level of chondromalacia, although they talked about full thickness fissuring, but then he graded it as grade 3 when he was in there. So my question is, he used the term, prior to the surgery, "mild patellofemoral chondromalacia" and didn't talk at all about medial compartment chondromalacia. So the fact that when he gets into the knee in August of 2022 and finds grade 3 chondromalacia, does that mean that between May of 2022 and August of '22 the claimant's chondromalacia worsened and became grade 3?
>
> A. No. These processes take many years to advance like that. And a grade 3 is pretty advanced arthritis. This is not uncommon for MRIs to -- like I said, you can't really grade cartilage injuries very accurately with MRIs. So -- but you wouldn't see this type of advancement over months.

[Hearing Transcript, pp. 38:22 – 39:13].

17. Claimant followed up with Dr. Schnell and Dr. Baker in the post-operative period. On December 27, 2022, Dr. Schnell documented that Claimant's complaints were limited to intermittent pain at night or after being on her feet for long periods of time. [Ex. D, p. 182]. He released Claimant to return to work without restrictions from an orthopedic standpoint, recommended Claimant use her final two physical therapy visits for transition to a home exercise program and recommended Claimant follow up on an as-needed basis. [Id.]

18. On January 3, 2023, Dr. Baker released Claimant to full duty work without restrictions. [Ex. C, p. 42]. On January 17, 2023, Dr. Baker referred Claimant to Greg Reichhardt, M.D., for an impairment rating. [Ex C, p. 38]. Dr. Reichhardt placed Claimant at Maximum Medical Improvement on March 6, 2023, with a 20% whole person impairment rating. [Ex. B, p. 19] Respondent filed a Final Admission of Liability consistent with Dr. Reichhardt's report on March 22, 2023. [Ex. B]. Claimant did not object to the Final Admission of Liability, so the claim closed pursuant to § 8-43-202(2)(b). The Final Admission of Liability admitted liability for treatment after Maximum Medical Improvement. [Ex. B, p. 5].

19. Claimant returned to Dr. Schnell on April 10, 2023, who documented that Claimant is clinically doing much better today. He also stated noted that:

> This is actually the best I have seen her while she does have a bit of an effusion. Her function is good. I did stress that she does have some underlying arthrosis, may have some permanent swelling of the knee, but I do not think it will be a permanent limitation from a functional standpoint. We discussed the potential repeat injection in future if she has a re- flare-up of symptoms. She is actually in favor of holding off on an injection at this time because she is doing so well.

[Ex. D, p. 187].

20. On June 20, 2023, Dr. Baker documented that Claimant was complaining that her knee felt worse. Dr. Baker documented that he "explained to her 4 times that her underlying arthrosis is now what is causing her pain." [Ex. C, p. 27].

21. Dr. Burris performed a second Independent Medical Examination of Claimant on July 11, 2023. Dr. Burris opined that Claimant's continued knee pain was not related to her injury of February 22, 2022, which caused a medial meniscus tear and resulted in relatively minor medial meniscus repair surgery. [Ex. F, p. 236].

22. Dr. Buris also testified that an injury or surgery would be the two leading causes for Claimant's worsening osteoarthritis. Moreover, he also testified that Claimant's work injury did not cause, accelerate, or aggravate Claimant's underlying osteoarthritis. Therefore, it appears that Dr. Burris is of the opinion that the portion of the July 2022, surgery, i.e., the 2-compartment chondroplasty, which was not necessitated by the work injury, is the more likely the cause of Claimant's worsening of condition and need for additional medical treatment, which includes a knee replacement.

23. The ALJ credits, and finds persuasive, the opinion of Dr. Burris that the Claimant's worsening knee pain and need for additional medical treatment, which includes the need for a knee replacement, is not related to the February 22, 2022, work injury.

24. On October 4, 2023, Claimant was seen at the Orthopaedic & Spine Center of the Rockies by Scott A. Galey, M.D. Dr. Galey reviewed weightbearing x-rays taken on that date which demonstrated "severe bone-on-bone medial compartment osteoarthritis." [Ex. H, p. 265]. Dr. Galey diagnosed Claimant with severe right knee osteoarthritis. [Id.] Dr. Galey's note provides no opinion on whether Claimant's severe right knee osteoarthritis was caused, aggravated, or accelerated by the injury of February 22, 2022, or medial meniscus surgery of September 23, 2022. In addition, there is no credible evidence that Dr. Galey had seen any of the prior medical records, including Dr. Schnell's records which indicate Claimant's knee pain was caused by the torn medial meniscus and recommended a partial medial meniscectomy repair, but performed a 2-compartment chondroplasty when he realized during the surgery that Claimant also had grade III osteoarthritis of both the patellofemoral joint space and the medial compartment at the weightbearing surface of the medial femoral condyle.

25. David A. Beard, M.D., examined Claimant on October 31, 2023, diagnosing Claimant with primary osteoarthritis. Dr. Beard performed right total knee arthroplasty on November 9, 2023. Dr. Beard's notes provide no opinion on whether Claimant's severe right knee osteoarthritis and the need for the right total knee arthroplasty was caused, aggravated, or accelerated by the injury of February 22, 2022, or medial meniscus surgery of September 23, 2022. In addition, there is no credible evidence that Dr. Beard had seen any of the prior medical records, including Dr. Schnell's records which unequivocally opine that Claimant's knee pain was caused by the torn medial meniscus and recommended a partial medial meniscectomy repair, but performed a 2-compartment chondroplasty when he realized during the surgery that Claimant also had grade III osteoarthritis of both the

patellofemoral joint space and the medial compartment at the weightbearing surface of the medial femoral condyle.

26. On cross examination of Dr. Burris, Claimant attempted to argue that Claimant's x-rays taken on April 6, 2022, showed "just really minimal degenerative findings," implying that "something has happened in those 16 months to the cartilage." However, Dr. Burris testified that the two x-rays cannot be compared because "the first study [April 6, 2022], there is no mention about whether it was weight-bearing or not. And this is important, because again, if you're just laying down, there is no forces going across the joint. If you're standing up on your weight, it can actually decrease the joint space." [Hearing Transcript, p. 44:1 – 45:23].

27. Philip A. Stull, M.D., an orthopedic surgeon specializing in hip, knee, and shoulder replacement surgery, authored a report dated October 30, 2023. After reviewing all of the medical records, Dr. Stull opined that "[t]he need for knee replacement in this Claimant would be related to the underlying degenerative condition of her right knee, which dates back to at least 2016 based on the medical records provided and is not directly related to the work injury/episode in question. The alleged work "injury" that she sustained to her knee in Feb. 2022, did not accelerate the progression of the underlying degenerative arthritic condition of her knee." The ALJ finds Dr. Stull's opinion to be credible and persuasive.

28. Dr. Burris testified that Claimant underwent the total knee arthroscopy for advanced arthritis and that the injury of February 22, 2022, did not cause, aggravate, or accelerate the need for the total knee arthroplasty as the injury caused a torn medial meniscus but the total knee arthroplasty was performed for advanced arthritis. [Hearing Transcript, p. 39:14-24].

29. The ALJ credits, and finds persuasive, the opinion of Dr. Burris that the Claimant's worsening of condition and need for additional medical treatment is not related to the February 22, 2022, work injury.

30. Dr. Schnell concluded that the meniscus tear was the cause of Claimant's symptoms prior to surgery and recommended a partial medial meniscectomy surgery to alleviate Claimant's symptoms. However, upon examining Claimant's knee during the arthroscopic surgery, Dr. Schnell saw that Claimant had grade III osteoarthritis of both the patellofemoral joint space and the medial compartment at the weightbearing surface of the medial femoral condyle and decided to perform a 2-compartment chondroplasty to clean up Claimant's osteoarthritis. While it was reasonable for Dr. Schnell to perform this additional procedure while he was inside Claimant's knee, the ALJ finds that the need for the 2-compartment chondroplasty was not caused by the injury of February 22, 2022, as Dr. Schnell repeatedly opined that the injury caused a meniscus tear.

31. Based on Dr. Burris' testimony, it is possible that Claimant's pre-existing osteoarthritis was aggravated when Dr. Schnell decided to perform the unanticipated 2-compartment chondroplasty of the patellofemoral joint space and the medial compartment at the weightbearing surface of the medial femoral condyle. While this surgery was performed at the same time as the surgery to cure and relieve the effects of the torn meniscus, the need for the 2-compartment chondroplasty was not

caused by the torn meniscus or work accident. Rather, Dr. Schnell took advantage of the opportunity to address the osteoarthritis while he was already inside Claimant's knee.

32. As such, Claimant's knee pain and need for treatment, i.e., worsened or changed condition, is not related to her February 22, 2022, work injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant established by a preponderance of the evidence that her claim for workers' compensation benefits should be reopened.

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

In this case, Dr. Schnell concluded that Claimant's fall while going up the stairs resulted in a medial meniscus tear and that the medial meniscus tear was the cause of Claimant's knee pain prior to her surgery. Dr. Schnell recommended a partial medial meniscectomy to cure and relieve Claimant from the effects of the industrial injury. However, while inside Claimant's knee during the partial medial meniscectomy surgery, Dr. Schnell also found that Claimant had grade III osteoarthritis of both the patellofemoral joint space and the medial compartment at the weightbearing surface of the medial femoral condyle and decided to perform a 2-compartment chondroplasty to clean up Claimant's osteoarthritis. As found, the need for the 2-compartment chondroplasty was not caused by the injury of February 22, 2022. Rather, need for the 2-compartment chondroplasty was caused by Claimant's pre-existing, non-industrial osteoarthritis- which was not caused or aggravated by her industrial injury.

Dr. Burris performed two IMEs and testified at hearing. He ultimately concluded that the Claimant's worsening of condition and need for a total knee replacement is not due to the work injury, but due to the progression of her underlying arthritis that was neither caused nor aggravated by her work injury. Overall the ALJ finds Dr. Burris' ultimate opinions and conclusions to be persuasive for a number of reasons. First, when Dr. Burris performed an IME in July of 2022, he evaluated Claimant, the mechanism of injury, and her failure to improve with conservative treatment to determine whether Dr. Schnell's recommendation for a right knee arthroscopic partial medial meniscectomy and chondroplasty was reasonable, necessary, and related to the work accident. After a thorough assessment, he concluded the surgery was reasonable, necessary, and related to Claimant's work accident. Second, his opinion that Claimant's worsening of condition and need for additional medical treatment, in the form of a knee replacement, is not related to the industrial injury is also supported by the opinion of Dr. Stull, an orthopedic surgeon. As found, Dr. Stull concluded that the work injury sustained on February 22, 2022, did not accelerate the progression of

Claimant's underlying degenerative arthritic condition of her right knee. Third, Dr. Burris seems to indicate in his testimony that the 2-compartment chondroplasty of the patellofemoral joint space and the medial compartment at the weight bearing surface of the medial femoral condyle, which was for a non-work-related condition, could be the cause of the progression of Claimant's osteoarthritis and need for a knee replacement.

The ALJ also finds the opinion of Dr. Stull to be persuasive evidence which supports a finding that the Claimant's worsening or change of condition, and need for additional treatment, including the knee replacement, is not due to her work injury, but due to her preexisting osteoarthritis.

In this case, Claimant contends that she hurt her knee in February of 2022, underwent treatment, got placed at MMI, and is now worse – thus her case should be reopened. While the ALJ agrees that Claimant's condition is worse, Claimant has failed to establish by a preponderance of the evidence that her worsened or changed condition is due to her work injury. In other words, the mere fact that her knee, in general, is worse does not automatically establish that the worsening or changed condition and need for additional medical treatment is causally related to her work injury.

Respondents contend that because the worsening of condition is due to the 2-compartment chondroplasty performed by Dr. Schnell, which was for a condition that was not caused by the work accident, then any worsening of condition due to that surgery is not a compensable consequence. While the ALJ has not specifically found that that the 2-compartment chondroplasty caused the worsening or change of condition, Respondents legal contention is consistent and supported by *Gordon v. Final Order Ross Stores, Inc*. W.C. No. 4-878-759-05 (August 20, 2015). (The consequences from the treatment of an unrelated condition are not the "direct and natural" consequence of an original injury. Thus, the consequences are not compensable.)

Based on the totality of the evidence presented at hearing, the ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that her work injury has worsened or changed and that her claim should be reopened.

ORDER

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

1. Claimant's petition to reopen is denied and dismissed.
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: March 28, 2024

s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-241-303-001

ISSUES

- Did Claimant prove that he sustained a compensable injury?
- What is Claimant's Average Weekly Wage?
- Did Respondents prove that Claimant was responsible for termination of his employment on July 26, 2023 thus precluding temporary disability after this date?

FINDINGS OF FACT

1. Claimant worked for employer as a courtesy clerk and had been employed at employer's grocery store in Woodland Park for fifteen months.

2. Claimant injured himself on May 5, 2023 while helping a customer load bags of pellet into the customer's vehicle. As he was doing this, he felt a snap or a pop in his left shoulder. Claimant completed his shift, which was a Friday and was not scheduled to return to work until the following Wednesday, May 10, 2023.

3. Claimant did attempt to report the injury on Sunday, May 7, 2023, but the store Manage, [Redacted, hereinafter JD] was not in the store that day. Although he was unable to report the work injury on that day, he did seek medical care at the emergency department at UCHealth the following day. Dr. Browning assessed Claimant with a rupture of the left biceps tendon. Claimant was provided with an arm sling and instructed to see a physician for follow up.

4. The Claimant testified that he returned to Employer's store the day after to report the injury and obtain a list of doctors to provide treatment for his work injury.

5. Claimant attempted to obtain treatment from UC Health Occupational Medicine Clinic on May 9, 2023, but was informed that no workers' compensation health care providers were available on that date. Claimant was given an urgent referral to orthopedics.

6. Claimant reported to UC Health Orthopedics Clinic on May 11, 2023, where he was seen by Ross Aron Schumer, M.D. [Ex. H, pp. 126-29]. Dr. Schumer diagnosed Claimant with a long head biceps tendon rupture. [Ex. H, p. 128]. Dr. Schumer explained treatment options and Claimant chose to pursue a non-operative treatment plan. [Ex. H, p. 128]. Dr. Schumer provided a letter indicating that Claimant could return to work with no restrictions starting June 5, 2023. [Ex. H., p. 129]. However,

Dr. Schumer's report does not address what restrictions, if any, Claimant had as of the date that he saw Claimant on May 11, 2023.

7. Claimant presented to UC Health Occupational Medicine Clinic on May 12, 2023, where he was seen by Cynthia A. Schafer, M.D. [Ex. H, pp. 120-22]. She provided restrictions of no use of the left arm or hand. [Id.]. Claimant is right-hand dominant. [Ex. I, p. 168].

8. Claimant testified that he began modified-duty work for Employer a few days after seeing Dr. Schafer on May 12, 2023, primarily cleaning windows on the freezer aisle with his right arm. [Hearing Transcript, pp. 20:23 – 22:25].

9. On June 26, 2023, Dr. Schumer provided restrictions of no lifting, pushing or pulling greater than 2 pounds with the left hand, no work above chest level with the left hand. [Ex. H, pp. 108-09]. Claimant testified that he continued to work light duty through July 21, 2023. [Hearing Transcript, pp. 22:25 – 23:2].

10. On July 21, 2023, Claimant was working his modified-duty work changing tags on sale items. [Hearing Transcript, pp. 18-25]. Claimant approached his supervisor, [Redacted, hereinafter MW], with a question. [Hearing Transcript, p. 29:4-9]. Claimant believed that MW[Redacted] responded to him "in a very condescending voice." [Hearing Transcript, p. 29:20-23]. Approximately ten minutes later, Claimant walked up to MW[Redacted] while on the sales floor and stated "MW[Redacted], if you just tell me what you want me to do, I'll do it for you, but you need to stop this F'ing interrogation. It is just ridiculous." [Hearing Transcript, p. 30:22-24. Claimant clarified that he "used the full word" when speaking with MW[Redacted] on the sales floor. [Hearing Transcript, p. 31:2].

11. Claimant acknowledged that when he approached MW[Redacted] and made the statement using profanity, he did not have a question for her and just wanted to state what he was thinking at that time. [Hearing Transcript, p. 37:15-21]. Claimant also acknowledged that he could have let MW[Redacted] know what he was thinking without using "the F word." [Hearing Transcript, p. 37:22-25].

12. Claimant testified that he waited to approach MW[Redacted] at the back of the store (but still on the sales floor) when nobody else was around. [Hearing Transcript, p. 31:6-12]. Claimant also testified that when he made the statement he knew Employer had policies and procedures which prohibited him from using profanity in the workplace.

13. . Claimant was terminated for this violation of the workplace policies and procedures on July 26, 2023.

14. The Administrative Law Judge finds that Claimant was responsible for his termination of employment. Claimant knew that the policies and procedures manual clearly stated that "[e]mployees using profanity on the sales floor will be immediately terminated." Indeed, Claimant testified that he waited to approach MW[Redacted] until nobody was around, indicating that he knew his actions were prohibited and he wanted

to engage in the conduct outside of hearing of anyone else. This established intent on behalf of Claimant to engage in conduct he knew was prohibited.

15. Claimant's wage records while working for Respondent were entered into evidence as Exhibit G. Those wage records provide the current pay period earnings and a running total of year-to-date wages earned by Claimant.

16. Claimant's year-to-date wages for the period pay period ending March 4, 2023, totaled $4,177.32. [Ex. G, p. 73]. There are no wage records for the pay periods ending March 11, 2023, and March 18, 2023. Claimant earned $242.55 for the pay period ending March 25, 2023. [Ex. G, p. 75]. At the end of that pay period, Claimant's year-to-date wages were $4,419.87, which is $242.55 more than the year-to-date wages Claimant had earned for the pay period ending March 4, 2023. Therefore, Claimant did not earn any wages for the pay periods ending March 11, 2023, and March 18, 2023.

17. For the pay period ending April 8, 2023, Claimant had earned a year-to-date total of $5,271.27. [Ex. G, p. 79]. There are no wage records for the pay period ending April 15, 2023. The wage records for the pay period ending April 22, 2023, show that Claimant earned $361.35 for that pay period and had earned a year-to-date total of $6,003.87. [Ex. G, p. 81]. The year-to-date total of $6,003.87 minus the $361.35 earned for that pay period equals a year-to-date total of $5,642.52, which is $371.25 more than the year-to-date total Claimant had earned for the pay period ending April 8, 2023. Therefore, although the wage records for the pay period ending April 15, 2023, are not in evidence, Claimant must have earned $371.25 for that pay period. The wage records establish that Claimant earned a total of $12,395.76 over a 32 week period prior to his injury:

18. The Claimant's AWW is $387.37.

19. On August 3, 2023, Dr. Schafer responded to the adjuster's inquiries regarding causation and treatment. With respect to treatment, Dr. Schaffer recommended an MRI to determine the extent of the internal damage to Claimant's left shoulder. I find that this imaging is reasonable, necessary and related to the work injury.

CONCLUSIONS OF LAW

A. Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

B. Temporary Total Disability

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, “In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.” A claimant’s responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of “volitional conduct” is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice

in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Based on the evidence presented, I conclude that Claimant was responsible for his termination by violating a reasonable rule, of which he was aware, which resulted in his termination.

ORDER

It is therefore ordered that:

1. The Claimant sustained a compensable injury to his left shoulder on May 5, 2023.

2. Respondents sustained their burden of proof that Claimant was responsible for termination on July 26, 2023 and is not entitled to Temporary disability benefits as of that date.

3. The treatment provided by Dr. Schafer has been reasonable necessary and related. Respondent shall provide the MRI recommended by Dr. Schafer on August 3, 2023.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27 and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email

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

DATED: March 28, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-212-146-001

ISSUE

- Did Claimant prove by a preponderance of the evidence that the C6-7, C7-T1 anterior cervical discectomy and fusion surgery recommended by Dr. Gary Ghiselli is reasonable, necessary and related to the compensable June 16, 2022 work injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a truck driver delivering and picking up ocean shipping containers and as a mechanic. He has worked for the Employer for approximately 4 years. His job is very physically demanding. He would work 12 to 14 hours per day.

2. On June 16, 2022 Claimant sustained injuries to his neck, right shoulder and right arm. The claim was determined to be compensable by order dated February 2, 2023.[1]

3. At the first hearing, the Claimant testified that when he fell he fell on to his side he hit his shoulder and elbow. The fall knocked the wind out of him. He laid there for a while after falling. The immediate pain was in his knuckles and elbow and from the middle of his back all down his right side including his right shoulder. After he went home, he took a hot bath and took Advil dual action for the pain. He experienced trouble breathing, which he attributed to having a rib "out". He had experienced having a rib out previously but lower down in his torso.

4. After Claimant received the MRI results, he met with Dr. Poindexter, to discuss the results. He took Dr. Poindexter's advice to take it easy, relaxing, keeping a pain diary, including the pain levels, intensity and whether the pain was going away. Following receiving the MRI, [Redacted, hereinafter HD] submitted the claim the [Redacted, hereinafter PL] and Claimant submitted a statement regarding what happened in the original incident. HD[Redacted] did not want Claimant to return to work until he received a clearance to return to work from the doctors. He began treatment with [Redacted, hereinafter AA] at the ROMP clinic in Alamosa. She referred him to Dr. Timothy.

5. Dr. Timothy referred Claimant to Denver Spine and Pain Management. He received an injection from Dr. Bainbridge at that facility. The injection helped his symptoms and the pain is no longer debilitating. Following the injection, he was able to return to work on November 10, 2022. Dr. Timothy allowed him to return to work with

[1] The ALJ takes judicial notice of the prior Findings of Fact Conclusions of Law and Order.

restrictions including no lifting above his head. He allowed him to drive as long as he could maintain control of his right hand.

6. Dr. Alexis, an occupational medicine specialist treated the Claimant for his work related injury. In her practice, she has provided treatment for patients with workers compensation with cervical spine injuries 40% of the time. She provided the primary care to Claimant. She referred Claimant to Dr. Ghiselli. After receiving an updated MRI, Claimant saw Dr. Ghiselli on April 27, 2023 and he reviewed the MRI. The MRI showed severe left stenosis at C6-C7 and severe right stenosis at C7-T1. Dr. Ghiselli noted that Claimant continued to have symptoms in his bilateral upper extremities, right greater than left.

7. Dr. Ghiselli's assessment on April 23, 2023 was "54 y.o male status post a fall with injury to his right ulnar nerve. EMG is confirmed the injury at the cubital tunnel. He has multilevel cervical stenosis and compression of the right-sided C8nerve root. Overall he is doing better. He feels as though his strength is improving but he continues to have numbness in his bilateral upper extremities." At this point in time, the Claimant did not want surgery since he was improving.

8. Claimant's condition worsened after the April visit. Based on this worsening, Dr. Ghiselli recommended the C6-7, C7-T1 anterior cervical discectomy and fusion surgery.

9. After the recommendation for surgery, Dr. Alexis reviewed the medical records and opined that the need for surgery was reasonable, necessary and related to his work injury. She further opined that even though there was evidence of a preexisting degenerative condition, the cervical spine condition was accelerated by the work injury.

10. Dr. Chen did an IME at the request of Respondents. He also testified in a post-hearing deposition. After he testified as to his qualifications at the deposition, Claimant objected to his qualifications as an expert since he had not performed a cervical fusion, among other objections. Dr. Chen is a level II accredited physician and is trained in causation analysis in workers compensation cases for all body parts. The objection is therefore overruled.

11. In addition to his IME which included taking a history, an examination and review of the medical records, he also listened to the testimony taken at the hearings. He took issue with respect to the causal connection of the need for surgery with the work injury. He also questioned whether the surgery was reasonable. With respect to the first opinion, he testified that the findings on the MRI of the neck were essentially chronic, age-related and preexisting. The second issue is where Dr. Ghiselli is stopping the fusion based on the Claimant's kyphotic spine. He opined that essentially ending at the kyphotic level may result in an earlier break down at that level and may result in the need for another surgery.

CONCLUSIONS OF LAW

A. General Principals

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

2. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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).

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere

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

In addition to proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993.

After review of the evidence, I am more persuaded by the testimony of Dr. Alexis than I am by the testimony of Dr. Chen. Although I have considered all of the doctors opinions, the opinions of Dr. Alexis and Dr. Chen are based on a more comprehensive review of the medical records. I conclude that the surgery proposed by Dr. Ghiselli is reasonable, necessary and related to the work injury on June 16, 2022.

.

ORDER

It is therefore ordered that:

1. The anterior cervical discectomy and fusion at C6-7 and C7-T1 recommended by Dr. Ghiselli is reasonable, necessary and related to Claimant's work injury.

2. Any issue not addressed in this order is reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27 and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: March 28, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-175-016-004

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the March 21, 2023 Division Independent Medical Examination (DIME) opinion of Justin D. Green, M.D. that he suffered no permanent impairment as a result of his March 9, 2021 industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a carpenter. On March 9, 2021 Claimant arrived at the job site at 7:00 a.m. and met with the foreman to obtain his job assignment. As Claimant proceeded to his work area, he fell on ice located at the entrance to a building. Claimant experienced pain in his back, neck and left leg as a result of the fall. In Findings of Fact, Conclusions of Law and Order issued on November 4, 2021, the undersigned ALJ concluded that Claimant suffered compensable injuries to his neck and back during the course and scope of his employment on March 9, 2021

2. On March 17, 2021 Claimant presented to Michael Sanders, D.C. with complaints of constant lower back and neck pain after his "slip and fall on the ice" that was affecting his job duties. Dr. Sanders diagnosed Claimant with segmental and somatic dysfunction of his cervical, thoracic, lumbar and sacral regions. Claimant received chiropractic adjustments to the affected body parts. Dr. Sanders provided adjustments to Claimant on March 18, 19, 20, 23, 25, 26, and 30, 2021.

3. On May 7, 2021 Claimant visited Paul Ogden, M.D. at Authorized Treating Provider (ATP) Workwell Occupational Medicine and reported constant neck, back and left leg pain. Dr. Ogden diagnosed him with cervical, thoracic and lumbar strains. He limited Claimant's work to lifting, pushing and pulling no more than 20 pounds.

4. On May 16, 2021 Claimant underwent a lumbar spine MRI. The MRI revealed the following: (1) an L4-5 left protrusion with disc material contacting the descending left L5 nerve root; and (2) an L5-S1 disc protrusion with annular fissuring.

5. On December 27, 2021 Claimant returned to Workwell. He subsequently received physical therapy and chiropractic treatment for two months. Claimant was then referred to John T. Sacha, M.D. for an evaluation.

6. On March 18, 2022 Claimant visited Dr. Sacha at Mile High Sports and Rehabilitation Medicine for an examination. He diagnosed Claimant with the following: (1) lumbar radiculopathy; (2) mild cervical facet syndrome; and (3) adjustment disorder. Dr. Sacha recommended a transforaminal lumbar epidural steroid injection for diagnosis, causality and treatment. He also suggested acupuncture for the cervical spine.

7. On April 15, 2022 Claimant returned to Dr. Sacha for an examination. Dr. Sacha noted that Claimant had undergone an L5-S1 transforaminal epidural injection. Claimant had a diagnostic response with no lasting relief. Dr. Sacha explained that Claimant had received the injection less than one week earlier and "it was likely too early to tell" whether he obtained relief. He planned to reevaluate Claimant in about one to two weeks.

8. On April 22, 2022 Claimant again visited Dr. Sacha Dr. Sacha commented that Claimant's L5-S1 transforaminal epidural injection provided a diagnostic response with only temporary relief. He suggested an EMG/nerve conduction study. Dr. Sacha explained that Claimant might be approaching Maximum Medical Improvement (MMI) and case closure.

9. On April 25, 2022 Claimant visited Samuel Y. Chan, M.D. at Mile High Sports. Dr. Chan noted that Claimant received no diagnostic benefit from the epidural steroid injection. He remarked that Claimant demonstrated a "certain amount of symptom magnification" and pain behaviors.

10. On May 9, 2022 Claimant again visited Dr. Chan. He commented that Claimant's physical examination was unrevealing and there were no focal findings. Moreover, Claimant's imaging studies revealed only mild degenerative changes. He also had a non-diagnostic response to an epidural steroid injection. Dr. Chan thus concluded that Claimant's imaging findings were more likely incidental rather than pain generators.

11. On May 10, 2022 Dr. Sacha reviewed Claimant's EMG studies. He determined the results were normal, with no evidence of acute or chronic denervation. Dr. Sacha concluded that Claimant had reached MMI.

12. On May 16, 2022 Dr. Chan noted the imaging and EMG studies had not revealed any specific objective pathology. Claimant thus experienced only subjective pain with no objective support.

13. On June 7, 2022 Claimant returned to Workwell and visited Brenden Matus, M.D. for an examination. Dr. Matus diagnosed Claimant with cervical, thoracic and lumbar strains. He determined that Claimant had reached MMI. Relying on Table 53 of the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Matus assigned a total 23% whole person impairment rating for Claimant's lumbar spine. The rating consisted of 7% for a specific disorder of the lumbar spine pursuant to Table 53.II.C. and an additional 1% for two-level involvement consistent with Table 53.II.F. Dr. Matus also assigned a 16% impairment for range of motion deficits. He noted that Claimant was scheduled for a Functional Capacity Examination (FCE) to better ascertain his permanent restrictions. Dr. Matus recommended maintenance care with Dr. Sacha for pool therapy and medication management.

14. On March 21, 2023 Claimant underwent a Division Independent Medical Examination (DIME) with Justin D. Green, M.D. He reviewed Claimant's medical records

and conducted a physical examination. Dr. Green agreed with Dr. Matus that Claimant had reached MMI on June 7, 2022. He determined there was no objective basis for an impairment of Claimant's cervical, thoracic or lumbar spine that was causally related to the March 9, 2021 industrial injury. Dr. Green explained that Claimant had a "dramatically non-physiologic presentation" with no changes in symptoms for almost two years. Claimant's treatment was "refractory to multiple interventions, medications, interventional procedures, therapy, massage, acupuncture, and modification of activity." He also exhibited multiple Waddell's signs suggesting a non-physiologic pain presentation.

15. On December 5, 2023 Claimant underwent an Independent Medical Examination (IME) with Quing-Min Chen, M.D. Dr. Chen reviewed Claimant's medical records and performed a physical examination. He diagnosed Claimant with the following: (1) C5-C6 degenerative disc disease; (2) multilevel lumbar spine degenerative disc disease from L4 to S1; and (3) depression. Dr. Chen reasoned that all of the preceding diagnoses were not related to Claimant's March 9, 2021 work accident, but constituted pre-existing conditions. He also assessed Claimant with non-physiologic responses, anxiety and positive Waddell's signs from multiple providers including at the FCE. Dr. Chen noted that Claimant initially suffered neck and back problems after his March 9, 2021 work accident. However, after Claimant underwent a negative MRI of the cervical spine he ceased reporting neck pain and started complaining of back pain that was consistent with the lumbar spine MRI. Moreover, Claimant has visited multiple providers and the records document numerous discussions concerning Claimant's non-physiologic responses. Claimant's non-physiologic presentation, especially involving range of motion deficits, cast doubt on the high impairment rating assigned by Dr. Matus. Dr. Chen further commented that there was "also no great evidence here that [Claimant's] L4-S1 degenerative disc disease was due to this accident." There were simply no objective findings to support a permanent impairment or pathological worsening of Claimant's pre-existing conditions.

16. In response to specific interrogatories Dr. Chen noted there were no objective findings during his physical examination. Furthermore, the MRI of the cervical spine also revealed minimal findings to support Claimant's subjective neck complaints. With respect to the lumbar spine, Claimant has two-level lumbar degenerative disc disease from L4 to S1. Dr. Chen remarked that the disc disease likely constituted a pre-existing condition. During the physical examination Claimant did not display any overt signs of pain behaviors, symptom magnification, or Waddell's signs. Nevertheless, Claimant's range of motion examination was invalid based on lack of effort regarding the lumbar spine. There was thus insufficient evidence to support Claimant's limited lumbar spine range of motion. Dr. Chen concluded that Claimant reached MMI on May 16, 2021 and did not require any work restrictions or maintenance treatment.

17. Dr. Matus testified at the hearing in this matter. He explained that Dr. Sacha administered injections to Claimant's lumbar spine for both diagnostic and therapeutic purposes. According to Dr. Sacha, Claimant had a diagnostic response to the injections. The diagnostic response permitted Dr. Matus to identify the lumbar MRI findings at L4-5 and L5-S1 as pain generators and objective evidence of an injury that supported a Table 53 rating. According to Dr. Matus and consistent with 53.II.C., the diagnostic response

demonstrated that Claimant "clearly" had "moderate to severe degenerative changes" on his MRI that were aggravated by his March 9, 2021 industrial injury. Furthermore, Dr. Matus noted that Claimant's lumbar condition had a muscular or myogenic component that was part of his March 9, 2021 injury. Claimant's lumbar spine range of motion deficits on June 7, 2022 were valid and met the consistency requirements of the *AMA Guides*.

18. Dr. Matus also addressed Dr. Green's DIME determination. He commented that Dr. Green did not perform or even attempt an impairment rating evaluation of Claimant. Dr. Matus remarked that, when an injured worker demonstrates inconsistent motion loss, the protocol under the *AMA Guides* is to bring the claimant back on a future date for repeat measurements. Dr. Green should have attempted to perform a range of motion evaluation even if he felt that ultimately the case would justify no impairment or there was otherwise no objective basis for a rating.

19. Dr. Chen also testified at the hearing in this matter. He maintained that Dr. Green properly determined there was no objective basis for an impairment of Claimant's cervical, thoracic or lumbar spine causally related to the March 9, 2021 industrial injury. Dr. Chen reiterated that there were simply no objective findings to support a permanent impairment or pathological worsening of Claimant's pre-existing conditions. He commented that numerous providers throughout the medical records documented that Claimant demonstrated non-physiologic responses during their examinations. Because there were no objective findings to support an injury or worsening of Claimant's lumbar spine condition, no Table 53 rating pursuant to the *AMA Guides* was warranted. In the absence of a Table 53 rating, there was no basis for a range of motion impairment. Therefore, Dr. Green properly determined that Claimant did not warrant an impairment rating for the March 9, 2021 incident pursuant to the *AMA Guides*.

20. Dr. Chen commented that Claimant suffers from two-level lumbar degenerative disc disease from L4 to S1. There was no evidence on the MRI of an acute traumatic disc extrusion that permanently aggravated Claimant's pre-existing lumbar disc disease. Although Dr. Sacha mentioned that Claimant's L5-S1 transforaminal epidural injection provided a diagnostic response, Dr. Chen remarked that the injection failed to produce a diagnostic benefit. Moreover, Dr. Chen reasoned that any type of injection has a placebo effect, and Dr. Sacha never mentioned the extent of diagnostic effectiveness. Notably, most physiatrists would document the effectiveness of an injection to provide evidence that the procedure was beneficial.

21. Claimant has failed to produce clear and convincing evidence to overcome the March 21, 2023 DIME opinion of Dr. Green that he suffered no permanent impairment as a result of his March 9, 2021 industrial injuries. Specifically, Claimant has not demonstrated that it is highly probable that Dr. Green's determination was incorrect. Initially, Claimant slipped on ice and suffered compensable injuries to his neck and back during the course and scope of his employment on March 9, 2021. On May 7, 2021 Dr. Ogden diagnosed Claimant with cervical, thoracic and lumbar strains. Claimant then received physical therapy and chiropractic treatment for two months.

22. Dr. Sacha subsequently administered an L5-S1 transforaminal epidural injection. He noted that the injection provided a diagnostic response with no lasting relief. Dr. Chan later remarked that Claimant's imaging studies revealed only mild degenerative changes. He also noted Claimant had a non-diagnostic response to an epidural steroid injection. Dr. Chan thus concluded that Claimant's imaging findings were more likely incidental rather than a pain generator. On June 7, 2022 Claimant returned to Workwell and Dr. Matus diagnosed cervical, thoracic and lumbar strains. He determined that Claimant had reached MMI. Relying on Table 53 of the A*MA Guides*, Dr. Matus assigned a total 23% whole person impairment rating for Claimant's lumbar spine. The rating consisted of 7% for a specific disorder of the lumbar spine pursuant to Table 53.II.C. and an additional 1% for a two-level involvement consistent with Table 53.II.F. DIME Dr. Green subsequently agreed with Dr. Matus that Claimant had reached MMI on June 7, 2022. However, he determined there was no objective basis for an impairment of Claimant's cervical, thoracic or lumbar spine causally related to the March 9, 2021 industrial injury. Dr. Green explained that Claimant had a "dramatically nonphysiologic presentation" with no changes in symptoms for almost two years.

23. In contrast to Dr. Green's DIME opinion, Dr. Matus explained that Claimant's diagnostic response to the epidural steroid injection permitted him to identify the lumbar MRI findings at L4-5 and L5-S1 as pain generators. The objective evidence of an injury supported a Table 53 rating of Claimant's lumbar spine. According to Dr. Matus and consistent with Table 53.II.C., the diagnostic response demonstrated that Claimant "clearly" had "moderate to severe degenerative changes" on his MRI that were caused by his March 9, 2021 industrial injury. Dr. Matus also remarked that when an injured worker demonstrates inconsistent range of motion loss, the protocol under the *AMA Guides* is to bring the claimant back on a future date for repeat measurements. Dr. Green thus should have attempted to perform a range of motion evaluation even if there was otherwise no objective basis for an impairment rating.

24. Despite Dr. Matus' opinion, the record reveals that Dr. Green properly concluded that Claimant did not suffer any impairment as a result of his March 9, 2021 work injuries. Notably, in support of Dr. Green's opinion, Dr. Chan remarked that Claimant's imaging studies revealed only mild degenerative changes. He also noted Claimant had a non-diagnostic response to an epidural steroid injection. Dr. Chan thus concluded that Claimant's imaging findings did not likely constitute pain generators but were rather incidental. Moreover, Dr. Chen explained that Dr. Green properly determined there was no objective basis for an impairment of Claimant's cervical, thoracic or lumbar spine causally related to the March 9, 2021 industrial injury. He commented that there were simply no objective findings to support a permanent impairment or pathological worsening of Claimant's pre-existing conditions. Dr. Chen explained that numerous providers throughout the medical records determined that Claimant demonstrated non-physiologic responses during their examinations. Because there were no objective findings to support an injury or worsening of Claimant's lumbar spine condition, no Table 53 rating pursuant to the *AMA Guides* was warranted. In the absence of a Table 53 rating, there was no basis for a range of motion impairment.

25. Based on the medical records and persuasive opinion of Dr. Chen, Dr. Green correctly did not assign an impairment rating for Claimant's March 9, 2021 industrial injury. The contrary determination of Dr. Matus is a mere differences of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Green's DIME opinion. Accordingly, Claimant has not produced unmistakable evidence free from serious or substantial doubt that Dr. Green's determination that he did not warrant an impairment rating was incorrect.

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 that 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. As found, Claimant has failed to produce clear and convincing evidence to overcome the March 21, 2023 DIME opinion of Dr. Green that he suffered no permanent impairment as a result of his March 9, 2021 industrial injuries. Specifically, Claimant has not demonstrated that it is highly probable that Dr. Green's determination was incorrect. Initially, Claimant slipped on ice and suffered compensable injuries to his neck and back during the course and scope of his employment on March 9, 2021. On May 7, 2021 Dr. Ogden diagnosed Claimant with cervical, thoracic and lumbar strains. Claimant then received physical therapy and chiropractic treatment for two months.

9. As found, Dr. Sacha subsequently administered an L5-S1 transforaminal epidural injection. He noted that the injection provided a diagnostic response with no lasting relief. Dr. Chan later remarked that Claimant's imaging studies revealed only mild degenerative changes. He also noted Claimant had a non-diagnostic response to an epidural steroid injection. Dr. Chan thus concluded that Claimant's imaging findings were more likely incidental rather than a pain generator. On June 7, 2022 Claimant returned to Workwell and Dr. Matus diagnosed cervical, thoracic and lumbar strains. He determined that Claimant had reached MMI. Relying on Table 53 of the A*MA Guides*, Dr. Matus assigned a total 23% whole person impairment rating for Claimant's lumbar spine. The

rating consisted of 7% for a specific disorder of the lumbar spine pursuant to Table 53.II.C. and an additional 1% for a two-level involvement consistent with Table 53.II.F. DIME Dr. Green subsequently agreed with Dr. Matus that Claimant had reached MMI on June 7, 2022. However, he determined there was no objective basis for an impairment of Claimant's cervical, thoracic or lumbar spine causally related to the March 9, 2021 industrial injury. Dr. Green explained that Claimant had a "dramatically nonphysiologic presentation" with no changes in symptoms for almost two years.

10. As found, in contrast to Dr. Green's DIME opinion, Dr. Matus explained that Claimant's diagnostic response to the epidural steroid injection permitted him to identify the lumbar MRI findings at L4-5 and L5-S1 as pain generators. The objective evidence of an injury supported a Table 53 rating of Claimant's lumbar spine. According to Dr. Matus and consistent with Table 53.II.C., the diagnostic response demonstrated that Claimant "clearly" had "moderate to severe degenerative changes" on his MRI that were caused by his March 9, 2021 industrial injury. Dr. Matus also remarked that when an injured worker demonstrates inconsistent range of motion loss, the protocol under the *AMA Guides* is to bring the claimant back on a future date for repeat measurements. Dr. Green thus should have attempted to perform a range of motion evaluation even if there was otherwise no objective basis for an impairment rating.

11. As found, despite Dr. Matus' opinion, the record reveals that Dr. Green properly concluded that Claimant did not suffer any impairment as a result of his March 9, 2021 work injuries. Notably, in support of Dr. Green's opinion, Dr. Chan remarked that Claimant's imaging studies revealed only mild degenerative changes. He also noted Claimant had a non-diagnostic response to an epidural steroid injection. Dr. Chan thus concluded that Claimant's imaging findings did not likely constitute pain generators but were rather incidental. Moreover, Dr. Chen explained that Dr. Green properly determined there was no objective basis for an impairment of Claimant's cervical, thoracic or lumbar spine causally related to the March 9, 2021 industrial injury. He commented that there were simply no objective findings to support a permanent impairment or pathological worsening of Claimant's pre-existing conditions. Dr. Chen explained that numerous providers throughout the medical records determined that Claimant demonstrated non-physiologic responses during their examinations. Because there were no objective findings to support an injury or worsening of Claimant's lumbar spine condition, no Table 53 rating pursuant to the *AMA Guides* was warranted. In the absence of a Table 53 rating, there was no basis for a range of motion impairment.

12. As found, based on the medical records and persuasive opinion of Dr. Chen, Dr. Green correctly did not assign an impairment rating for Claimant's March 9, 2021 industrial injury. The contrary determination of Dr. Matus is a mere differences of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Green's DIME opinion. Accordingly, Claimant has not produced unmistakable evidence free from serious or substantial doubt that Dr. Green's determination that he did not warrant an impairment rating was incorrect.

ORDER

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

1. Claimant has failed to produce clear and convincing evidence to overcome the March 21, 2023 DIME opinion of Dr. Green that he suffered no permanent impairment as a result of his March 9, 2021 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 https://oac.colorado.gov/resources/oac-forms*.

DATED: March 28, 2024.

DIGITAL SIGNATURE.
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-233-166-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury on March 2, 2023.

2. If Claimant sustained a compensable injury, what is Claimant's average weekly wage?

FINDINGS OF FACT

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

1. Claimant is a 43 year-old man who worked for Employer as a truck driver and heavy equipment operator. He began working for Employer on May 9, 2022. (Ex. A). Claimant testified that his job duties consisted of delivering building materials and equipment to jobsites and operating heavy equipment. He occasionally performed manual labor, such as digging trenches for water and sewer lines.

2. Claimant credibly testified that he earned twenty-six dollars per hour and occasionally worked overtime.

3. On March 2, 2023, Claimant finished his driving tasks for the day. Around 3:30 or 4:00 p.m., Claimant started helping his coworkers dig a French drain. Claimant credibly testified that after shoveling for some time, he pulled up from the left side to throw the dirt over his right shoulder, when he felt a pop in his back and a sharp pain in his lower back on both sides. Claimant credibly testified that the injury occurred around 5:00 p.m., and he continued shoveling and threw a few more shovels of dirt and gravel before his supervisor told him and others to go home.

4. Claimant credibly testified that he did not report his injury on March 2, 2023, because he did not think it was a big deal, and he thought the pain would go away. Claimant credibly testified he went back to the shop to clock out, and then he drove home, which was about an hour and a half a way. Claimant further testified that when he arrived at home, his pain was worse and he was unable to stand up straight, so he took a hot shower for relief, which did not help, and went to his bedroom to rest. Claimant credibly testified that the pain was so extreme he could not sleep.

5. Claimant lived with two roommates, one of whom was [Redacted, hereinafter GS]. GS[Redacted] rented the room to Claimant and he also worked for Employer with Claimant. Claimant testified that when he arrived home on March 2, 2023, his one roommate was home, but Mr. GS[Redacted] was not.

6. GS[Redacted] testified he went to his girlfriend's house after work and returned home between 9:00 p.m. and 10:00 p.m. the night of March 2, 2023. He testified that Claimant's vehicle was not there and Claimant's bedroom door was closed. GS[Redacted] testified that Claimant was not home that evening. GS[Redacted], however, did not go into Claimant's room, nor did he knock on the door.

7. On March 3, 2023, Claimant arrived at work in the morning with red marks on his face. Claimant testified he has a mental condition, dermatillomania, which causes him to scratch at his face and/or pull his hair out, when he has anxiety. He testified that the March 2, 2023 injury, and resulting pain trigged his condition and he scratched at his face. He testified that he takes preventative medication for this condition but it does not help during acute attacks. Claimant's diagnoses of bipolar disorder and PTSD are noted throughout the records, but there is not a specific reference to dermatillomania. Claimant testified that he has similar occurrences with this condition once a month.

8. GS[Redacted] and [Redacted, hereinafter AG], another co-worker of Claimant, both testified they did not previously observe scratches or marks on Claimant's face at work. GS[Redacted] testified that when he saw Claimant on March 3, 2023, he asked him if he had gotten into a fight. Claimant said he had not been in a fight, but was not feeling well.

9. The ALJ finds Claimant's testimony credible. The ALJ finds that Claimant was home the evening of March 2, 2023, and scratched at his face that evening, causing the marks on his face the next day.

10. Claimant testified he arrived at work around 6:45 a.m., the morning of March 3, 2023. Claimant testified that the pain in his back was worse that morning. He could not straighten his back and had a hard time walking. He testified that he hauled one load and returned to the shop, and reported his injury to his supervisor at approximately 10:00 a.m. Claimant testified that his supervisor told him to "take care of" his injury, so he went to Stout Street Clinic to be evaluated. Claimant testified they turned him away because it was a workers' compensation case. Employer directed Claimant to a specific American Family Care (AFC) clinic to go to for evaluation.

11. Frances Schreiber, PA-C, at AFC, evaluated Claimant on March 3, 2023. Claimant reported having pain in the mid-back, central lower back, left buttock and right buttock. The pain was sharp, and the severity was mild. Claimant told Ms. Schrieber that he was shoveling at work the day prior, when he felt a sharp pain in his back after throwing dirt behind him. Claimant admitted to a prior back strain in 2007. Claimant was not experiencing any numbness, radiculopathy, bladder issues, or foot drop, but did complain of a headache and generalized back pain. It was noted that Claimant was bipolar and had PTSD. Imaging demonstrated a normal t-spine and an old compression fracture at Claimant's L-1. Claimant was diagnosed with low back pain, pain in the thoracic spine, and unspecified injuries to his thorax and low back. He was prescribed naproxen, a muscle relaxer, and told to go to the ER if lower extremity symptoms developed. (Ex. E).

12. Claimant returned to AFC for follow-up appointments on March 6 and 13, 2023. Claimant continued to experience generalized low back pain. Claimant's physical examination on March 13, 2023, showed no spasm or tenderness of spine or paraspinal muscles with no midline lumbar tenderness, no midline sacral tenderness, with diffuse tenderness of his lumbar muscles. Claimant had normal strength and sensation in his lower extremities and his straight leg raise test bilaterally was negative. Claimant had no focal neuro deficits on examination and was again diagnosed by Theresa Shieh, PA-C, with low back pain. Ms. Shieh noted that Claimant had persistent left-sided lumbar back pain, and had been kept out of work for 11 days. Ms. Shieh referred Claimant to Colorado Rehabilitation & Occupational Medicine (CROM) because his lower back pain was not improving. (Ex. E).

13. David Reinhard, M.D., at CROM, evaluated Claimant on March 21, 2023. Claimant's primary complaint was low back pain, and numbness down the back of his buttocks. Claimant reported he was shoveling and tossing dirt over his right shoulder when he felt acute onset of low back pain bilaterally. He also experienced numbness and pain in the gluteal region bilaterally. Claimant reported having constipation for days at a time and then bowel urgency, but no incontinence. Claimant reported a prior back injury and treatment between 2004 and 2009. Dr. Reinhard's physical examination and testing showed restricted range of motion, tenderness of the SI joints, bilateral tenderness in the lumbar spine, a negative straight leg raise test, with numbness in his bilateral buttocks. The Patrick maneuver was positive bilaterally. Dr. Reinhard diagnosed Claimant with a lumbar sprain, sacroiliac joint dysfunction, and cluneal neuropathy. He ordered physical therapy and referred Claimant for an MRI. Dr. Reinhard also noted on the WC164 form that Claimant was unable to work. (Ex. G).

14. Claimant's March 29, 2023 MRI results, showed a chronic L1 compression abnormality with loss of height at approximately 45%. There was no evidence of acute compression abnormality. The impression was minimal, mostly lower lumbar degenerative changes, and no significant canal or foraminal narrowing. (Ex. 9).

15. Claimant had a follow-up appointment with Dr. Reinhard on April 7, 2023, and he reviewed the MRI with Claimant. Claimant had not yet heard back from physical therapy, so he had been unable to begin therapy. Claimant's pain level was a 3/10 with bilateral gluteal numbness, and restricted lumbar range of motion. Dr. Reinhard opined that Claimant appeared to have primarily lumbar strain and sprain, with some SI joint involvement and painful muscle spasms. He further opined that Claimant's numbness in the gluteal region is most likely from irritation/compression from muscular hypertonia of the cluneal nerves since there was no neural compressive pathology noted on the MRI. Dr. Reinhard contacted CACC to get physical therapy started. Dr. Reinhard updated the WC 164 form to keep Claimant off of work for the next four weeks. (Ex. G).

16. CACC was not able to get Claimant in for physical therapy until, April 20, 2023. Claimant reported low back pain and numbness and tingling to bilateral glutes. He reported not being able to sleep for the past 14 days because of the pain, although the pain was improving. Claimant's recorded average range of pain was 3-4/10, worst being in the evening. Claimant's physical evaluation revealed decreased lumbar range of

motion, decreased lower extremity strength, increased lumbar arc of pain, right lateral lean upper and lower extremity tremors with movement, impaired breathing with myotomal testing and left lower extremity active range of motion, and significantly poor activity tolerance all limiting his functional abilities. Claimant was referred back to his physician regarding his bowel and bladder changes, saddle anesthesia, DTR and dermatomal impairments, and impaired breathing. The plan was for Claimant to receive physical therapy twice a week for four weeks. (Ex H).

17. Claimant had a follow-up appointment with Dr. Reinhard on May 3, 2023. Claimant had participated in three physical therapy sessions to date. The physical therapist spoke with Dr. Reinhard regarding her concern about Claimant's gluteal numbness. The pain was primarily left-sided, and was 2/10 pain that day. Claimant reported symptoms of feeling like he has to move his bowels or has to urinate frequently, but will only have a bowel movement every 2-3 days. The prescription for Senokot did not help him. Dr. Reinhard noted that on examination, Claimant was tender over the left SI joint, not the right. He had increased pain with lumbar flexion, where he had failed restricted range of motion. Claimant had asymmetric SI joint motion with forward bending. Patrick, Gaenslen, and Yeoman Tests were all positive on the left side. Dr. Reinhard added six physical therapy sessions and made a referral for a left SI joint injection. (Ex. G).

18. Claimant returned to CROM on June 7, 2023 noting completion of eight physical therapy sessions. He complained of 2/10 pain in his lumbar spine with continued bilateral gluteal numbness. He reported continued urgency with regard to both bowel and bladder function. The SI joint injection had not been authorized. Dr. Reinhard ordered an MRI of Claimant's pelvis due to the continuing bowel and bladder issues and gluteal numbness. (Ex. G).

19. Claimant underwent an MRI of his pelvis on June 10, 2023. According to the documented findings, there were no bone marrow signal abnormalities to indicate fracture, avascular necrosis, or a deconstruction marrow process. Claimant's sacroiliac joints were symmetric without effusion, erosions, widening, or ankylosis. The musculature of the hip and proximal thigh region was unremarkable. The impression was noted as "unremarkable exam." (Ex. 14).

20. Jeffrey Raschbacher, M.D. completed an independent medical examination (IME) of Claimant on July 18, 2023, on behalf of Respondents. He completed a records review and examined Claimant. In his IME report, Dr. Raschbacher noted that he reviewed medical records from AFC and CACC. At the hearing, Dr. Raschbacher testified that he "screwed up" his report because he actually reviewed Dr. Reinhard's records, but inadvertently listed them as documents from AFC.

21. In his IME report, Dr. Raschbacher noted that Claimant reported little benefit from physical therapy and had problems with his bladder dribbling. Dr. Raschbacher opined Claimant did not sustain a work-related injury. He noted that Claimant's "condition" consisted of complaints of low back pain without any objective evidence to corroborate his complaints. He reasoned that had Claimant sustained a lumbar strain from work-activities, he most certainly would have improved at this point in time, even without

treatment. The fact that Claimant continued to complain of low back complaints from an incident months prior and without objective pathology made it more likely that his complaints were not a result of work-activities. Dr. Raschbacher also opined that the mechanism of injury was not one that would be likely to produce SI joint dysfunction and Claimant's subjective symptoms were out of proportion to the paucity of objective findings. (Ex. I).

22. John Aschberger, M.D. performed an IME on August 14, 2023. Claimant explained his mechanism of injury as shoveling dirt from left to right with a twisting motion, and he told Dr. Aschberger that he experienced a sharp onset of pain at the low back. Dr. Aschberger reviewed and summarized, the medical records from AFC, Dr. Reinhard, Health Images and CACC. Dr. Aschberger's physical examination revealed localized sacral tenderness bilaterally, left worse than right. Claimant had restricted and painful SI joint range of motion, positive straight leg raise, positive passive straight leg raise, positive Patrick's test, and positive Gaenslen's test. (Ex. 15).

23. Dr. Aschberger assessed Claimant with a lumbosacral strain, SI joint irritation, and facet irritation. He noted Claimant exhibited no exaggerated pain behaviors. Dr. Aschberger opined that further treatment was warranted, including additional physical therapy, chiropractic intervention for mobilization of the SI joints and lumbar facets. He also opined that the interventional injections recommended by Dr. Reinhard were appropriate and reasonable. Dr. Aschberger concluded that Claimant's conditions were related to the work injury as described by Claimant. He opined that Claimant could perform light to light-medium work with restrictions. (Ex. 15.) The ALJ finds Dr. Aschberger's opinions to be credible and persuasive.

24. Dr. Raschbacher testified consistent with the opinions in his IME report. Dr. Raschbacher testified that he did not believe Claimant sustained a work-related injury on March 2, 2023. He testified there was no objective corroboration of Claimant's subjective complaints and this was an important factor when assessing causation. He testified as to his disagreement with Dr. Aschberger's assessment of relatedness. Dr. Raschbacher explained the typical progression of a lumbosacral sprain and how if this was in fact a correct diagnosis, then Claimant's complaints would have resolved by now. Based on Claimant's continued complaints of pain and dysfunction, coupled with the unexplained complaints of lower extremity dysfunction, Dr. Raschbacher opined it was more likely than not that Claimant did not sustain a work-injury. Dr. Raschbacher also testified that he no longer refers patients to CROM, and in his opinion, injectionists provide patients with injections without reason.

25. Dr. Raschbacher testified he was unlikely to rely on Claimant's subjective claims without objective evidence. When questioned as to what objective evidence he would consider, Dr. Raschbacher testified that objective evidence of Claimant's injury would include straight leg raise, Patrick's test, and muscle spasm. As Dr. Aschberger found, Claimant had restricted straight leg raise, positive Patrick's test, and a positive Gaenslen's test. (Ex. 15).

26. The ALJ finds Dr. Raschbacher's opinion to be credible, but not persuasive. Dr. Raschbacher's IME makes no reference to Dr. Reinhard, or AMC's referral of Claimant to Dr. Reinhard, and mistakenly attributes Dr. Reinhard's records to AMC. Dr. Raschbacher expressed a bias towards CROM and injectionists. Finally, Dr. Raschbacher does not address Claimant's objective tests such as a positive Patrick's test and a positive Gaenslen's test. As found, the ALJ finds Dr. Aschberger's opinions to be credible and persuasive.

27. The ALJ finds Claimant's testimony regarding the mechanism of injury and his subsequent subjective complaints of lumbar back pain, and bilateral numbness in the gluteal region to be credible.

28. Based on the totality of the evidence, the ALJ finds that Claimant proved by a preponderance of the evidence that he suffered a compensable injury on March 2, 2023.

29. The ALJ finds that Claimant is entitled to medical benefits that are reasonable, necessary and related. The ALJ finds that all medical benefits Claimant has incurred to date are reasonable, necessary and related.

30. Prior to the work-related injury, Claimant earned $8,774.87 between January 1, 2023 and March 3, 2023. Claimant worked 8.71 weeks in 2023 (61 days ÷ 7 = 8.71). (Ex. J). The ALJ finds that Claimant's average weekly wage is $1,007.44. ($8,774.87÷8.71= $1,007.44).

CONCLUSIONS OF LAW

Generally

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

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

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

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

Compensability

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

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

The mere occurrence of symptoms at work, however, does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of, or natural progression of, a pre-existing

condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 at 791; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant's testimony at hearing was credible. On March 2, 2023, Claimant was performing repetitive, manual labor when he felt a pop and sharp pains in his lower back region. There is no objective evidence that Claimant was suffering from back issues on March 2, 2023. Claimant was fully functional while working for Employer prior to his injury. Claimant credibly testified that he delayed reporting the injury until the following day, March 3, 2023, because he hoped the injury was not significant, that the pain would resolve.

The totality of the evidence supports Claimant's testimony that he sustained a work-related back injury on March 2, 2023. He consistently reported the mechanism of injury to all providers. Dr. Reinhard, Dr. Aschberger and even Dr. Raschbacher noted objective physical exam results corroborating the occurrence of a lumbar and SI joint injury. Claimant's medical records document objective evidence to support Claimant's subjective complaints, such as positive straight leg raises, lumbosacral muscle spasm, and positive Patrick's tests. Claimant consistently demonstrated reduced and painful range of motion. Dr. Raschbacher's own physical examination demonstrated a positive Patrick's test. As found Dr. Raschbacher's opinion is credible, but not persuasive. Claimant's treating providers, and Dr. Aschberger opined that Claimant's condition is work-related. The ALJ find's Dr. Aschberger's opinion to be credible and persuasive. As found, Claimant has demonstrated by a preponderance of the evidence that he sustained a compensable injury within the course and scope of his employment on March 2, 2023.

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101, C.R.S. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Compensable medical treatment includes reasonably necessary diagnostic evaluations and testing. The respondents must cover diagnostic testing that has a reasonable prospect of diagnosing or defining the claimant's condition to suggest a course of further treatment. *Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (February 23, 2012).

Here, Claimant was referred to AFC by his employer after reporting the March 2, 2023 injury. All subsequent diagnostics, prescriptions and treatment performed thereafter were within the chain of referral and were reasonable and necessary according to authorized treating physicians. As found, all medical benefits incurred to date are reasonable, necessary and related.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his earnings at the time of injury. Under certain circumstances, however, the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. As found, prior to Claimant's work-related injury, he earned $8,774.87 between January 1, 2023 and March 3, 2023. This equates to 8.71 weeks Claimant worked in 2023 (61 days ÷ 7 = 8.71). The ALJ finds that Claimant's average weekly wage is $1,007.44. ($8,774.87÷8.71= $1,007.44).

Temporary Total Disability Benefits

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

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

As found, Claimant sustained an injury within the course and scope of his employment on March 2, 2023. He sought treatment on March 3, 2023, and Ms. Schreiber at AFC completed an M164 form restricting Claimant from work. (Ex. 5). Claimant's restrictions varied, but continued at every following medical appointment. Claimant has not been released to regular duty, there is no objective evidence in the record that Claimant was provided an offer of modified employment, and no authorized treating physician has opined that Claimant has reached MMI. As found, Claimant has

proven by a preponderance of the evidence that he is entitled to an award of temporary benefits beginning March 3, 2023, and ongoing.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury on March 2, 2023.

2. Claimant is entitled to medical benefits that are reasonable, necessary and related. All medical benefits incurred to date are reasonable, necessary, and related.

3. Claimant's average weekly wage is $1,007.44.

4. Claimant is entitled to temporary total disability from March 3, 2023 and ongoing.

5. Respondent shall pay 8% interest on all benefits due and not paid.

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

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

DATED: March 28, 2024

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

ISSUES

- Did Claimant prove he suffered a compensable injury to his left knee?
- If the claim is compensable, Respondents stipulated that Claimant is entitled to TTD benefits commencing August 27, 2023 and continuing until terminated by law. The parties reserved the issue of TPD benefits from February 21, 2023 through August 26, 2023.
- Did Claimant prove the right to select a treating physician passed to him and Nurse Dawn Evert is an ATP?
- Was a left total knee arthroplasty (TKA) performed by Dr. Derek Purcell on October 27, 2023 reasonably needed and causally related to a compensable injury?
- Average weekly wage.
- Did Claimant prove Employer should be penalized for violating § 8-43-103(1) and WCRP 5-2(A) by failing to timely report the injury to insurer?

FINDINGS OF FACT

1. Claimant works for Employer as a warehouse worker. His job duties primarily involved unloading products from shipping pallets.

2. Claimant has an extensive history of left knee problems dating to at least September 2019. An MRI in 2020 showed full-thickness cartilage loss on the medial femoral condyle and a radial tear of the posterior horn of the medial meniscus adjacent to the root insertion. Claimant was evaluated by Dr. Derek Purcell, an orthopedic surgeon, on November 19, 2020. Dr. Purcell explained that arthroscopic surgery for a radial tear is unreliable and recommended a brace to unload the osteoarthritis and subchondral edema and take stress off the medical meniscus.

3. Claimant returned to Dr. Purcell in May 2021 for persistent and worsening left knee pain and mechanical symptoms, including pain with weightbearing. On June 4, 2021, Dr. Purcell performed an arthroscopic meniscal root repair and debridement of extensive multicompartmental articular cartilage degeneration.

4. On September 23, 2021, Dr. Purcell documented Claimant had reinjured his knee the week before. He reported significant swelling and was ambulating with a cane. An MRI on October 6, 2021 showed high-grade cartilage loss and subchondral edema of the medial femoral condyle and medial tibial plateau. There was mild extrusion of the medial meniscus, but the prior meniscal root repair appeared to be intact. Dr.

Purcell administered a cortisone injection but explained that "definitive management will require total knee arthroplasty."

5. Claimant underwent a series of three viscosupplementation injections in November 2021, and Dr. Purcell released him to follow up as needed.

6. Claimant regularly treated with his PCP, Dawn Evert, NP, for chronic left knee pain. Claimant saw Ms. Evert on October 10, 2022 for pain in his left arm and both knees. He was observed to be walking with some difficulty. He reported that his knee pain worsened with weight bearing, climbing stairs, prolonged sitting, flexion, extension, squatting, palpation, rising in the morning, and changes in the weather. Over the counter medications were not helpful. Claimant was prescribed Norco and meloxicam for the pain in his knees and arm. Ms. Evert advised Claimant to wrap his knee in an ACE bandage, use crutches as instructed, apply topical capsaicin, and follow RICE instructions. Claimant was also advised to avoid jumping, squatting, and pressure on the left knee. Ms. Evert's records from December 12, 2022, and January 9, 2023 document similar symptoms and limitations.

7. Claimant testified he injured his left knee on February 21, 2023, when he stepped on a broken pallet and fell. He testified he hyperextended his knee and felt a "pop" or "tear." Claimant testified a coworker was working "next to" him at the time, although no corroborative witness was presented at hearing. Claimant testified he continued working for 2 to 3 hours but then noticed his knee had swollen to "the size of a cantaloupe." He reported the symptoms to a supervisor and was referred to the onsite medical clinic, Medcor. Claimant testified he went to the Medcor office "that day."

8. Claimant completed a handwritten accident report on February 21, 2023 that tells a significantly different story. Claimant wrote that he injured his knee on February 16, 2023 when he "step[ped] on a broken pallet." Claimant stated there were "no witnesses" to the accident, and he did not report the injury to anyone. There is no mention of any alleged accident occurring on February 21, 2023 (the day he wrote the report). At hearing, Claimant testified he did not know why he wrote that the injury occurred on February 16, because he was certain the accident occurred on February 21, and that he reported the accident the same day.

9. Claimant saw Linda White, an occupational health nurse at Medcor, on February 21, 2023. Ms. White documented,

> [Claimant] came to clinic reporting that he had left knee pain . . . he stepped on a broken pallet, and he felt his knee "pop." He said he did this on 2/16/2023 but didn't report [it]. But now his left knee hurts and is swollen. He states he put ice on it at home, and when he came to work today he was given BioFreeze by a co-worker and he applied that to his knee, but his knee is still hurting and is swollen.

10. Contrary to Claimant's testimony that his knee was swollen to "the size of a cantaloupe," examination of his left knee showed only "slight" swelling. Ms. White

diagnosed “left knee injury with pain,” and opined it was “hard to determine if work related or not.” She gave Claimant an ice pack and advised him to take ibuprofen or acetaminophen for pain. Claimant declined a knee brace. Claimant said he would speak with HR about short term leave so he could go to his personal physician for cortisone injections. But he returned to the clinic later that afternoon and said he would rather take an “IH7D plan”[1] and work on modified duty.

11. In the afternoon of February 21, Employer transmitted an incident report to [Redacted, hereinafter SK], its third-party administrator for workers’ compensation claims. SK[Redacted] logged the incident but did not open a formal “claim” because Claimant had lost no time and received no treatment beyond the first aid provided at the onsite Medcor clinic. Claimant failed to prove that Employer did not timely report the injury to its insurer as required by the Act.

12. Claimant returned to Medcor on February 22, 2023. His knee was painful and again exhibited “mild” swelling. The nurse gave Claimant BioFreeze and heat/ice packs. He was also given restrictions for the IH7D plan of no walking or climbing and allowance for frequent breaks to elevate and ice his knee.

13. On February 26, 2023, the clinic manager [Redacted, hereinafter SS] went to the warehouse floor and met with Claimant to discuss his options. They discussed his current symptoms and a prior nonwork-related knee injury. SS[Redacted] told Claimant that he could see a workers’ compensation provider if his knee continued to bother him. They also discussed possibly returning to his PCP. Claimant said he was not really interested in going to a workers’ compensation provider. At hearing, Claimant acknowledged meeting with SS[Redacted] on the warehouse floor but insisted that the meeting took place on February 28, 2023. He testified he asked to see a workers’ compensation provider, but SS[Redacted] refused the request. Given the details in SS[Redacted] note, including information regarding Claimant’s past treatment that could have only come from Claimant, SS[Redacted] note is probably an accurate account of the conversation.

14. Claimant followed up at Medcor the morning of March 1, 2023. He said he was “good to return to his normal function. States his ROM is normal, no swelling, no numbness/tingling, and no pain. [Claimant] did mention that he ‘wants to see how it goes’ with his knee and will return to the clinic should his normal function start causing knee pain again.” Claimant’s IH7D plan expired and he returned to regular duty.

15. Claimant saw Ms. Evert on March 6, 2023 for management of his chronic left knee pain. His symptom onset was described as gradual and while at rest. There was no mention of a recent work-related injury. As he had in the months before February 2023, Claimant again reported difficulties with all activities. No new treatment was recommended. At hearing, Claimant disputed the accuracy of Ms. Evert’s report and

[1] An IH7D plan is a 7-day modified duty assignment at Employer’s facility. I infer that these assignments are provided for nonwork-related medical issues.

claimed he was certain he told her it was a work-related injury. He further testified he went to Ms. Evert because Employer had refused to give him any help or treatment.

16. Claimant sought no treatment between March 6, 2023 and May 2, 2023. There are no Medcor notes between these dates even though Claimant testified he repeatedly asked the clinic and other representatives of Employer to send him to the workers compensation doctor. On May 2, 2023, Claimant returned to Ms. Evert for ongoing management of left knee pain with "gradual" onset of pain. There was again no mention of a work-related injury. Ms. Evert referred Claimant to Dr. Purcell for further evaluation.

17. On May 12, 2023, Claimant was contacted by Employer's HR department about several no call no shows. In response, Claimant said he had a left knee injury for which he was still seeking treatment. He was referred to the Medcor clinic. Claimant called Medcor and spoke with [Redacted, hereinafter KR]. Claimant reported that he was "getting fired or something" and needed to speak to Medcor because he had an MRI scheduled. Claimant said he had issues with his knees since he started working for Employer and didn't feel he had been treated fairly. Claimant said his knee "always flared up after a day of work," and he felt it should be a workers' compensation claim. He said his doctor had told him "I'll write down whatever I need to, to make this a work-related injury." KR[Redacted] was confused because Claimant hadn't been to the clinic with any complaints since March 1, 2023, when he said he was ready to return to work. KR[Redacted] advised Claimant to call back and speak with the clinic manager, SS[Redacted], when she returned to the office on May 14.

18. Claimant did not call back on as instructed, so SS[Redacted] contacted him on May 14. Claimant claimed he had asked to see a workers compensation provider several times but was refused. SS[Redacted] reminded Claimant of their prior conversation when she gave him the choice to see a workers' compensation doctor, but he declined. She also reminded Claimant that he came to the clinic on March 1 and said he was ready to return to work. Claimant claimed he went to Medcor for a hearing test on an unknown (and undocumented) date and mentioned at that time he was having problems with his knee, but his request to see a physician was denied. SS[Redacted] disputed Claimant's account of the alleged interaction because it was inconsistent with Medcor's standard practice. Nevertheless, she instructed Claimant to come to the clinic as soon as possible to complete the necessary paperwork to be referred to a workers' compensation provider.

19. Claimant went to Medcor on May 16 and was referred to Dr. Thomas Centi at the Southern Colorado Clinic. Claimant said he would continue seeing his own provider or get an outside opinion if he disagreed with Dr. Centi's assessment.

20. The Medcor records document instances in June 2023 where Claimant "ranted" at the office staff, and asked "what else do I need to do so I can just stay home and workers comp pay me?"

21. The Medcor notes are credible and more persuasive than any contrary testimony provided by Claimant.

22. Claimant underwent an MRI on May 12, 2023. It showed advanced degenerative changes, a medial meniscal tear that the radiologist interpreted as new since a previous MRI in June 202, a joint effusion with synovitis, an ACL strain, and an MCL strain.

23. Dr. Centi initially evaluated Claimant on May 16, 2023. In June 2023, Dr. Centi placed Claimant on restrictions and referred him to Dr. Purcell for an orthopedic consultation.

24. Dr. Purcell recommended a left total knee arthroplasty (TKA), which was eventually performed on October 27, 2023, using Claimant's personal medical insurance.

25. Dr. Timothy O'Brien performed an IME for Respondents on August 16, 2023. When comparing Claimant's pre- and post-incident medical records, Dr. O'Brien noted the symptoms and limitations reported on March 6, 2023 were virtually identical to those documented on January 9, 2023. Dr. O'Brien personally reviewed the MRI films and noted extensive and advanced osteoarthritis, with no objective evidence of any new injury. He opined that the meniscal tear noted by the radiologist was probably degenerative in nature and unrelated to trauma. He opined Claimant was a candidate for a TKA before the alleged work accident from a radiographic perspective and considering his documented pre-existing symptoms and functional limitations. Furthermore, the incident Claimant described, even if it occurred, would not aggravate his underlying osteoarthritis, or accelerate the need for a TKA. Claimant's symptoms in late 2022 and early 2023 reflect the expected waxing and waning of his severe underlying osteoarthritis for which Claimant was already being treated.

26. Claimant saw Dr. Jack Rook for an IME on November 29, 2023 at the request of his counsel. Dr. Rook ultimately concluded that Claimant suffered a work-related injury on February 21, 2023. He based this conclusion on the described mechanism of injury, his acceptance of Claimant's statement that he "went to see a company nurse within hours of sustaining an acute injury," and his impression that Claimant was working a heavy job without difficulty before the alleged work incident.

27. Dr. O'Brien's opinions and conclusions are credible and more persuasive than the contrary opinions offered by Dr. Rook.

28. Claimant failed to prove he suffered a compensable injury to his left knee on February 16 or February 21, 2023.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*,

33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which they seek benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for compensation where the industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere fact that an employee experiences symptoms while working does not compel an inference the work caused an injury or aggravated a pre-existing condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). The claimant must prove by a preponderance of the evidence that their work proximately caused the need for treatment.

The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed they were injured. *Washburn v. City Market*, W.C. No. 5-109-470 (June 3, 2020). A referral to a medical provider may be made so that the respondent does not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id*. Although a physician designated by the employer provides diagnostic evaluations, treatment, and work restrictions based on a claimant's reported symptoms, it does not necessarily follow that the claimant sustained a compensable injury. *Fay v. East Penn Manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (April 24, 2020).

Claimant failed to prove he suffered a compensable injury on February 16 or February 21, 2023. Claimant's testimony is not credible. Claimant's handwritten incident report, completed on February 21, 2023, states he injured his knee on February 16 when he stepped on a pallet. He provided a similar history to Ms. White at Medcor, stating, "he stepped on a broken pallet and he felt his knee 'pop.' He said he did this on 2/16/2023 but did not report that injury [ ]. But now his left knee hurts and is swollen. He states he put ice on it at home, and when he came to work today, he was given BioFreeze by a co-worker and he applied that to his knee, but his knee still hurts and is swollen." It is implausible Ms. White would have invented the details in the report, and the report probably reflects what Claimant said during the evaluation. By contrast, Claimant testified he stepped on a broken pallet on February 21, hyperextended his knee, and fell to the ground with pallets landing on top of him. He further testified he reported the injury "that day" and was sent to Medcor. He testified about a separate incident on February 16, but specifically denied that he suffered any injury on February 16.

Crediting Claimant's testimony to find an injury on February 21 would require rejecting his handwritten incident report and his contemporaneous statements to Ms. White. Conversely, crediting the accident report and the Medcor notes to find an injury on February 16 would be contrary to Claimant's sworn testimony that no injury occurred on February 16, and similar statements to IMEs and other providers. Claimant provided no persuasive explanation at hearing to reconcile these inconsistent stories. Claimant has the burden of proof in this matter, and the conflicting evidence fatally undermines his ability to carry that burden.

Additionally, Claimant failed to prove any knee symptoms he experienced on February 16, February 21, or thereafter, were proximately caused by work activities. Dr. O'Brien's opinions are credible and persuasive. Claimant had severe osteoarthritis in his left knee that caused symptoms, functional limitations, and a need for treatment long before February 2023. As opined by Dr. O'Brien, the meniscal tear shown on the May 12, 2023 MRI is probably degenerative and unrelated to any trauma. As recently as 6 weeks before the alleged work injury, Claimant's PCP documented "constant" knee pain that interfered with weight bearing and was aggravated by basic activities such as knee movement, climbing stairs, standing, walking, and sitting. Claimant was a reasonable candidate for a TKA before any alleged injury at work, and there is no persuasive evidence a work accident aggravated, accelerated, or combined with the pre-existing condition to cause disability or a need for treatment. Rather, Claimant's ongoing knee issues reflect the natural progression of his underlying pre-existing condition, without contribution from his work.

ORDER

It is therefore ordered that:

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

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

DATED: March 29, 2024

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