OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-253-760-002

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the back surgery recommended by Dr. Rauzzino is reasonably necessary and related to Claimant's work injury.

FINDINGS OF FACT

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

1. This is an admitted claim with a September 14, 2023, date of injury.
2. Claimant is a maintenance technician for Employer at an apartment complex.

Back Problems and Surgery before September 2023 Work Injury

3. In December 2020, Claimant was suffering from chronic left sacroiliac joint pain, IT band syndrome, and intermittent left leg pain with possible lumbar radiculopathy. Treatment included Flexeril, Mobic, and prednisone. His symptoms were exacerbated by stair climbing.
4. In April 2021, he had chronic left-sided back pain radiating down the posterior left leg, which was similar to past episodes.
5. On August 6, 2021, he underwent a minimally invasive left L4-5 hemi-laminectomy with foraminotomies to treat his back pain and radicular symptoms.

Postoperative Period and Last Back Appointment

6. On January 21, 2022, Claimant was seen by Dr. Trommeter. At this appointment, it was noted that Claimant was last prescribed oxycodone, 30 tablets, on August 6, 2021, the date of his surgery.
7. On October 2, 2022, Claimant was evaluated by Dr. Malm. During this appointment, Claimant's primary complaint was tingling in both upper extremities, which had begun weeks prior. And while it was also noted that the Claimant had a history of chronic low back pain, his back condition remained at baseline. Nor did Claimant have any radicular symptoms at this time – such as numbness, tingling, or weakness in his lower extremities.
8. Thus, in 2020, Claimant had chronic back pain with intermittent left leg symptoms, underwent surgery in August 2021, and then had no radicular symptoms as of October 2022.

Employment and Accident after 2021 Back Surgery

9. Claimant was hired by Employer as a maintenance technician for an apartment complex on December 17, 2022.

10. There is no credible evidence that Claimant's prior back problems were disabling and prevented Claimant from performing his regular job duties as a maintenance technician for Employer or that he was having radicular symptoms when he started working for Employer and until his September 2023 work accident.

September 11, 2023, Finger Incident

11. On September 11, 2023, Claimant was moving a couch at work and got a staple in his left index finger. Therefore, he went to Concentra for medical treatment – and to get a tetanus shot. In the history, it is noted that Claimant did have back surgery in 2021, but except for a little bit of soreness, he had healed well overall. There is no mention in this report that Claimant was having significant back pain or ongoing radicular symptoms.

September 14, 2023 Work Accident

12. On September 14, 2023, while at work, Claimant was assisting with moving two dollies. To move the dollies, Claimant and a coworker used a golf cart, with the coworker driving and the Claimant seated as a passenger. Claimant turned his upper body around, in a twisting motion, and was holding one dolly with each hand. While in this twisted position, another cart rear-ended their cart with enough force to cause the second cart to go underneath the back end of Claimant's cart.

13. Claimant reported the accident to Employer the day it happened. The Employer completed an Employer's First Report of Injury, noting Claimant was involved in an accident, reported it the day it happened, and that he suffered a strain to multiple body parts.

14. After the accident, Claimant developed low back pain and a vibrating sensation going down into his left thigh. Claimant also had left shoulder pain.

Subsequent Treatment and Evaluations

15. On September 16, 2023, Claimant sought medical treatment at North Suburban Medical Center. During this visit, Claimant reported that he had been riding in a golf cart two days earlier when it was rear-ended by another golf cart, resulting in back pain accompanied by "an abnormal vibrating sensation going down into his left thigh." He also reported left shoulder pain. Claimant disclosed his history of prior back surgery. Claimant was diagnosed with back pain, prescribed medications for pain and muscle spasms, and told to follow up with his primary care physician. He was also told that his physician might order an MRI if his symptoms persisted.

16. On September 20, 2023, Claimant started treating at Concentra and was seen by Dr. Wendy Carle. At this appointment, Claimant's back pain was 8/10. He also had pain radiating down his left leg to the bottom of his left foot. Claimant advised Dr. Carle of his prior back injury and surgery for his left sided sciatica that improved after his surgery. Dr. Carle diagnosed Claimant with a new back injury, with acute central low back pain radiating into his left lower extremity and getting worse. Due to the injury,

Dr. Carle restricted Claimant from performing his regular job duties. She restricted Claimant to primarily sedentary work, to avoid bending and twisting of his back, and limited his lifting to 5 pounds. She also ordered an MRI and requested it to be scheduled within 24 hours and for Claimant to follow up with her within 1-2 days so she could review the MRI results with him.

17. On September 20, 2023, Claimant underwent an MRI. At the L4-5 level, the radiologist noted:

> There is diffuse disc bulging, small superimposed left neural foramen disc extrusion…, thickening of the ligamentum flavum and moderate bilateral facet arthropathy resulting in mild central canal stenosis and moderate right and moderate-severe left neural foraminal narrowing. There is an annular fissure in the posterior disc. A left hemilaminectomy is noted.

18. On September 22, 2023, Claimant returned to Concentra and was seen by Physicians Assistant Jeffrey Wallace for his back injury. At this appointment, Claimant's low back pain was 8-9/10. He also had pain that was radiating into the posterior and lateral thigh, posterior leg and bottom of his left foot. Moreover, he had paresthesias in his left leg and his leg felt tired. Based on his physical examination, and Claimant's symptoms, PA Wallace referred Claimant to a physiatrist and continued Claimant's work restrictions.

19. On October 4, 2023, Claimant returned to PA Wallace. At this appointment Claimant's pain was still 8/10 and he was having symptoms going down his right side, including into his buttocks and posterior right thigh. Based on his ongoing symptoms, he was told to follow up with Dr. Olsen.

20. On October 10, 2023, Claimant saw Dr. Olsen for an initial consultation. At this time Claimant's symptoms included 8/10 pain and intermittent radicular symptoms "right greater than left." Claimant told Dr. Olsen that he had a prior back injury and surgery, which was successful, as he experienced no back pain afterward. Dr. Olsen performed a physical examination and found, among other things, a positive dural stretch test, which recreated lower extremity pain and paresthesias, and a positive SLR [straight leg test] on the left, which caused radiation of symptoms into Claimant's buttocks and posterior thigh. Dr. Olsen also reviewed the September 20, 2023, MRI and noted that it demonstrated a disc protrusion at L4-L5 with the presence of a central annular fissure. Based on his assessment, Dr. Olsen recommended bilateral epidural steroid injections at the L4-L5 level for diagnostic and therapeutic purposes.

21. On November 14, 2023, Dr. Olsen performed a bilateral L4-5 transforaminal epidural steroid injection for Claimant's disc protrusion at L4-5 with lower extremity radiculopathy. Claimant had an equivocal response to the injections.

22. On December 19, 2023, Claimant returned to Dr. Olson and underwent bilateral L3-L4, L4-L5 facet injections for lumbar facet arthrosis. Claimant had a nondiagnostic response to the injections.

23. On January 3, 2024, and due to Claimant's ongoing back pain with radicular symptoms, Dr. Olsen referred Claimant to a back surgeon.

24. On January 15, 2024, Claimant was evaluated by Dr. Michael Rauzzino, a surgeon. On physical examination Dr. Rauzzino noted Claimant had a positive straight leg raise on the left. He also indicated Claimant had paresthesia down the left leg in an L5 distribution and that Claimant walked with an antalgic gait secondary to pain. Based on his assessment, he recommended an updated MRI, with and without contrast. He also wanted a CT scan to understand the bony anatomy in the foramina and what was done during Claimant's prior back surgery. Lastly, he stated that an EMG/NCV might be helpful and deferred making any treatment recommendations pending the updated imaging.

25. On January 30, 2024, Claimant underwent a repeat MRI. According to Dr. Aronovitz, the radiologist, the MRI demonstrated unchanged moderate degenerative changes including a small left L4-L5 neural foramen disc extrusion, mild L4-L5 central canal stenosis and moderate-severe left, and moderate right L4-L5 and moderate right L3-L4 neural foraminal narrowing.

26. In February 2024, Claimant underwent an EMG with Dr. Olsen. The EMG findings bilaterally were negative for evidence of muscular denervation patterns and nerve conductions were normal. Dr. Olsen concluded that there was no electrodiagnostic evidence of lumbar radiculopathy, plexopathy, or peripheral nerve entrapment.

27. On February 22, 2024, Claimant underwent a contrast enhanced MRI. The report states the following:

> Compared with the January 30, 2024, MRI lumbar spine examination, there is unchanged 3 mm L4-LS retrolisthesis. There is enhancement of the L4-LS posterior annular fissure. There is unchanged left L4-LS hemilaminectomy with mild enhancing scar tissue in the left and posterior L4-LS epidural space. There is no nerve root enhancement at any level.
>
> IMPRESSION: Left L4-LS laminectomy with mild enhancing scar tissue in the left and posterior L4-LS epidural space and enhancement of the posterior L4-LS annular fissure.

28. However, on February 26, 2024, Dr. Aronovitz issued an addendum to his February 22, 2024, MRI report, which was compared to the September 20, 2023 MRI. His addendum indicates that: "there is an unchanged left-sided L4-5 subarticular disc extrusion causing moderate to severe left subarticular recess stenosis." The addendum MRI report substantiates and supports a finding that Claimant has a herniated disc that is causing moderate to severe left subarticular stenosis.

29. On February 26, 2024, Claimant returned to Dr. Rauzzino. At this appointment, Claimant continued to suffer from severe back and left leg pain and he was unable to sleep at night. Claimant also continued to have weakness and paresthesias in the left L5 distribution, and weakness bringing his left foot up. According to Dr. Rauzzino, the CT scan confirmed the prior surgical level was at the L4-5. He also stated that he reviewed the new MRI, with and without contrast, to delineate scar tissue versus a recurrent disc herniation. Moreover, he reached out to Dr. Aronovitz, the radiologist,

so they could review the studies together. According to Dr. Rauzzino, after reviewing the new MRI with Dr. Aronovitz, he concluded that the MRI study demonstrated a large recurrent disc fragment in the foramina causing severe foraminal stenosis and that it was not scar tissue from the prior surgery. The ALJ finds that Dr. Rauzzino's conclusion is supported by the MRI findings stated in the addendum. The addendum also supports Dr. Rauzzino's statement in his report that he reached out to Dr. Aronovitz to discuss the MRI and that they agreed that the MRI showed a disc herniation/fragment causing severe foraminal stenosis.

30. Dr. Rauzzino told Claimant he could either give it more time to see if his condition improved on its own or have surgery to correct the problem. Due to the extent of his symptoms, and being "miserable," Claimant elected for surgery. Therefore, Dr. Rauzzino recommended a redo microdiscectomy at L4-L5 on the left.

31. On February 28, 2024, Claimant returned to North Suburban Meical Center Emergency Department. The report from that visit indicated Claimant has lumbar radiculopathy and an L4-5 disc herniation and that he presented to the emergency department with complaints of acute-on-chronic lower lumbar back pain radiating into his left buttock and lower thigh. Claimant stated that his pain was consistent with previous episodes and stated that he awoke that morning with worsening symptoms. The Claimant noted he was scheduled for a lumbar discectomy in two weeks. The primary impression was lumbar radiculopathy. Claimant's pain was treated with the medication and he was told to follow up with his orthopedist.

32. On February 29, 2024, Dr. Rauzzino requested authorization for surgery – a redo left sided microdiscectomy at L4-L5.

33. On March 5, 2024, Dr. N. Neil Brown performed a records review to assess whether the surgery recommended by Dr. Rauzzino was reasonable, necessary, and related to the work accident. Since this was purely a records review, he did not interview Claimant or perform a physical examination. Dr. Brown expressed uncertainty as to whether the surgery was reasonable, necessary and related. He recommended a direct review of the MRI studies from September 20, 2023, January 30, 2024, and February 22, 2024, before making a definitive decision. He added that the mechanics of the injury—a rear impact from golf carts—would typically cause spinal extension, not flexion, which is usually associated with disc herniations. However, he failed to take into consideration Claimant was twisted while holding the two dollies that were in the cart behind him at the time of impact. Despite his recommendation for him to review the MRIs before he rendered an opinion, there is not another report from Dr. Brown. Thus, whether he ultimately reviewed the MRIs and had an opinion, but did not put it in writing, is unknown.

34. On March 12, 2024, Dr. Rauzzino prepared a letter, assumingly for the insurance company, in response to Dr. Brown's report. Dr. Rauzzino stated that while Dr. Brown said that he did not have Dr. Aronovitz' addendum to the MRI report, which demonstrated a recurrent herniated disc, the addendum was provided to the carrier. Again, Dr. Rauzzino stated that the MRI demonstrates an unchanged left subarticular disc extrusion causing moderate to severe left subarticular stenosis and again requested authorization for the surgery.

35. The ALJ finds Dr. Rauzzino's reports, opinions, and recommendations for surgery highly persuasive for several reasons. First, due to the accident, Claimant has developed severe back pain and radicular symptoms. Second, Claimant's MRI, as interpreted by Dr. Aronovitz, confirms the presence of a disc herniation/fragment consistent with Dr. Rauzzino's findings. Third, Claimant has not improved with conservative treatment. Fourth, no other reasonable treatment options with a likelihood of improving Claimant's condition have been proposed.

36. On April 2, 2024, Dr. Qing-Min Chen, an orthopedic surgeon, also performed a records review. Like Dr. Brown, Dr. Chen did not interview Claimant or perform a physical examination. Dr. Chen concluded that the revision L4-5 microdiscectomy is unrelated to the work injury. He highlights the negative EMG results for acute radiculopathy and the lack of relief from an epidural steroid injection as objective evidence suggesting surgery would be unhelpful. Dr. Chen also notes Claimant experienced similar left-sided leg pain in 2020, indicating the current symptoms are likely due to the natural progression of a preexisting condition rather than an aggravation caused by the golf cart incident.

37. In any event, Dr. Chen's opinion is not particularly persuasive because it heavily relies on Claimant's prior symptoms without fully addressing whether the work injury could have aggravated the underlying condition and caused the increase in back pain, recurrent disc herniation, and recurrent radicular symptoms. In addition, his conclusory contention that Claimant's symptoms are merely the natural progression of his prior condition is more speculative than grounded in objective medical evidence directly tied to the injury since Claimant's back problems got better after his surgery and his back pain, with associated radicular symptoms, emerged right after the work accident.

38. On April 3, 2024, Claimant was seen by Dr. Patrick Antonio. At this appointment, Dr. Atonio continued to restrict Claimant to mostly sedentary work and no lifting in excess of 5 pounds.

39. On July 26, 2024, Dr. Castro performed a records review. This appears to be the third records review performed on behalf of Respondents. After reviewing Claimant's medical records, Dr. Castro concluded that it was unclear to him whether the surgery was reasonable and necessary. One problem he had was that only Dr. Rauzzino found a foot drop on physical examination. On the other hand, two of the other doctors evaluating Claimant did not perform a physical examination either. According to Dr. Castro, he thought that review of the actual imaging – the MRIs and CT scan – would help determine whether there was acute neurologic impingement. Moreover, since it had been six months since the last MRI, he suggested a new MRI. Dr. Castro believed that there were substantial discrepancies regarding the Claimant's complaints and exam findings that gave pause to any consideration for surgical intervention.

40. On August 16, 2024, Dr. Castro issued another report after reviewing the MRI films. In reviewing the February 22, 2024 MRI, Dr. Castro could not rule out that the MRI demonstrated a large recurrent herniation. Dr. Castro stated that "It is not clear whether this represents a large recurrent herniation as described by Dr. Rauzzino. Indeed, I do not see a large recurrent herniation."

41. Dr. Castro, after reviewing additional records, provided a thorough and nuanced opinion regarding Claimant's condition. He noted that the spinal canal has been adequately decompressed with only mild residual left-sided central canal impingement, which might mildly affect the traversing L5 nerve root but without significant displacement or central canal impingement. He observed disc bulging and potential impingement of the exiting L4 nerve root, consistent with imaging findings.

42. Dr. Castro expressed concern about the development of foot drop in the context of a negative EMG, highlighting the inconsistency and variability of Claimant's symptoms, including bilateral lower extremity complaints not fully explained by imaging findings. He concurred with the prior assessments of Drs. Brown and Chen and suggested that a radiology independent medical evaluation could provide greater clarity regarding the status of the L4 nerve root and potential neural foraminal encroachment.

43. On October 11, 2024, Dr. Aronovitz issued a report setting forth the findings of the three MRIs and CT scan. His report notes the following:

> <u>September 20, 2023, MRI lumbar spine examination</u>
>
> At the L4-L5 level there is diffuse disc bulging, small superimposed left neural foramen disc extrusion (best visualized on image #5, series 2), thickening of the ligamentum flavum and moderate bilateral facet arthropathy resulting in mild central canal stenosis and moderate right and moderate-severe left neural foraminal narrowing. There is an annular fissure in the posterior disc. A left hemilaminectomy is noted.
>
> The impression is: Moderate degenerative changes including small left L4-L5 neural foramen disc extrusion, mild L4-L5 central canal stenosis and moderate-severe left and moderate right L4-L5 and moderate right L3-L4 neural foraminal narrowing.
>
> <u>January 30, 2024 CT lumbar spine examination</u>
>
> At the L4-L5 level there is diffuse disc bulging, thickening of the ligamentum flavum and moderate bilateral facet arthropathy resulting in mild central canal stenosis and moderate right and moderate-severe left neural foraminal narrowing. A left hemilaminectomy is again noted.
>
> The impression is: Moderate degenerative changes including mild L4-L5 central canal stenosis and moderate-severe left and moderate right L4-L5 and moderate right L3-L4 neural foraminal narrowing.
>
> <u>January 30, 2024 MRI lumbar spine examination</u>
>
> At the L4-L5 there is unchanged diffuse disc bulging, small superimposed left neural foramen disc extrusion (best visualized on image #5 series 2), thickening of the ligamentum flavum and moderate bilateral facet arthropathy resulting in mild central canal stenosis and moderate right and moderate-severe left neural foraminal narrowing. There is unchanged annular fissure in the posterior disc. A left hemilaminectomy is again noted.
>
> The impression is: Unchanged moderate degenerative changes including small left L4-L5 neural foramen disc extrusion, mild L4-L5 central canal

stenosis and moderate-severe left and moderate right L4-L5 and moderate right L3-L4 neural foraminal narrowing.

February 22, 2024, contrast enhanced MRI lumbar spine examination

Compared with the January 30, 2024, MRI lumbar spine examination, there is unchanged 3 mm L4-LS retrolisthesis. There is enhancement of the L4-L5 posterior annular fissure. There is unchanged left L4-L5 hemilaminectomy with mild enhancing scar tissue in the left and posterior L4-L5 epidural space. There is no nerve root enhancement at any level.

The impression is: Left L4-L5 laminectomy with mild enhancing scar tissue in the left and posterior L4-L5 epidural space and enhancement of the posterior L4-L5 annular fissure.

February 26, 2024, Addendum

Compared with the September 20, 2023, postoperative MRI lumbar spine examination, there is an unchanged left L4-5 subarticular disc extrusion resulting in moderate-severe left subarticular stenosis.

44. Dr. Aronovitz' description of the medical imaging of the lumbar spine, including three MRIs and one CT scan, provides inconsistent and incomplete information regarding the presence and status of a disc herniation at the L4-L5 level. For example, the September 20, 2023, MRI identifies a small left L4-L5 neural foramen disc extrusion, which is again noted in the January 30, 2024 MRI. That said, the January 30, 2024 CT scan, performed the same day as the MRI, does not mention the disc extrusion, despite identifying the same level of disc bulging and foraminal narrowing. Then, the most recent MRI, dated February 22, 2024, similarly omits any reference to the previously documented disc extrusion, focusing instead on scar tissue, enhancement of the annular fissure, and unchanged retrolisthesis. The doctor's report provides no explanation for the absence of the previously identified disc extrusion in the later imaging, leaving uncertainty about whether the herniation has resolved, been overlooked, or remains unchanged.

45. Then, on February 26, 2024, Dr. Aronovitz issued an addendum acknowledging the disc herniation and noting that it was causing moderate to severe stenosis. This delayed recognition, absent from his initial February 22, 2024, MRI report - and might have occurred after his discussion with Dr. Rauzzino - suggests that either his initial comparative analysis was not thorough or that interpreting MRI films is not an exact science but rather a reasonable interpretation of inherently imprecise data contained in an MRI.

46. In any event, the addendum confirming a disc herniation causing moderate to severe left subarticular stenosis is consistent with the Claimant's reported left-sided radicular symptoms that arose after his work accident. While the discrepancies in the MRI interpretations make the imaging difficult to reconcile—apparently due to different radiologists reading some of the scans— and/or that interpreting MRI films is not an exact science - the totality of the evidence supports a finding that there is a disc herniation at L4-L5 and that the disc herniation is causing Claimant's symptoms.

47. On October 28, 2024, Dr. Castro issued his third report. In his final report, Dr. Castro reviews the MRI findings and acknowledges the presence of some postoperative

changes but does not identify significant neural foraminal stenosis due to a disc herniation. He expresses concern about the inconsistencies of Claimant's symptoms, particularly the varying reports of foot drop and differing neurological exam findings-despite the fact that none of Respondents' IME doctors performed a physical examination of Claimant.

48. Yet Dr. Castro indicates that, if Dr. Rauzzino has concerns about potential neurological issues, he could appropriately pursue more urgent treatment based on his clinical judgement. In this regard, Dr. Castro appears to defer to Dr. Rauzzino's expertise and judgement regarding the necessity and urgency of surgical intervention.

49. Given the discrepancies in symptom presentation and imaging interpretations, Dr. Castro recommended obtaining a second surgical opinion through an Independent Medical Examination (IME) conducted by a local surgeon. He suggested that a timely, in-person evaluation by a local specialist would provide more clarity regarding the need for potential surgical intervention. Dr. Castro stated his willingness to review the findings of the IME or defer to the local physician's recommendations if they find surgical intervention, such as a revision discectomy, to be appropriate.

50. While Dr. Castro does not appear to believe that the surgery is reasonably necessary based on the imaging and the alleged inconsistencies of Claimant's symptoms noted in the medical records, he seems hesitant to definitively oppose the clinical judgement of Dr. Rauzzino. His recommendation for a second surgical opinion via an IME, along with his willingness to defer to the expertise of a local physician if surgery is deemed appropriate, suggests that he remains on the fence about fully discounting the necessity of the procedure. This cautious approach underscores his uncertainty about the clinical picture and his reluctance to override the treating surgeon's opinion regarding the need for surgery.

51. On January 7, 2025, Claimant underwent an IME with Dr. John Hughes to assess whether the surgery recommended by Dr. Rauzzino is reasonable, necessary, and related to Claimant's work injury. Dr. Hughes obtained a detailed history, reviewed Claimant's medical records, and performed a physical examination. It does not appear that he reviewed the actual MRI and CT films.

52. Dr. Hughes' examination confirmed ongoing lumbar spine pain, left leg weakness, and reduced lumbar range of motion. He agreed with Dr. Rauzzino's recommendation, concluding that the disc fragment and resulting symptoms were directly attributable to the September 2023 work injury rather than the natural progression of [redacted] preexisting spinal condition.

53. The ALJ finds Dr. Hughes' opinions persuasive for several reasons. First, he notes the consistent documentation of Claimant's left lower extremity radicular symptoms following the September 14, 2023, injury, which were absent before that date. Second, he relies on the imaging that demonstrates abnormalities at the L4-L5 level, providing objective support for surgical intervention. Third, he addresses and refutes the suggestion that the need for surgery results from preexisting degeneration by pointing to records from October 2022 indicating no lower extremity symptoms at that time. Fourth, his endorsement of the surgical recommendation aligns with the clinical course of treatment failures and the documented presence of Claimant's symptoms. In the end, the ALJ finds that his report thoroughly reviews Claimant's medical history,

treatment progression, and competing medical opinions, demonstrating a well-reasoned, evidence-based conclusion.

54. Despite undergoing conservative treatment, including medications, physical therapy, and injections, Claimant continues to experience severe back and left leg pain with radicular symptoms.

55. Although Claimant had a prior back injury that required surgery, his condition was stable. While he may have occasionally experienced back soreness before the work accident, he did not have severe back pain and he did not have radicular symptoms. Additionally, he was able to perform his job duties without restriction. However, following the work accident on September 14, 2023, Claimant developed chronic and severe back pain, radicular symptoms, and was restricted from performing his regular job duties.

56. Since the September 2023 work injury, Claimant's back pain and radicular symptoms have persisted despite conservative treatment. He remains on restricted duty and cannot perform his regular job duties. To alleviate his symptoms, Dr. Rauzzino has recommended surgery.

57. The ALJ finds that the surgery recommended by Dr. Rauzzino is reasonable and necessary to treat the effects of Claimant's work injury. Therefore, the need for surgery is causally related to his 2023 work injury with Employer.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility

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

I. Whether Claimant established by a preponderance of the evidence that the back surgery recommended by Dr. Rauzzino is reasonably necessary and related to Claimant's work 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).

Claimant sustained a prior back injury in 2020, experiencing back pain and radicular symptoms. In August 2021, he underwent a minimally invasive left L4-5 hemi-laminectomy with foraminotomies, which successfully alleviated his symptoms, aside from occasional back soreness before his work injury.

On September 14, 2023, Claimant was seated in the front seat of a golf cart, twisted his torso around to hold two moving dollies while a coworker drove. Another golf cart rear-ended them with enough force to lift the second cart under the back of Claimant's cart.

Following the accident, Claimant developed increasing low back pain and radicular symptoms in his left lower extremity. An MRI revealed a herniated disc at L4-L5, causing moderate to severe stenosis. Despite conservative treatment, his symptoms persisted, leading to a referral to Dr. Rauzzino for a surgical evaluation. After reviewing Claimant's MRIs, physically evaluating Claimant, and considering the other tests that were performed, Dr. Rauzzino recommended a repeat L4-L5 microdiscectomy to treat Claimant from the effects of 2023 work injury.

The conclusions of Dr. Rauzzino are corroborated by Dr. Hughes, the Independent Medical Examiner who conducted a physical examination, reviewed medical records, and opined that the work-related injury directly contributed to Claimant's current symptoms and the need for surgery.

While Respondents' medical reviewers expressed reservations regarding the necessity of surgery, these opinions were based on record reviews and did not include direct physical examinations of Claimant or the obtaining a history from Claimant. Additionally, the inconsistencies cited in the MRI interpretations and the negative EMG/NCV testing does not undermine the overall weight of the medical evidence demonstrating Claimant's need for surgery due to his 2023 work accident.

As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that his September 14, 2023, work-related injury caused or aggravated a disc herniation at L4-L5, resulting in ongoing pain and radicular symptoms and that conservative treatment measures have failed to alleviate his symptoms. The ALJ further finds and concludes that Claimant has established by a preponderance of the evidence that the recommended L4-L5 microdiscectomy is reasonable, necessary, and causally related to Claimant's work injury. As a result, Claimant has met his burden of proof and Respondents are therefore liable for the cost of the recommended surgery.

ORDER

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

1. Respondents shall pay for the L4-L5 microdiscectomy recommended by Dr. Rauzzino.

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 4, 2025

s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-235-896-002

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a functional impairment not listed on the schedule?

- Is Claimant entitled to post-MMI medical benefits?

FINDINGS OF FACT

1. Claimant worked for the Employer on February 15, 2023. On that date, Claimant sustained an injury to his right upper extremity when he fell on his right side and shoulder. The claim was admitted.

2. Claimant initially treated with Dr. Thomas Centi at Southern Colorado Clinic in Pueblo. After a trial of conservative care, Claimant was referred to Dr. Kenneth Danylchuk at Maple Leaf Orthopedic Clinic for evaluation and treatment.

3. Dr. Danylchuk performed shoulder surgery on April 14, 2023. The surgery included open repair of the rotator cuff, distal clavicle excision and lysis of adhesions.

4. Following the surgery, Claimant was off work from April 19, 2023 through April 30, 2023. Then he returned to work in a different position.

5. Claimant was placed at maximum medical improvement on February 19, 2024 by Dr. Centi. Dr. Centi did not recommend medical treatment after MMI. Dr. Centi gave a 21% upper extremity rating which converted to 13% whole person.

6. A division IME was requested and was performed by Dr. Higginbotham on August 1, 2024. At the DIME Claimant indicated, that he had difficulty with overhead activity, including dressing and hair work. Claimant was given an impairment rating of 22% of the upper extremity which converts to 13% of the whole person.

7. Dr. Higginbotham recommended restrictions of no ladder/scaffold climbing. Lifting of a maximum of 25 pounds bilaterally. The lifting restriction for the right upper extremity only was a maximum of 8 pounds. Under maintenance care, Dr. Higginbotham noted that Claimant had an appointment with his treating orthopedist on August 20, 2024. He also recommended that Claimant be afforded a year's worth of muscle relaxants.

8. Respondents admitted for the 22% upper extremity rating in a Final Admission of Liability on August 12, 2024 and denied maintenance care without referencing a physician's report to support the denial.

9. Claimant testified at hearing that he is still having pain in the shoulder that radiates into the shoulder girdle and into his neck which he believes was caused by the initial injury and subsequent surgical intervention. Claimant also testified that he has had to modify both his work activities and his activities of daily living in order to continue his employment. Claimant's testimony was credible.

10. Dr. Danylchuk completed an "ongoing medical treatment letter" which he signed on September 19, 2024, indicating that Claimant would require ongoing medications and periodic doctor visits to remain at MMI. Dr. Danylchuk's opinions regarding medical treatment after MMI are credible and persuasive.

CONCLUSIONS OF LAW

A. Burdens of Proof regarding impairment

Claimant is requesting whole person benefits for his shoulder. Whether Claimant's shoulder impairment represents a scheduled or whole person impairment is a threshold question. Section 8-42-107 sets forth two methods of compensating permanent medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings from the ATP. If either party disputes the impairment rating, a DIME process is available. Whether a claimant sustained a scheduled or non-scheduled impairment is a question of fact for determination by the ALJ.

B. Claimant proved he suffered functional impairment not listed on the schedule

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 her body other than the "arm", she has sustained 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 trapezius and 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 he suffered functional impairment not listed on the schedule. Claimant's testimony regarding the impact the injury has had on his ability to perform various activities was credible. The preponderance of persuasive evidence shows Claimant has functional impairment to parts of her body beyond his "arm".

C. Medical benefits

Dr. Danylchuk's determination that the Claimant requires medical benefits after MMI is credible and persuasive.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant PPD benefits based on Dr. Higginbotham's 13% whole person rating. Respondent may take credit for any PPD benefits previously paid to Claimant on this claim.

2. Claimant's request for medical benefits after MMI is granted.

3. Insurer shall pay statutory interest of 8% per annum on all benefits not paid when due.

4. Any issues not decided herein are reserved for future determination.

DATED: March 5, 2025

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

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4. Any issues not decided herein are reserved for future determination.

DATED: March 5, 2025

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the surgery recommended by Dr. Liotta is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

FINDINGS OF FACT

1. Claimant was employed with Employer as a housekeeper. Claimant testified at hearing that while exiting a room on September 19, 2022, she went to pick up a rag and struck her shoulder on a metal door jam. Respondents subsequently admitted liability for the work injury.

2. Following Claimant's injury, Claimant was referred to Dr. Swenson where she was initially examined on September 21, 2022. Dr. Swenson noted in his report that Claimant reported that her injury occurred when she dropped some items in a door way and a metal door hit her in the left arm. Claimant reported that the pain was bearable and she was able to complete her usual activities but the following day the pain was significantly worse. Dr. Swenson noted Claimant had a bruise on her arm that was 7 x 5 mm in size and diagnosed Claimant with an intramuscular hematoma and referred Claimant for an x-ray.

3. Claimant returned to Dr. Swenson and underwent a course of conservative treatment that included medications (including cyclobenzaprine), therapy, ice and work restrictions. By October 20, 2022, Dr. Swenson noted that Claimant appeared to finally starting to improve from a presumed Sandor hematoma and noted Claimant was no longer reporting somewhat constant pain.

4. Claimant returned to Dr. Swenson on April 14, 2023. Dr. Swenson noted that Claimant had been reporting some improvement at her last visit and was planning to follow up several weeks later, but did not fully recover and did not follow up until this evaluation. Dr. Swenson noted that based on her history and exam, she had developed a frozen shoulder. Dr. Swenson recommended a trial empiric steroid injection and physical therapy. The injection was performed that day.

5. Claimant returned to Dr. Swenson on June 22, 2023. Dr. Swenson again noted that Claimant appeared to have developed adhesive capsulitis (frozen shoulder) in her left shoulder and noted Claimant did not report improvement with the prior injection. Dr. Swenson referred Claimant for an orthopedic evaluation.

6. Claimant again returned to Dr. Swenson on July 28, 2023. Dr. Swenson again recommended that Claimant undergo an orthopedic evaluation considering Claimant's atypical course. Claimant also started a course of physical therapy.

7. Claimant was examined by Dr. Liotta on September 1, 2023. Dr. Liotta obtained a medical history, performed a physical examination, reviewed x-rays of her left shoulder and diagnosed Claimant with adhesive capsulitis of the left shoulder along with tendinosis versus calcific tendinitis. Dr. Liotta referred Claimant for a magnetic resonance image ("MRI") of the left shoulder

8. Claimant underwent the MRI of the left shoulder on September 2, 2023. The MRI demonstrated mild increased signal in the supraspinatus tendon without evidence of a tear and small effusion in the subacromial/subdeltoid bursa. Additionally, mild osteoarthritis of the acromioclavicular joint with mild inferior degenerative hypertrophy that mildly impinged on the supraspinatus myotendinous junction.

9. During this period of time, Claimant continued to treat with Dr. Swenson and consistently reported ongoing subjective complaints.

10. Claimant returned to Dr. Liotta on October 27, 2023 at which time Dr. Liotta noted Claimant's MRI showed marked edema around the rotator cuff and subacromial space along with tendinosis with mild medialization and flattening of the biceps as it enters the groove in the subscapularis. Dr. Liotta noted the rotator cuff tendon showed inflammation about it but no true tear. Dr. Liotta performed a corticosteroid injection and referred Claimant for additional physical therapy.

11. Dr. Liotta re-examined Claimant on November 29, 2023 and reiterated his diagnosis of adhesive capsulitis of the left shoulder. Dr. Liotta noted Claimant continued to present with limited range of motion on internal rotation with pain on flexion, abduction, internal and external rotation. Dr. Liotta noted Claimant complained of shoulder pain with overhead motion after her recent return to work along with a sensation of snapping or clicking along the upper anterior shoulder with overhead motions. Dr. Liotta recommended continued physical therapy.

12. Claimant returned to Dr. Swenson on December 8, 2023. Dr. Swenson reiterated that his opinion was that Claimant's pain in resistance in essentially every direction was secondary to adhesive capsulitis.

13. Claimant was re-examined by Dr. Liotta on January 31, 2024. Dr. Liotta noted Claimant reported she had been consistent with the formal physical therapy, chiropractic care and massage, but had not made much progress and felt relatively unimproved compared to the last visit. Dr. Liotta noted that he believed surgery was premature at this point and recommended an intra-articular expansion injection.

14. Claimant returned to Dr. Liotta on April 29, 2024. Dr. Liotta noted Claimant's lack of progress with regard to conservative treatment and noted that at

this point, her options included surgery that would include arthroscopic capsular release, biceps tenodesis and debridement.

15. Respondents obtained an independent medical examination ("IME") with Dr. Mark Failinger on May 3, 2024. Dr. Failinger reviewed Claimant's medical records, obtained a medical history, and performed a physical examination. Dr. Failinger noted that after no treatment for approximately six months, Claimant returned to Dr. Swenson and was diagnosed with adhesive capsulitis. Dr. Failinger opined that Claimant was not a surgical candidate, but could be in the future. Dr. Failinger recommended another injection which could allow Claimant to avoid the potential surgery.

16. Claimant returned to Dr. Liotta on September 18, 2024. Dr. Liotta noted Claimant had been continuing her physical therapy and home exercise without any improvement. Dr. Liotta recommended surgery consisting of capsular release and biceps tenodesis.

17. Respondents obtained a medical records review IME from Dr. Wallace Larson on September 27, 2024. Dr. Larson summarized Claimant's treatment to her left shoulder in his report and opined that Claimant's therapy notes were quite atypical for adhesive capsulitis. Dr. Larson noted Claimant's records documented range of motion of the left shoulder that were unexpected given a diagnosis of adhesive capsulitis. Dr. Larson further opined that the MRI report did not indicate the type of capsular contracture most commonly seen with adhesive capsulitis.

18. Dr. Larson indicated in his report that Claimant appeared to have pain out of proportion to and symptoms generally unexpected with a diagnosis of adhesive capsulitis. Dr. Larson further opined that most cases of adhesive capsulitis can be treated nonoperatively, which Dr. Larson noted would be his recommendation. Dr. Larson opined in his report that the proposed surgery was not recommended and noted the unusual aspects involved in this case, including Claimant having range of motion the Dr. Larson found to be much greater than typically seen in frozen shoulder cases, pain out of proportion to the injury, and findings on the MRI that did not demonstrate the type of capsular contracture commonly seen with frozen shoulder. Dr. Larson ultimately opined that the proposed surgical procedure was not reasonable, necessary and occupationally related.

19. Dr. Larson testified consistent with his IME report at hearing in this case. Dr. Larson testified that he disagrees with the diagnosis of adhesive capsulitis or frozen shoulder in this case. Dr. Larson testified that he believes the diagnosis in Claimant's case would be limited to a shoulder contusion and noted that frozen shoulder resulting from trauma was quite rare.

20. Claimant testified that she would like to obtain the recommended surgery in this case in an attempt to recover from her injury. Claimant testified that she developed pain in her left shoulder after the September 19, 2022 work injury. Claimant testified she had conservative treatment for the shoulder, but the

conservative treatment has not alleviated her symptoms. Claimant testified she had pain in her shoulder that she described as pulsating that does not allow Claimant to lift or put on clothing and causes Claimant problems with her sleep. Claimant's testimony in this regard is found to be credible by the ALJ.

21. The ALJ credits the opinions expressed by Dr. Swenson and Dr. Liotta in their medical reports over the contrary opinions expressed by Dr. Larson in his report and testimony and finds that Claimant has established that it is more probable than not that the surgery recommended by Dr. Liotta is reasonable medical treatment necessary to cure and relieve the Claimant from the effects of her September 19, 2022 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016.

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

3. 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. As found, Claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Liotta including the proposed surgery to her left shoulder is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the September 19, 2022 work injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the September 19, 2022 industrial injury including the surgery recommended by Dr. Liotta.

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, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (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 petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 6, 2025

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-214-905-001

STIPULATION

At the commencement of the hearing, the parties stipulated that if Claimant's claimed injury was deemed compensable, her average weekly wage (AWW) was $723.50 per week.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable respiratory injury due to repeated exposure to mold while working for the Rio Grande County Sheriff's Office.

II. If Claimant established that she sustained a compensable respiratory injury, whether she also established, by a preponderance of the evidence, that she is entitled to receive reasonable, necessary and related medical treatment for this industrial injury.

Because the ALJ finds/concludes that Claimant failed to establish that she suffered a compensable injury in this case, this order does not address issue II outlined above.

FINDINGS OF FACT

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

1. Claimant commenced work with Employer (Rio Grande County Sheriffs Office) as a records management specialist in October of 2020 and retired from this employment on October 10, 2024. She had previously worked as a jail sergeant for the Conejos County Sheriff's department on two occasions, the last of which was for five years right before she went to work for the Employer.

2. As a records specialist, Claimant's job duties included redacting and digitizing information from old case files and booking records maintained by Employer. These files were kept in bankers boxes in the basement of Employer's building. Some 360 boxes of old records were kept in the basement and these boxes had to be moved from the cellar to a portable Conex[1] container after which Claimant and another employer were to begin their redaction and digitizing work. The files were in poor condition having been exposed to water in prior basement flood.

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[1] Described by Claimant as a water and rodent proof rail car type container without any ventilation.

3. Claimant testified that as part of her job, she helped move 50-75 boxes of old files from the basement to the Conex container. Because these boxes and the files they contained were water damaged, Claimant testified that the portions of the boxes and files were black, moldy and mildewed. Claimant testified that these boxes were placed in the Conex with other boxes of moldy, water damaged files previously retrieved from the basement of the sheriff's office.

4. Claimant testified that she began working with the blackened moldy files in February of 2021, and that she and her co-employee, Roxanne, worked with these files from February of 2021 to December of 2022. Claimant described that she and Roxanne would each bring two or three boxes of old files from the Conex container to their office, in the sheriff's office on a two- wheel dolly daily. She described the office as an approximately 10 X 11 foot room with countertop desk, files cabinets and two chairs, one for herself and the other for Roxanne. While there was a small window in the office, Claimant testified that it did not open. Thus, she reported that the office was poorly ventilated. According to Claimant, she would put two or three boxes right next to her chair and her co-worker would do the same. She testified that she and Roxanne worked very close to each other on their individual files, which they kept less than a foot away. Claimant testified that she and her co-worker would remove the moldy files from the boxes, open the files and scan/input the necessary information from each file to their computer system and restart the process. Per Claimant, a pungent odor permeated the office as she and Roxanne worked on the files in question.

5. As referenced, Claimant testified that the above-described work started in February of 2021. Because this work started during the Covid-19 pandemic, she and her co-worker were given cloth type masks to wear. Claimant testified that at the end of the day the inside of her mask would be black and at times she had to change out her mask during the day.

6. Claimant testified that she and Roxanne developed sneezing, itching, and watering eyes after they began working with the files in their office. Claimant testified that after several months of working with these water damaged files, she developed a cough, headaches and fatigue. She reportedly had to sleep in a recliner chair because of constant coughing which she reported grew progressively worse.

7. A first report of injury regarding Claimant's exposure to mold and her claimed respiratory injury was filed by Lieutenant Tyler Dean on August 24, 2022. Claimant was then referred to Dr. Joseph Browne for care and treatment of her alleged allergic response and respiratory complaints. Dr. Browne noted that Claimant was having respiratory issues with a severe cough after being exposed to mold in the workplace. He referred Claimant to National Jewish Hospital (National Jewish) in Denver for further evaluation and treatment.

8. Claimant was evaluated at National Jewish on November 9, 2022. (CHE 9). Pulmonary function (PF) studies were performed and a patient questionnaire

completed. *Id.* Following her initial interview and PF testing, Claimant was seen by Dr. Karin Pacheco. (CHE 10). Dr. Pacheco reviewed Claimant's PF test results noting that Claimant's lung volumes were "slightly low, likely due to body habitus". *Id*. at 163. Nonetheless, Claimant provided good effort, and the test results were deemed by Dr. Pacheco to be "normal". *Id*. at 164. As part of Claimant's November 9, 2022, evaluation, a CT of the chest was performed. *Id*. at 159-160. Based upon the CT findings, Dr. Valerie Hale noted the following impression: "Mild patchy air trapping may suggest obstructive airways disease due to asthma or bronchitis". *Id*. at 160.

9. Dr. Pacheco expressed concern that Claimant's upper respiratory symptoms may be caused by an allergic reaction to mold from her work. (CHE 10, p. 164). She suggested removal of Claimant from her small unventilated office to a well-ventilated room and "at a minimum" that Claimant be equipped with a Tyvek suit and an N-95 mask. *Id.* She sent a letter to the Rio Grande County Sheriff regarding these recommendations. *Id.* She also recommended skin prick allergy testing and a CT of the sinuses. *Id*.

10. Claimant returned to Dr. Browne on November 23, 2022. (CHE 8, p. 68). Although Claimant had not been formally diagnosed with asthma, he started her on Adviar and Albuterol Sulfate inhalers and advised that she follow-up with National Jewish for further evaluation and treatment. *Id*. at 70.

11. Sometime after Dr. Pacheco sent her letter to the Sheriff, Claimant indicated that some air quality testing was done. According to Claimant, she and her co-worker were not working on the files when this testing was done and the moldy files that had been in their office had been removed for two months. After this testing, Claimant testified that the Sheriff's office undertook a remediation of all the files. That remediation was done outside in a tent during the spring and summer months of 2023-2024. According to Claimant, remediation consisted of the files being removed from the boxes and wiped down with a liquid cleaner, page by page and then being placed in new boxes. Claimant and her co-worker oversaw this remediation. Despite being provided with N-95 masks, gloves and goggles, Claimant reportedly developed symptoms similar to those she experienced while working inside her office with these water damaged files. Specifically, Claimant complained of itching, watery eyes, coughing and a runny nose.

12. Claimant returned to National Jewish on December 14, 2022. (CHE 10, p. 170). She was seen by Dr. Pacheco who noted that Dr. Browne had started Claimant on Advair and inhaled Albuterol but that Claimant *"[did] not notice a difference in her symptoms with these medications"*. *Id*. (emphasis added). Dr. Pacheco also noted that Claimant had skin prick allergy testing which demonstrated "equivocal reactions to green ash, Chinese elm, Rocky Mountain juniper, Ponderosa Pine and Western ragweed". *Id*. at p. 173. Importantly, Claimant's expanded mold panel testing revealed an "equivocal reaction to Hormodendrum only". *Id*. Claimant's mold sensitivity testing was negative for Alternaria, Aspergillus Mix, Cladosporium-Herbarum and Penicillium Mix. *Id*. at 176. Accordingly, Dr. Pacheco provided the following assessment: "No

current evidence for allergic sensitization". *Id*. at 170. She went on to note: "Review of her test results indicates that [Claimant] does not appear to have developed a mold related lung disease as yet, although she does have decreased lung volumes on PFTs (possibly due to body habitus). *Id*. at 171. Finally, Claimant's CT of the sinuses revealed "patent paranasal sinuses without evidence of sinusitis". *Id*. at 177-178.

13. Respondents sought additional environmental testing. Accordingly, on February 5, 2023, Jack Klein performed air sample testing to determine the presence of any potential mold emanating from the water-damaged banker boxes and the files they contained. Mr. Klein testified as an expert in environmental testing. Mr. Klein understood that a boiler leak in the basement that had occurred approximately two years before his sampling had exposed the boxes/files to water. Mr. Klein testified that he collected air samples from the Conex container and other locations in and around the Sheriff's office, to include obtaining an outside control sample. He also used tape to lift a sample of the substance on an area of dark staining on a file, which he believed looked suspicious for mold.

14. The testing results for the samples obtained by Mr. Klein are contained at RHE F. As it pertains to the air sample obtained in the Conex container, the test demonstrated the presence of the mold Cladosporium (RHE F, p. 226). Specifically, under the results of Cladosporium, a raw count of 2 is documented, which translates into a count of 40 spores per cubic meter and with an interpretation guideline of "slightly elevated". Mr. Klein testified that the count of 40 Cladosporium per cubic meter of air is a very low concentration of mold spores. Mr. Klein testified that one could produce the same results by incidentally walking by a sample while it is being taken, and something comes off an article of clothing. The results of the tape sampling test demonstrated the presence of Aspergillus, Penicillium and Cladosporium. (RHE F, pp. 242-243). He could not recall which office the claimant was working in as it pertains to the report outlining the test results from various rooms where samples where obtained. However, review of all rooms tested reveals similar low spore counts as was sampled from the Conex container. (RHE F). Indeed, no room tested above slightly elevated above the background sample obtained. Moreover, no room tested demonstrated a total fungi spore count above that of the Conex container at 47 total fungi spore per cubic meter.[2] Mr. Klein stated that when he did his air sampling it did not appear that there were any mold or mildewed boxes of files in any of the offices tested. However, he did observe moldy files in the Conex.

15. Claimant obtained follow-up treatment from Dr. Karin Pacheco on February 20, 2023. (CHE 10, p. 183-189). In her report from this encounter, Dr. Pacheco noted that air sampling had been performed in Claimant's work area, as well as in the Conex container. She alluded to contacting the Health Department to obtain the results of this testing; however, the medical records submitted fail to establish that she ever reviewed or commented about the results of Mr. Klein's air sampling.

[2] The "Weekend" Court" room scored a total fungi count of 47 made up from 20 Cladosporium spores, 20 Myxoycetes spores and 7 unidentifiable spore.

16. Claimant denied any preexisting ongoing health issues before being exposed to mold at her place of employment. She indicated that she had what she thought was bronchitis many years before and that the doctor may have said she had asthma. She was given an inhaler, but she testified that she never used it.

17. A medical record from San Luis Valley Health System from July 11, 2019, contains the following medical history: "Asthma—albuterol, she doesn't use it. Last exacerbation was 1 week ago. She just went inside and cooled down and breathed deep. She has had asthma for 3-4 years that she knows of. She is supposed to take albuterol inhaler but doesn't have a new one. She has not been to the ER for asthma. She does not have nighttime awaking's. She has never had specialized lung or breathing tests". (CHE 5, p. 15). Claimant was assessed with "intermittent asthma" and her albuterol inhaler prescription was refilled. *Id.* at 17.

18. Claimant also testified that she experiences indigestion and heart burn after eating spicy food. She reported regurgitation, testifying that she can feel it (food) coming up. She treats this with baking soda and water. She reported the same to Dr. Pacheco during her initial evaluation on November 9, 2022, evaluation. (CHE 10, p. 163). On December 14, 2022, Dr. Pacheco assessed "increased recent gastroesophageal reflux disease symptoms". *Id*. at 170. Dr. Pacheco assessed gastroesophageal reflux disease (GERD) on February 20, 2023, which she later noted was triggered by the need for constant bronchodilator use*. Id.* at 192.

19. Dr. Jeffrey Schwartz performed an independent medical evaluation (IME) of Claimant on November 14, 2023 (RHE A, pp. 3-12). As part of his IME, Dr. Schwartz obtained a medical history, reviewed records and completed a physical examination. In his report dated November 23, 2023, Dr. Schwartz documented the history that Claimant provided as to the work activities that she believes caused her exposure to mold. Claimant stated she began working as a records management specialist for Rio Grande County in October 2020. Claimant initially moved boxes for several days to a storage container [Conex]. Beginning in February 2021, Claimant began spending more time in the Conex storage container and was tasked with taking banker boxes of files from the Conex storage container to a poorly ventilated office where she digitally recorded information from the files. Claimant stated the boxes of old files had been previously damaged by water and also stated that there was visible mold on the files. Claimant would retrieve boxes of moldy files from the Conex storage 2-3 times per day and that the inside of the Conex storage smelled moldy as did the files she took to work on in her office. Claimant continued this work from February 2021 through November 2022. Claimant did not return to the Conex storage or work with moldy files indoors since November 2022. However, in approximately June or July of 2023, Claimant stated that she was tasked with supervising remedial work on the moldy files performed by others. This remedial work was performed outdoors while she was wearing a heavy mask and goggles. Claimant estimated that she was approximately three feet away from the files where the others were performing remedial work. (See generally, RHE A, p. 4).

20. Following a records review and a physical examination, Dr. Schwartz authored a report outlining his opinions concerning Claimant's claimed work-related injuries due to mold exposure at work. (RHE A). Dr. Schwartz noted that because mold is "ubiquitous" in the environment, including the air we breathe, the "inhalation of a high level of mold spores is required for mold spores to possibly cause adverse health effects in immunocompetent individuals". *Id*. at 9. Dr. Schwartz concluded that there was no evidence that Claimant has ever been exposed to a high level of airborne mold at her work. Further, Dr. Schwartz noted that based on her prick skin testing performed at National Jewish, there is scant evidence that Claimant is allergic to mold.

21. Dr. Schwartz noted that Claimant had never undergone a methacholine challenge test to confirm a diagnosis of asthma. Indeed, Dr. Schwartz observed that because the symptoms of asthma (cough, chest tightness, wheezing and shortness of breath) are not specific to asthma, objective evidence of bronchial hyper-responsiveness (BH) must be present to diagnose asthma. (RHE A, p. 10). Because Claimant had not undergone a methacholine challenge and all of her PF testing was normal, Dr. Schwartz concluded that there was no objective evidence to substantiate that Claimant had asthma and this likely explained the reason that Claimant reported no improvement in her cough and shortness of breath with the use of Advair and Albuterol inhalers. In the absence of evidence that Claimant had asthma, Dr. Schwartz found it concerning that Claimant was continued on treatment (bronchodilators) for asthma, particularly when Dr. Pacheco observed that this treatment was aggravating Claimant's pre-existing GERD. *Id*.

22. Regarding Claimant's persistent cough, Dr. Schwartz noted that there was no evidence to support Dr. Browne's assessment of pneumonitis caused by exposure to mold. In support of his assertion, Dr. Schwartz again cited to Claimant's insignificant exposure to airborne mold (by air sampling testing), the results of Claimant's allergy testing supporting a conclusion that she is not allergic to mold, Claimant's CT scan revealing no evidence of sinusitis, Claimant's failure to respond to asthma treatment and Claimant's worsening cough despite no evidence on chest CT of pneumonitis. (RHE A, p. 10). Based upon Claimant's clinical picture and the results of her diagnostic testing, Dr. Schwartz concluded that her persistent cough, which was worse when she was lying down was "almost certainly secondary to her very severe GERD". *Id*. at 10-11. Dr. Schwartz explained that from the history Claimant provided to Dr. Pacheco, i.e. heartburn two times a week along with associated episodes of spontaneous regurgitation into her throat, Claimant has signs of "*very severe GERD, which is a common cause of cough that is unlike asthma, associated with hoarseness and recumbency and is refractory to treatment with asthma medications*". *Id.* at 11 (emphasis added). Dr. Schwartz noted that this opinion would likely be "strongly" borne out by performing a simple office procedure, i.e. a laryngoscopy, which would "likely show the redness of her laryngeal structures from her chronic high-level acid reflux". *Id*.

23. As noted, Dr. Schwartz testified as a board-certified pulmonologist by post-hearing deposition on January 8, 2025. Dr. Schwartz testified that he listened to the testimony that Claimant gave at hearing pertaining to her work activities from February 2021 through the end of November 2022 and this was substantially similar to that Claimant provided during her IME in his office on November 14, 2023. (Dr. Schwartz' Depo. Tr. pp. 7-8).

24. Dr. Schwartz reiterated his opinion that, in order for a mold exposure to cause respiratory symptoms, there first needs to be a high level of airborne mold exposure, and that the individual impacted must actually be allergic to the mold he/she is exposed to. (Dr. Schwartz' Depo. Tr. pp. 9-10). As noted, Claimant underwent allergy testing at National Jewish, including an extended mold panel. (CHE 10, p. 173). After reviewing this allergy testing, Dr. Schwartz testified that Claimant did not have an allergic response to any of the molds that were identified either through the air sampling obtained or through the actual tape sample lifted from an actual file consistent with those Claimant was working with. (Dr. Schwartz Depo. Tr. p. 18-19). Accordingly, Dr. Schwartz opined that the cause of Claimant's ongoing symptoms, including her runny nose, watery eyes, itchiness, persistent cough and hoarseness was not the result of any kind of allergic reaction to the molds that she may have been in contact with while she was working with water damaged files from February 2021, through November 2022. (Dr. Schwartz' Depo, p. 19).

25. As he did in his IME report, Dr. Schwartz excluded conditions other than GERD as the cause of Claimant's chronic upper respiratory and allergy related complaints during his deposition. Specifically, Dr. Schwartz excluded hypersensitivity pneumonitis (HP), chronic sinusitis and occupationally induced asthma as the cause of Claimant's persistent upper respiratory symptoms, including her chronic cough.

26. According to Dr. Schwartz, hypersensitivity pneumonitis or HP is an unusual allergic condition resulting from repeated exposures to an allergen in a particular environment (Dr. Schwartz' Depo. Tr. p. 14). These recurrent exposures give rise to a chronic allergic response causing pneumonitis, i.e. inflammation of the lung. *Id*. HP has specific hallmarks on CT imaging, including change of centrilobular nodules and ground glass inflammation of the upper lung fields. *Id*. Exposure to mold can cause HP. However, to make an HP diagnosis one would need to have repeated exposure to high levels of an allergen known to cause HP, have the characteristic CT findings and a bronchoscopy with evidence of excess lymphocytes in the bronchoscopy fluid. (Dr. Schwartz' Depo. Tr. p. 14-15).

27. As noted, Claimant underwent a high-resolution CT scan at National Jewish as part of her workup on November 9, 2022. After reviewing the report generated from this imaging, Dr. Schwartz opined that the CT scan was not consistent with a diagnosis of HP (Dr. Schwartz' Depo. Tr. p. 15-16). Dr. Schwartz noted that the CT scan did not have evidence of inflammation, particularly in the upper lung fields, and there was no evidence of the characteristic centrilobular nodules consistent with HP. Accordingly, Dr. Schwartz testified that Claimant did not have HP nor did Dr. Pacheco

opine that Claimant had HP. *Id*. at 16. Based upon the evidence presented, the ALJ is convinced that Dr. Browne's conclusion that Claimant had HP related to repeated exposure to mold causing pneumonitis, which explained her persistent cough and upper respiratory symptoms, is probably erroneous.

28. Dr. Schwartz also excluded chronic sinusitis resulting from exposure to mold as the cause of Claimant's upper respiratory symptoms. Per Dr. Schwartz, chronic sinusitis is chronically inflamed sinuses (Dr. Schwartz' Depo. Tr. pp. 19-20). The diagnostic criteria for chronic sinusitis is three months of symptoms and a CT scan showing inflammation of the sinuses, particularly the frontal, ethmoid, maxillary, and sphenoid sinuses, as well as the nasal passages (Dr. Schwartz' Depo. Tr. pp. 20-21). As noted above, the workup performed at National Jewish included a CT scan of the sinuses that was performed on December 14, 2022. The reading radiologist from National Jewish read the CT scan as demonstrating "patent paranasal sinuses without evidence of sinusitis". (CHE 10, pp. 177-178). Dr. Schwartz agreed with the reading indicating that none of Claimant's sinuses revealed any evidence of inflammation. Consequently, Dr. Schwartz persuasively opined that Claimant's ongoing symptoms were not the result of chronic sinusitis. (Dr. Schwartz' Depo. Tr. p. 21). As of her 12/14/2022 encounter with Claimant, Dr. Pacheco agreed with this conclusion as supported by her assessment that there was "no current evidence for chronic sinusitis". (RHE B, p. 38).

29. Dr. Schwartz also reiterated his IME opinions regarding asthma. Indeed, Dr. Schwartz testified that asthma is a heterogeneous condition of a lower respiratory tract sensitivity in which the bronchial tubes are hyper-responsive (Dr. Schwartz' Depo. Tr. p. 22). This increase in hyper-responsiveness results in the bronchial tubes constricting when exposed to irritants or allergens at levels lower than would make a non-asthmatic individual have bronchial constriction. The typical symptoms of asthma include cough, chest tightness, wheezing and shortness of breath. *Id*. at 22.

30. As he did on his IME report, Dr. Schwartz explained that the diagnosis of asthma requires objective evidence of bronchial hyper-responsiveness. (Dr. Schwartz' Depo. Tr. pp. 22-23). Objective evidence of bronchial hyper-responsiveness can be determined in two ways. First, it can be established through a pre and post bronchodilator spirometry test, i.e. pulmonary function testing (PFT) in which the individual shows that after a bronchodilator, that individual has a significant improvement in the air flow (more than 10% improvement in the FEV1 compared to baseline) (See RHE A, p. 10). Second, it can be established through a methacholine challenge, which is a provocative test to a nonspecific bronchoconstrictor, which in the asthmatic person will cause the bronchial tubes to constrict at amounts of inhaled methacholine lower than what would cause bronchial construction in the non-asthmatic person. (Dr. Schwartz' Depo. Tr. p. 23). In this case, Claimant underwent three pre and post bronchodilator spirometry tests over the eight months between her first visit with Dr. Pacheco, and her last visit: November 9, 2022 (Respondents' pp. 27-28), December 14, 2022 (Respondents' pp. 49-52) and February 20, 2023 (Respondents' pp. 60-61). As noted by Dr. Schwartz, Claimant never underwent a methacholine

challenge and the three pre and post bronchodilator spirometry tests showed no evidence of reversible airflow obstruction. Therefore, Dr. Schwartz opined that Claimant had no objective evidence to support a diagnosis of asthma (RHE A, p. 10; Dr. Schwartz' Depo. Tr. p. 23). As referenced, Dr. Schwartz concluded that this is the likely reason that Claimant continued to complain of cough and shortness of breath even though she was on inhaled asthmatic medications (Adviar and Albuterol) prescribed by Dr. Pacheco (See RHE A, p. 10). As presented, the evidence persuades the ALJ that Claimant has failed to establish that she has occupationally induced asthma. Indeed, Claimant's PFT and her reported response to asthma medications (Advair/Albuterol) support a conclusion that her previous diagnosis of asthma and Dr. Browne's decision to place her on Advair and Albuterol was unsubstantiated and premature.

31. The ALJ credits the environmental testing results from the samples obtained by Mr. Klein along with the allergy testing performed at National Jewish in combination with the 12/14/2022 report of Dr. Pacheco (FOF ¶ 12) and the opinions of Dr. Schwartz to find that Claimant probably never developed an allergic response to the low-level concentrations of mold present in her work environment. Based upon the medical records presented, including the records of Dr. Trevor Steinbach (CHE 15), the ALJ credits the opinions of Dr. Schwartz to find that Claimant's respiratory symptoms are not related to asthma caused by exposure to mold in her workplace. To the contrary, the evidence presented persuaded the ALJ that Claimant's persistent upper respiratory symptoms, including her chronic cough and hoarseness are related to gastroesophageal reflux disease or GERD.

32. As explained by Dr. Schwartz, GERD is a condition where the usual acids that are produced in the stomach are allowed to pass upwards into the esophagus (Dr. Schwartz' Depo. Tr. p. 24). Normally, the lower esophagus is closed and only opens when there is a neuro input to the esophagus triggering it to open when there is food or liquid coming down. However, when the lower esophagus does not close, then acid will move up into the esophagus and cause heartburn. If the acid goes higher up into the esophagus and actually into the throat, pharynx and larynx, it can cause not only a significant cough, but hoarseness. Specifically, inasmuch as the throat has cough receptors, when the acid enters the windpipe, patients with GERD develop a chronic cough (Dr. Schwartz' Depo. Tr. pp. 25-26). GERD is common and increases with age and obesity. *Id*. at 24. At the time of her last appointment with Dr. Pacheco on July 17, 2023, Claimant was 64 years old. She was 5 feet 6 inches tall and weighed 262 lb. 5.6 oz. with a body mass index of 42.34 kilograms per meter squared. (CHE 10, p. 202). Based upon her body mass index, Claimant has been placed in the Class 3 severe obesity category. (CHE 17).

33. As noted above, Claimant saw Dr. Pacheco for the first time on November 9, 2022. At that time, Claimant reported that she was experiencing heartburn approximately two times per week as well as occasional episodes of regurgitation at night (CHE 10, p. 163). When Claimant saw Dr. Schwartz on November 14, 2023, she reported that she had heartburn symptoms two to three times per month that began before 2021 and also awoke with episodes of regurgitation up to her throat every two

months, without her feeling heartburn before she regurgitated (RHE A, p. 4). Dr. Schwartz testified that the history Claimant gave to him was strongly consistent with the diagnosis of GERD (Dr. Schwartz' Depo. Tr. pp. 27-28). As Dr. Schwartz stated, Claimant's report of heartburn is a typical symptom of GERD. Even more important was her history of episodes of regurgitation into her throat, which is consistent with someone who has severe GERD (Dr. Schwartz' Depo. Tr. p. 38). Dr. Schwartz noted that GERD not only explains Claimant's cough, but also her hoarseness. Dr. Schwartz explained that asthma does not cause hoarseness because asthma is a condition of the lower airways whereas hoarseness comes from our vocal cords (Dr. Schwartz' Depo. Tr. p. 36). Consequently, when a patient has both a chronic cough and chronic hoarseness that is typically related to GERD. *Id.*

34. As noted, in his IME report, Dr. Schwartz stated that GERD as the cause of Claimant's hoarseness and cough would likely be strongly supported by a simple office procedure, i.e. a laryngoscopy, which would likely show redness of her laryngeal structures from chronic high level acid reflux. (RHE A, p. 11). Claimant saw Dr. Trevor Steinbach, a pulmonologist, on February 20, 2024 (after she saw Dr. Schwartz for the aforementioned IME) (RHE E, pp. 213-218). Dr. Schwartz noted that Dr. Steinbach was the first pulmonologist that Claimant actually saw for treatment.[3] (Dr. Schwartz' Depo. Tr. p. 33). In his report, Dr. Steinbach stated that there were no overt abnormalities on CT scan which argued against any serious progressive lung disease. *Id*. at 213. Dr. Steinbach also stated that despite Claimant's history of exposure to mold, there was no obvious concern for HP. *Id.* Dr. Steinbach stated that Claimant could have some form of asthma, however her lack of response to asthma medications argued against that. *Id.* Finally, he referred Claimant to be evaluated by otolaryngology to rule out any possible airway causes for her cough. Dr. Steinbach did not diagnose Claimant with any respiratory diagnosis considered by either Dr. Pacheco or Dr. Browne.

35. After reviewing Dr. Steinbach's report, Dr. Schwartz stated that Dr. Steinbach's recommendation was consistent with what he had recommended during his November 26, 2023, IME, namely for Claimant to undergo a laryngoscopy to delineate whether Claimant's cough was "coming from her upper airways, which would be her throat, her pharynx, or her larynx as a result of GERD. (Dr. Schwartz' Depo. Tr. p. 34).

36. Claimant underwent a laryngoscopy on July 31, 2024. The procedure was completed by Nurse Practitioner (FNP) Corrine Size. (CHE 18, pp. 330-332). The report from this procedure notes that Claimant was advised by her primary care physician (PCP) to take omeprazole and famotidine for her GERD symptoms, and she reported doing that for "about six weeks" prior to her laryngoscopy with "minimal to no improvement in her coughing". *Id.* at 332. In essence, Claimant suggested to Dr. Ivers that despite being compliant with her GERD medications, they were not working to reduce her cough. Six weeks prior to July 31st means, by Claimant's report, that she had been compliant in taking her GERD medications since June 20, 2024. Contrary to Claimant's report, the medical records reflect that she was not taking her GERD related medications as prescribed. Indeed, on June 25, 2024, Claimant presented to Dr. Greta

[3] Dr. Pacheco is an allergist.

Ivers complaining of acid reflux and a persistent cough that had not changed. (CHE 17, pp. 312-313). Dr. Ivers noted that Claimant was "taking omeprazole *as needed*, and not taking famotidine nightly as recommended". *Id*. at 312 (emphasis added). Dr. Ivers discussed with Claimant the need to take her medications as prescribed, reminding her to take her "omeprazole daily in the a.m. and famotidine nightly". *Id*.

37. Findings on the laryngoscopy included suparglottic erythema and precricoid erythema. (CHE 18, p. 331). Dr. Schwartz noted that supraglottic means above the esophagus and epiglottis, i.e. the junction between the pharynx, throat, and the esophagus. Consequently, Claimant showed erythema (redness) above the epiglottis. The cricoid is one of the cartilage structures of the larynx which sits in front of the esophagus. Consequently, Claimant demonstrated redness in front of her larynx. (Dr. Schwartz' Depo. Tr. pp. 35-36). Based upon the results of her laryngoscopy, Claimant was diagnosed with laryngopharyngeal reflux (LPR), which NP Size noted was "likely worsening her cough symptoms. NP Size recommended that Claimant start Nexium twice daily in addition to making lifestyle modifications. (CHE 18, pp. 331-332). Dr. Schwartz testified that LPR is when acid comes up into the upper airways around the larynx or into the supraglottic region of her throat causing inflammation (Dr. Schwartz Depo. Tr. p. 36).

38. Although Dr. Pacheco did not diagnose Claimant with GERD at the initial evaluation on November 9, 2022, she thereafter assessed Claimant with GERD for the three subsequent evaluations. (See generally, CHE 10). Interestingly, Dr. Pacheco, during her July 17, 2023, evaluation, suggested that Claimant's GERD was triggered by the need for constant bronchodilator use. However, during the November 9, 2022, evaluation, Dr. Pacheco documented that Claimant was experiencing heartburn twice a week, as well as occasional episodes of regurgitation at night. (CHE 10, p. 163). As noted by Dr. Schwartz, Claimant, at the time of the November 9, 2022, evaluation, was not on any kind of asthma medication (Dr. Schwartz' Depo. Tr. pp. 29-30). In addition, to the extent that Dr. Pacheco is suggesting that Claimant's ongoing consumption of asthma medications worsened her GERD, the GERD-like symptoms reported to Dr. Schwartz during his November 26, 2023, IME were not as severe as the GERD-like symptoms that Claimant reported to Dr. Pacheco during her initial November 9, 2022, evaluation. As noted by Dr. Schwartz in his deposition, there is no convincing body of evidence in the medical literature that suggests that inhaled bronchodilators cause or worsen GERD (Dr. Schwartz' Depo. Tr. p. 31).

39. As outlined above, Dr. Pacheco, during the July 17, 2023, evaluation, noted that, since December 2022, Claimant was no longer exposed to either the mold contaminated Conex storage or the mold contaminated files (CHE 10, p. 192). Dr. Schwartz agreed with Dr. Pacheco that subsequent to November 2022, Claimant did not experience any additional mold exposure while at work. Nevertheless, not only did Claimant's symptoms not improve, they actually worsened (Dr. Schwartz' Depo. Tr. pp. 37-38). Because Claimant's symptoms worsened despite the fact that she was no longer exposed to any kind of mold, the ALJ is convinced that Claimant an alleged allergic response to mold does not explain her persistent symptoms. Instead, the

evidence, particularly the testimony of Dr. Schwartz, persuades the ALJ that Claimant's acid reflux (GERD/LPR) fully explains her ongoing upper respiratory complaints, including her chronic cough and hoarseness. (Dr. Schwartz' Depo. Tr. p. 37).

40. Based upon the evidence presented, Claimant has failed to establish a causal connection between her duties associated with working with moldy, water damaged files and her upper respiratory symptoms, including her persistent cough and hoarseness for which medical treatment has been provided. Simply put, Claimant has failed to prove that her claimed medical condition and her need for treatment was proximately caused by an injury or occupational disease arising out of and in the course of her employment.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), 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. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *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).

D. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Schwartz are credible and convincing. When the evidentiary record is considered as a whole, the medical opinions of Dr. Schwartz are more persuasive than the contrary opinions of Dr. Pacheco and Dr. Browne.

Compensability

E. A "compensable" injury is one that requires medical treatment or causes disability. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo.App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S.

F. Under the Workers' Compensation Act, an injured employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which an alleged work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little doubt that Claimant produced sufficient evidence to support a conclusion that she was in the scope of her work when she was exposed to mold spores. Nonetheless, because Claimant must meet both requirements as referenced above, the question of whether her medical condition and need for treatment she alleges arose out of her exposure to mold must be answered affirmatively before her medical condition (injury) can be considered compensable.

G. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the claimed injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996). Based upon the evidence presented, the ALJ concludes that Claimant's claims of injury are rooted in the legal principles surrounding the manifestation of an occupational disease.

H. Section 8-40-201(14), C.R.S. defines "occupational disease" 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.

I. This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo.App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo.App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. To the contrary, a claimant is entitled to recovery if he/she demonstrates that the hazards of employment cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). In this case, the ALJ agrees with Respondents that the evidence, as presented, supports a conclusion that Claimant probably did not sustain an exposure to mold at work that likely caused the development of an occupational disease resulting in her need for treatment. Indeed, the evidence presented, including the medical records and the testimony of Dr. Schwartz, establishes that Claimant probably does not have asthma at all. Furthermore, the environmental testing evidence supports a conclusion that Claimant was not subjected to concentrations of air borne or surface connected mold spores sufficient to cause

injury/disease. Finally, there are no results from allergy testing to substantiate that Claimant was sensitized (allergic) to any mold found to be present in her various workplaces to support a conclusion that she suffered an occupationally induced injury/disease, including HP, sinusitis or asthma. Indeed, Dr. Pacheco noted on December 14, 2022, some 22 months after Claimant developed symptoms while working with the moldy files, that there was no "current" evidence to establish that Claimant suffered an allergic sensitization to the mold in her work environment, prompting her to note: "Review of her test results indicates that [Claimant] does not appear to have developed a mold related lung disease".

J. In contrast, the evidence presented strongly supports that Claimant has GERD/LPR, a condition known to cause upper respiratory like symptoms which mimic asthma, including persistent cough and hoarseness. While Claimant's need for treatment with Dr. Browne and Dr. Pacheco was certainly reasonable and objectively necessary, the evidence presented persuades the ALJ that the condition (GERD/LPR) prompting the need for this treatment is not causally related to Claimant's work or mold exposure. As explained by a Panel of the Industrial Claims Appeals Office in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, October 27, 2008), a coincidental correlation between a claimant's work and his/her symptoms does not mean there is a causal connection between a claimant's injury and his/her work. To the contrary, as noted by the Panel in *Scully* "correlation is not causation." Simply put, there is no presumption that an employee found injured on the employer's premises is presumably injured from something arising out of his work. *See Finn v. Industrial Commission,* 437 P.2d 542, 544 (Colo. 1968). While the evidence presented supports that Claimant was exposed to mold as part of her work, it does not support a nexus between this exposure and her upper respiratory symptoms. Rather, the evidence presented supports a conclusion that Claimant's respiratory symptoms are probably caused by and related to her GERD/LPR, without contribution from the mold found in low concentrations in her work environment. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between her employment and her upper respiratory symptoms, including her persistent cough and hoarseness for which medical treatment was provided and benefits sought. § 8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000). Because Claimant failed to establish that she suffered a compensable injury/disease that resulted directly from her employment or the conditions under which her work was performed and can be seen to have followed as a natural incident of her work, her claim for benefits must be denied and dismissed and her remaining claim for additional treatment need not be addressed.

ORDER

It is therefore ordered that:

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

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

DATED: March 6, 2025

/s/ Richard M. Lamphere

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

ISSUES

I. Whether Claimant overcame Dr. Hughes' DIME opinion on causation regarding a July 10, 2020 injury and December 17, 2020 cervical fusion.

II. Whether Respondents proved the July 10, 2020 injury was an intervening injury.

III. Whether Claimant proved the December 17, 2020 cervical fusion was reasonable, necessary and related medical treatment.

FINDINGS OF FACT

1. Claimant is a 48-year-old female who worked for Employer as a mental health technician and psychotherapist.

2. Claimant sustained an admitted work injury on December 22, 2018 when a patient punched her in the back of the head and neck.

3. Claimant was transported by ambulance to the Medical Center of the Rockies. She reported being punched in the head and posterior neck. Claimant denied injury to any other parts of her body, any loss of consciousness, and any weakness or numbness. Claimant complained of headache, blurry vision, and nausea. Physical exam revealed a small hematoma to the right posterior scalp and diffuse midline cervical spine and soft tissue tenderness to palpation without ecchymoses or hematoma. A CT scan of the cervical spine showed mild cervical spondylosis at C5-6 with no evidence of fracture or malalignment. The provider's clinical impressions were concussion without loss of consciousness and neck pain. (R. Ex. S, pp. 548-562).

4. On January 2, 2019, Claimant presented to Kevin Keefe, D.O. at Workwell for an initial occupational medicine evaluation. Claimant complained of pain in the back of her head and neck and right posterior shoulder discomfort. She denied any symptoms in her arms or legs. Review of systems was negative for weakness, numbness and headache. On examination, Dr. Keefe noted decreased neck range of motion, discomfort with palpation of the right neck and trapezius, normal DTRs and normal range of motion of the arms. Dr. Keefe diagnosed Claimant with a concussion, post-concussional syndrome, and a strain of muscle, fascia and tendon at the neck level. He removed Claimant from work and referred her for physical therapy. (R. Ex. Q, pp. 535-538).

5. Claimant began physical therapy on January 7, 2019 at Workwell. The physical therapist noted reduced cervical range of motion, tenderness to palpation in the cervical spine, and intact sensation to all dermatomes tested. Claimant reported intermittent

numbness and tingling in her left fourth and fifth fingertips as well as her right elbow. Spurling's test was positive on the left and right. (R. Ex. P, pp. 469-471).

6. On January 8, 2019, Claimant reported to Dr. Keefe experiencing a persistent headache as well as a tingling sensation beginning at top of her head extending down into her right lateral neck and right arm to the elbow. On exam, Dr. Keefe noted reduced cervical range of motion and tenderness to palpation without any muscle weakness in the upper extremities. Dr. Keefe released Claimant to modified duty work and referred her for chiropractic treatment and to Dr. Mistry for evaluation of her concussion. (R. Ex. Q, pp. 532-534).

7. Claimant attended four physical therapy sessions between January 14, 2019 and January 29, 2019 where she continued to complain of neck pain and headaches. Limited cervical range of motion is documented. (Cl. Ex. 2, pp. 132-140).

8. On January 22, 2019, Claimant complained to Dr. Keefe of continued neck discomfort with frequent headaches, as well as occasional numbness and tingling in the third, fourth, and fifth fingers of the left hand and occasional shooting pain down the right arm into the thumb. Dr. Keefe noted reduced cervical range of motion on examination. (R. Ex. Q, pp. 529-531).

9. At a January 31, 2019 physical therapy session Claimant reported that the numbness in the lateral three fingers of her left hand had subsided but the tingling persisted. (Cl. Ex. 2, pp. 130-131). Claimant continued to report persistent tingling into the lateral three fingers of her left hand as well as constant headaches at physical therapy appointments on February 5, 2019 and February 26, 2019. (Cl. Ex. 2, pp. 126-129).

10. On February 5, 2019, Claimant reported to Dr. Keefe continued neck discomfort and tightness, occasional shooting pain into the right upper arm, and tingling in the third and fourth fingers of the left hand. Claimant did not notice any weakness or coordination difficulties with her arms or legs. Dr. Keefe referred Claimant for an EMG and physiatry consultation, a cervical MRI, and massage therapy. (R. Ex. Q, pp. 526-528).

11. On February 8, 2019, Claimant presented to Dilaawar Mistry, M.D. reporting neck pain, headache, and numbness and tingling radiating to her limbs. On examination of the upper extremities, Dr. Mistry noted decreased sensation to light tough in the left lateral three fingers, normal reflexes and strength, and slowed finger-to-nose coordination. Gait and station were normal. Spurling's test was positive with pain and numbness in the left upper extremity. Dr. Mistry diagnosed Claimant with, inter alia, cervicalgia. (R. Ex. O, pp. 461-467).

12. On February 19, 2019, Claimant underwent a cervical MRI that was compared to a December 22, 2018 cervical MRI. At C4-5 the radiologist noted a minimal diffuse disc bulge, moderate to severe spinal stenosis, and severe right and moderate left neural foraminal stenosis. At C6-7 the radiologist noted a diffuse disc bulge, no significant

spinal stenosis, and mild right and moderate left neural foraminal stenosis. In his impression, the radiologist remarked that there was multilevel cervical disc pathology and spondylopathy present, most marked at the C5-6 level, causing moderate to severe spinal stenosis. He further noted prominence of the central canal of the lower cervical and upper thoracic spinal cord. (R. Ex. R, p. 545).

13. On March 4, 2019, Claimant presented to Alicia Feldman, M.D. for a pain management evaluation. Claimant reported neck pain on the right into the right shoulder and bicep, as well as numbness in the third, fourth and fifth digits of her left hand. On exam, Dr. Feldman noted decreased range of motion of the cervical spine with negative compression testing of the cervical spine, decreased sensation in the left upper extremity with a positive Tinel's test at the left elbow. Reflexes and motor exam were within normal limits. Dr. Feldman diagnosed Claimant with cervicalgia and ordered an EMG of the left upper extremity. She recommended consideration of Botox injections if Claimant's condition did not improve. (R. Ex. N, pp. 387-390).

14. On March 19, 2019, Claimant reported to Dr. Keefe she was no longer experiencing any right arm symptoms. Claimant reported still experiencing a little tingling in the left third, fourth and fifth fingers, but just intermittently. Claimant had not noticed any loss of strength or coordination in her arms or legs. Dr. Keefe noted Claimant neck was doing better and her was making progress. (R. Ex. Q, pp. 517-520).

15. Dr. Mistry reevaluated Claimant on March 21, 2019. Dr. Mistry noted Claimant's complaints of pain, numbness and tingling radiating from her neck into her limbs. On examination of the upper extremities, Dr. Mistry noted decreased sensation to light tough in the left lateral three fingers, normal reflexes and strength, and slowed finger-to-nose coordination. Gait and station were normal. (Cl. Ex. 6, p. 89- 94).

16. On April 9, 2019, Claimant reported continued neck discomfort and headaches to Dr. Keefe. She further reported that she continued to have intermittent paresthesias in the left hand, but that she may go several days without experiencing such symptom and that she was not having any other arm symptoms present at the time. Claimant again denied any loss of strength or coordination in her arms or legs. On examination, Dr. Keefe noted slightly reduced cervical range of motion and normal strength of the upper extremities. (R. Ex. Q, pp. 513-515).

17. On May 2, 2019, Dr. Keefe noted Claimant was now reporting numbness at the tip of her left thumb and index finger. (R. Ex. Q, pp. 510-512).

18. On May 30, 2019, Dr. Feldman performed an EMG of Claimant's left upper extremity, which was normal with no evidence of left-sided C5-T1 radiculopathy, brachial plexopathy or mononeuropathy of the median or ulnar nerves. Dr. Feldman remarked that Claimant's numbness was "likely nerve irritation from tight muscles" and recommended trigger point injections. (R. Ex. N, pp. 380-386).

19. On June 5, 2019, Claimant presented to Lawrence A. Meredith, M.D. at UC Health neurology clinic for evaluation of her posttraumatic headaches. Dr. Meredith noted that Claimant reported also having ongoing cervical discomfort, but that she did not report any prominent radicular type shooting pain. On exam, Dr. Meredith noted normal strength and reflexes, no sensory deficit, a negative Romberg's sign, and normal coordination and gait. (R. Ex. M, pp. 300-317).

20. By July 16, 2019, Claimant was reporting to Dr. Keefe overall improvement. She reported that her left arm tingling continued to improve and happened once a week. Romberg's test was negative on exam. Claimant was to continue chiropractic treatment. (R. Ex. Q).

21. At an August 6, 2019 evaluation with Neal Tah, M.D. at Workwell, Dr. Tah noted normal sensation and strength of upper extremities, normal gait, normal finger to nose testing, and intact cranial nerves II-XII. (R. Ex. Q).

22. On September 13, 2019, Dr. Feldman noted Claimant had undergone trigger point injections. Claimant reported feeling improved, but continued to complain of neck pain. (R. Ex. M, p. 374).

23. At a September 25, 2019 chiropractic session at Workwell, Claimant reported neck pain, pain in her right trapezius and shoulder, and headaches. The chiropractor noted restricted cervical range of motion, muscle spasms of lower cervical region and myospasms of upper thoracic region (Cl. Ex. 8, pp.122-124).

24. In her symptom reviews at evaluations with Dr. Mistry on October 10 and October 14, 2019, Claimant gave a score of zero for numbness and tingling and did not report any radiating symptoms into her limbs. Romberg and Spurling's tests were negative. Dr. Mistry noted Claimant should follow the plan outlined by Dr. Feldman for cervicalgia and spondylosis. (Cl. Ex. 6, pp. 67-71).

25. On December 5, 2019, Claimant reported to Dr. Mistry feeling better overall, and that her most concerning symptom was head pain. Dr. Mistry noted Claimant had been discharged from chiropractic care. Claimant again reported a score of zero for numbness and tingling and did not indicate any radiating pain into her limbs. (Cl. Ex. 6, pp. 60-66).

26. On December 11, 2019, Claimant saw Logan Jones, D.O. at Workwell with complaints of continued neck pain, right shoulder pain and headaches. On exam, Dr. Jones noted negative Spurlings bilaterally, normal sensation of the bilateral upper extremities and 5/5 grip. (R. Ex. Q).

27. On March 9, 2020, Claimant presented to Dr. Feldman for migraines. She complained of 7/10 neck pain. Dr. Feldman administered Botox injections for Claimant's migraines. (R. Ex. N, p. 370).

28. On March 23, 2020, Claimant attended a telemedicine appointment with Dr. Mistry. She reported that her migraines and shoulder pain had improved significantly following the Botox injections. Claimant reported that her current most concerning symptoms were migraines, anxiety and social anxiety. She again gave a score of zero for numbness and tingling son the symptom review and reported no radiating symptoms into her limbs. Dr. Mistry recommended that Claimant discuss with Dr. Feldman the need for a consultation with either an orthopedic spine surgeon or neurosurgeon. (Cl. Ex. 6, pp. 55-59).

29. At a telemedicine visit with Dr. Feldman on March 30, 2020 Claimant reported constant shoulder pain. Dr. Feldman noted all therapies were on hold secondary to the COVID-19 pandemic. (R. Ex. N, p. 363).

30. Claimant attended another telemedicine visit with Dr. Mistry on June 30 2020. Claimant reported her most concerning current symptoms were massive migraine pain and pain behind the eyes. Claimant reported that her headaches had worsened over the past month. She again reported a zero score of numbness and tingling and did not report any radiating symptoms into her limbs in the review of symptoms. Dr. Mistry remarked that a repeat cervical MRI may be needed to ascertain interval changes over the past 16 months based on Claimant's severe neck pain and headaches. He recommended Claimant attend a consultation with Dr. Lars Widdel, a neurosurgeon at UC Health. (Cl. Ex. 6, pp. 50-54).

31. Claimant credibly testified at hearing. Regarding the mechanism of work injury on December 22, 2018, Claimant testified that she underwent treatment for her neck, including physical therapy, dry needling, resistance bands, massage therapy and lidocaine shots. She testified that she felt the physical therapy made her condition worse. Claimant testified that her neck was feeling terrible on June 30, 2020.

32. Claimant testified that, on July 10, 2020, she was sitting on the floor at home watching a movie with a friend. Claimant testified that when her friend mentioned the presence of a big spider on the ceiling, she looked up and felt a snap and a tingling and burning sensation down both of her arms into the palms of her hands. Claimant testified it was horrible, very scary, and she was afraid to move. Claimant testified that she had her friend call Dr. Mistry's emergency line, and then subsequently called an ambulance.

33. Claimant was transported by ambulance to Poudre Valley Hospital emergency department and evaluated on the evening of July 10, 2020 into the early morning of July 11, 2020. Regarding the mechanism of injury and symptoms, the provider wrote,

> Approximately 1 to 2 hours ago she looked up at the ceiling and felt a crack in her neck and has constant severe sharp pain in the right posterior part of her neck and an instantaneous shooting sensation of pins-and-needles all the way down both of her arms to her middle fingers. She has severe sensitivity to her hands and skin and has loss of sensation and severe tingling…She states that she is always had [sic] some pain with

> movement of her head and neck especially when she looks up but she is never had this severe pain with a sensation in her arms.

(R. Ex. T, p. 565).

34. Although Claimant received 15 mg of ketamine while en route to the hospital, she advised this did not help much and still rated her pain as 8/10. On neurologic examination, Claimant reported severe discomfort when just touching her hands and described a “fire sensation”. Complete neurological examination was limited due to Claimant’s complaints of severe pain with any movement or touching of her upper extremities. (R. Ex. T, pp. 564-570).

35. On July 11, 2020, Claimant underwent a cervical MRI that was compared to her February 19, 2019 cervical MRI. The radiologist remarked that level C4-5 was not significantly changed, noting a diffuse disc bulge and mild bilateral neural foraminal stenosis without significant spinal stenosis. At C5-6 the radiologist noted a diffuse disc bulge, severe spinal stenosis, mild cord compression and severe bilateral neural foraminal stenosis. He opined that level C5-6 had worsened compared to the 2019 study. At C6-7 the radiologist noted a diffuse disc bulge, mild spinal stenosis, moderate right and severe left neural foraminal stenosis. He opined that level C6-7 had also worsened in comparison to the 2019 study. (R. Ex. R, pp. 543-544).

36. The emergency department provider noted that he felt a neurosurgery consultation and admission was indicated due to Claimant’s presentation, persistent burning sensation and pain, difficulty performing a proper neurological upper extremity exam, and the changes on MRI. Claimant elected to be discharged. In connection with Claimant’s decision to be discharged home instead, it was noted that Claimant made an informed decision and that she understood the risks of paralysis or other severe permanent neurologic deficit. (R. Ex. T, p. 564).

37. Claimant testified that she declined to undergo surgery at the time because she is a single mother and needed to make arrangements for her children.

38. On August 12, 2020, Claimant saw Dr. Mistry via a telemedicine appointment. She reported worsening headaches. Dr. Mistry noted that in July Claimant was evaluated in the emergency department for nerve pain in her fingers and was advised to see a neurosurgeon. Dr. Mistry’s medical record does not refer to any specific incident that precipitated the July 2020 emergency department visit. Claimant now reported a score of four for numbness and tingling in her symptoms review, as well as the presence of numbness and tingling into her limbs. Dr. Mistry recommended authorization of follow-up with Dr. Feldman and consultation with a neurosurgeon. (Cl. Ex.6, pp. 49-51).

39. On August 14, 2020, Claimant attended a follow-up evaluation with Dr. Feldman, who noted that Neurontin was helpful for the “fire” in Claimant’s arms and hands. There

is no mention in this report of the July 10, 2020 incident or emergency department visit. (R. Ex. N, pp. 358-362).

40. On September 10, 2020, Claimant presented to Pamela J. Rizza, M.D. at Workwell. Claimant complained of constant neck pain, a burning sensation in both arms, and tingling into fingers three through five. On examination, Dr. Rizza noted normal bilateral grip strength and strength of the upper extremities. There was slight decreased sensation to light touch of fingers three through five bilaterally. Dr. Rizza referred Claimant for a neurosurgical consultation for C5-7 disc disease with severe neuroforaminal stenosis. There is no mention in this report of the July 10, 2020 incident or emergency department visit. (R. Ex. Q, pp. 478-481).

41. On October 5, 2020, Dr. Mistry noted that he reviewed the results of Claimant's July 2020 cervical MRI compared to her February 2019 cervical MRI. Dr. Mistry remarked that there had been interval worsening of Claimant's cervical spine pathology which mandated expeditious evaluation by neurosurgery. (Cl. Ex. 6, pp. 41- 43).

42. On October 12, 2020, Claimant presented to Michael A. Finn, M.D. at UC Health for a neurosurgical consultation. Claimant reported that her symptoms began approximately two years ago with the work assault and that she developed myriad symptoms afterwards. Dr. Finn noted that Claimant developed severe neck pain, dysesthetic pain on both sides, left-sided clumsiness with fine motor coordination deficit, and Lhermitte sign in which Claimant had electrical shock symptoms up and down her spine when she extended her neck. There is no mention in this report of the July 10, 2020 incident or emergency department visit. On examination, Dr. Finn noted triceps weakness on the left, approximately 4/5, and brisk reflexes in the lower extremities 4+ patella with spreading with mild crossed adductors. Neck range of motion was very limited, particularly in extension. Dr. Finn concluded that Claimant has two-level cervical arthritis. He noted Claimant had a significant disk osteophyte complex at C5-6 causing significant cervical stenosis as well as a disk protrusion at C6-7 causing more modest, but still significant in his view, cervical stenosis. Dr. Finn recommended that Claimant undergo an anterior cervical discectomy and fusion ("ACDF") at C5-6 and C6-7. (R. Ex. J, pp. 179-180).

43. On November 10, 2020, Gregory Reichhardt, M.D. performed an independent medical examination ("IME") of Claimant at the request of Respondents. Dr. Reichhardt documented,

> [Claimant] notes that in terms of her neck pain prior to the 07/2020 incident, she had only tingling in her fingers a couple times per day, but states that she didn't really have any pain. She notes that it wasn't anything that she really paid attention to.
>
> In July 2020, she notes that she was sitting on the floor of her living room with a couple friends watching scary movies. Someone said there was a spider on the ceiling and she looked up. She indicated that her 'arms lit on

> fire' with pain radiating down the arms and states all her nerves 'lit on fire.' She could not make a fist. She could not spread her fingers out. She has had increased symptoms since then including neck pain and arm pain.

(R. Ex. I, p. 140).

44. Claimant reported arm pain extending down the radial and dorsal aspect of the forearms and invariably into any or all fingers. Claimant reported that such symptom had been occurring since the July 2020 spider incident. Dr. Reichhardt diagnosed Claimant with, in pertinent part, a cervical strain related to the December 22, 2018 work-related assault, and cervical cord compression associated with the July 10, 2020 non-work-related neck injury. (R. Ex. I, pp. 139-155).

45. Dr. Reichhardt opined that Claimant had complaints of neck pain after the December 2018 work injury, but no prominent ongoing neurologic signs or symptoms. He noted some medical records between December 22, 2018 and July 10, 2020 documented shooting pain, positive Romberg tests and decreased sensation to light touch in the left three lateral fingers; however, other records noted normal strength, reflexes, sensation, negative Romberg tests, and normal gait and coordination. He concluded that, up until the July 10, 2020 incident, Claimant had been thoroughly evaluated with no significant concerns of radiculopathy or myelopathy and no discussion of spine injections or surgery. Dr. Reichhardt opined that Claimant sustained a specific injury on July 10, 2020 in which she looked up, felt a pop in her neck and had the immediate onset of increased neck pain and pain radiating down her arms, severe enough to require transport by ambulance to the hospital. He noted that the July 2020 cervical MRI demonstrated worsening of her findings at C5-6 and C6-7 levels, and now mild cord compression. Dr. Reichhardt noted that Claimant has continued to have significant arm symptoms and has progressed on to report symptoms and demonstrates findings indicative of cord compression with dysesthetic pain in both sides, left greater than right, left-sided clumsiness with fine motor coordination deficit, and a positive Lhermitte's sign. Dr. Reichhardt concluded that, while the cervical fusion at C5-6 and C6-7 was appropriate and medically necessary, the surgery was not causally related to Claimant's December 22, 2018 work injury. (R. Ex. I, pp. 139-155).

46. On December 17, 2020, Claimant underwent a C5-6 and C6-7 ACDF performed by Dr. Finn. Dr. Finn identified his pre and post-operative diagnoses as cervical stenosis with myelopathy and noted that Claimant has had ongoing myelopathic symptoms and significant stenosis at C5 and C6. There was no mention of the C6-7 level in the pre- or post-operative diagnoses or in the History of Present Illness section. (R. Ex. J, pp. 176-178).

47. Claimant reported improvement of her cervical and radiating symptoms post-surgery. Claimant continued to receive Botox injections for headaches and continued to undergo psychological care.

48. Dr. Feldman placed Claimant at maximum medical improvement ("MMI") on July 27, 2022. Dr. Feldman assigned a total combined 46% whole person rating consisting of 17% for psychological impairment, 11% under Table 53 of the AMA Guides for a two-level cervical fusion, 19% for cervical range of motion, and 10% for a traumatic brain injury ("TBI") with mild impairment in complex integrated cerebral function. (R. Ex. N, pp. 322-330).

49. On September 22, 2022, Dr. Feldman responded to questions submitted by Respondents' counsel, together with a copy of Dr. Reichhardt's November 10, 2020 IME report and video surveillance obtained of Claimant on July 27, 2022. Dr. Feldman disagreed with Dr. Reichhardt's opinion that the ACDF performed by Dr. Finn was not causally related to Claimant's December 2018 work injury. Dr. Feldman noted that, prior to the July 10, 2020 incident, Claimant did have complaints of neck pain with radiation to the upper extremities and numbness and symptoms of cervical radiculopathy. She noted that Claimant received extensive diagnostic testing and workup for work-related neck pain and cervical radiculopathy symptoms that occurred prior to the July 10, 2020 incident. Dr. Feldman opined that looking up at the ceiling is not a traumatic event but that the work-related assault was, causing disk herniation and severe stenosis as well as symptoms of neck pain and cervical radiculopathy. Dr. Feldman acknowledged that the surveillance video she reviewed did show Claimant to be quite functional and have good cervical range of motion, and that the range of motion measurements she obtained during her impairment rating evaluation were inconsistent with Claimant's presentation on the surveillance video. She nonetheless opined that Claimant still qualified for an impairment rating for a two-level cervical fusion. (R. Ex. N, pp. 319-321).

50. Dr. Reichhardt conducted a follow-up IME of Claimant on September 30, 2022, obtaining an updated history from Claimant and reviewing updated medical records. Dr. Reichhardt again opined that the cervical fusion was not related to the December 22, 2018 work injury. He opined that Claimant reached MMI on July 27, 2022 with 6% whole person impairment of the cervical spine for specific disorders under Table 53(II)(C). He opined that, within a reasonable degree of medical probability, Claimant's need for the cervical fusion was related to Claimant's July 10, 2020 injury. Dr. Reichhardt again noted that, prior to the July 2020 injury, there was sporadic mention of nonspecific upper extremity symptoms, tingling, numbness, but Claimant did not have concerning neurologic findings on examination or a clear radicular presentation or presentation suggestive of myelopathy, nor was she diagnosed with a specific radiculopathy or myelopathy. Dr. Reichhardt explained,

> There are multiple potential causes for the nonspecific hand symptoms that she had prior to 7/20 apart from radiculopathy. These would include myofascial pain and carpal tunnel syndrome. An electrodiagnostic evaluation was ordered to evaluate the various potential causes of this in her differential. This was ordered, but to my knowledge was never completed. After her 7/20 injury, an electrodiagnostic evaluation was not required as it was clear she had myelopathy as a result of her 7/20 injury and required surgical intervention.

(R. Ex. I, p. 135).

51. Dr. Reichhardt opined that Claimant's presentation changed substantially after the July 10, 2020 incident, noting exams findings after July 10, 2020 included clumsiness with fine motor coordination deficit, a positive Lhermitte's sign, and changes in strength. There was also triceps weakness on examination as well as brisk lower extremity reflexes with spreading to the crossed adductors, objective indications of myelopathy. He noted that, after the July 10, 2020 injury, it was clear surgery was necessary given Claimant's findings of myelopathy. Dr. Reichhardt concluded,

> Cervical extension does represent an accepted mechanism of injury to the cervical spine. Her reported severe symptoms immediately after [the July 10, 2020] injury, the change in her cervical MRI at the level subsequently requiring surgery, the changes in her neurologic examination and the ultimate need for surgery indicate a specific injury to the C5-6 and C6-7 levels. Her subsequent surgery, to a reasonable degree of medical probability, was related to that 7/20 injury.

(R. Ex. I, p. 136).

52. On March 29, 2023, Dr. Mistry issued a report containing a chart review and narrative summary. Dr. Mistry opined that the cervical fusion surgery performed by Dr. Finn was reasonable, necessary and causally related to Claimant's December 22, 2018 work injury. He explained that Claimant's February 2019 MRI showed multilevel cervical disc pathology and spondylopathy most marked at C5-6, which caused moderate to severe spinal stenosis, and the July 2020 MRI demonstrated interval worsening at levels C5-6 and C6-7 levels with mild cord compression at C5-6. Dr. Mistry opined that the December 22, 2018 work assault was the direct cause of Claimant's significant cervical spine problems and pathology demonstrated on the February 2019 MRI. He noted that, prior to the December 2018 work injury, Claimant had only been evaluated once for neck pain in June 2017 following a motor vehicle accident ("MVA"), and there were no diagnostic studies performed and no records indicating Claimant had ongoing neck pain or other complications leading up to the work injury. Dr. Mistry explained that Claimant had persistent neck pain, but that her upper extremity paresthesias had resolved by his June 30, 2020 evaluation of Claimant. Dr. Mistry noted that in March, April, and May 2020 he recommended that Claimant have a discussion with Dr. Feldman regarding the need for a consultation with either an orthopedic spine surgeon or neurosurgeon when COVID-19 issues abated, and that in June 2020 he recommended neurosurgery consultation with Dr. Widdel based on Claimant's persistent neck pain. (R. Ex. O, pp. 392-451).

53. Dr. Mistry opined that the July 10, 2020 incident in which Claimant looked up at a spider was not a subsequent intervening event. He opined that the December 22, 2018 work injury caused Claimant's cervical spine pathology and such underlying cervical spine pathology made Claimant more vulnerable to the injury on July 10, 2020.

Dr. Mistry concluded, “Had the original work-related injury not occurred, [Claimant] would not have been susceptible to the injury on July 10, 2020 and [Claimant] would not have needed surgery.” (emphasis omitted) (R. Ex. O, p. 393).

54. John Hughes, M.D. performed a DIME on July 20, 2023. Dr. Hughes conducted a comprehensive medical records review, including, inter alia, Dr. Reichhardt’s two IME reports. He noted he also reviewed Dr. Mistry’s March 29, 2023 report in which Dr. Mistry opined that Claimant’s original work injury made Claimant more “vulnerable” to the July 2020 incident and but for the work injury Claimant would not have needed surgery. Regarding the July 10, 2020 incident, Dr. Hughes wrote, “[Claimant] sustained additional cervical spine injuries when she looked up overhead suddenly at home on July 10, 2020,” noting emergency department records documented a reported pop in her neck, onset of radicular symptoms and burning pain increased cervical spine symptoms MRI showed interval worsening at C5-6 and C6-7 with new onset of mild cord compression of C5-6. (R. Ex. E, pp. 48).

55. Dr. Hughes diagnosed Claimant with, in pertinent part: work-related assault with multiple injuries sustained on December 22, 2018; cervical spine sprain/strain with MRI findings of moderate to severe spinal stenosis at C5-6 without clinical evidence of myelopathy or radiculopathy; worsening of posttraumatic stress disorder secondary to the work-related assault of December 22, 2018; and cervical spine sprain/strain injuries sustained on July 10, 2020 with progressive spinal cord compression as seen on the MRI of July 11, 2020, with progressive myelopathy meriting anterior cervical discectomy and fusion of C5-6 and C6-7 done on December 17, 2020. Dr. Hughes agreed with Drs. Feldman and Reichhardt that Claimant reached MMI by July 27, 2022. He assigned a total combined 22% whole person impairment rating, consisting of 6% whole person impairment of the spine under Table 53(II)(C) of the AMA Guides and 17% whole person mental impairment. (R. Ex. E, pp. 41-55).

56. Dr. Hughes provided the following rationale for his decision, in relevant part:

> With respect to [Claimant’s] cervical spine injury, I agree with Dr. Reichhardt that she sustained a substantial and permanent aggravation of this condition as a result of activities at home on July 10, 2020. It is clear that she sustained progressive spinal cord compression leading to surgery done on December 17, 2020.
>
> Today’s findings of range of motion in the cervical spine probably reflect her post-surgical status. I will provide my findings for the purpose of comparison but I agree with Dr. Reichhardt that they should not be used in assignment of a permanent impairment rating in [Claimant’s] case.
>
> With respect to posttraumatic stress disorder, I have already outlined that I agree with Dr. Brady and disagree with Dr. Kleinman regarding substantial and permanent worsening of this condition as a result of [Claimant’s] work-related injuries.

(R. Ex. E, p. 54).

57. Respondents filed a Final Admission of Liability ("FAL") on August 14, 2023 in accordance with Dr. Hughes' DIME determinations. (R. Ex. C, pp. 10-34).

58. On September 5, 2023, Claimant filed an objection to the FAL and Application for Hearing ("AFH") endorsing, among other things, "Authorization of Claimant's surgery, overcome DIME, MMI, Maintenance." (Cl. Exs. 14 and 15).

59. Dr. Feldman authored a medical record review and report on October 25, 2023, wherein she reviewed Dr. Hughes' DIME report. Dr. Feldman disagreed with Dr. Hughes' finding that Claimant sustained a substantial and permanent aggravation of her condition as a result of the July 10, 2020 incident. Dr. Feldman opined that looking up is not a traumatic event, but instead an everyday benign activity. Dr. Feldman discussed the mechanism of injury on July 10, 2020, referencing the MTG:

> Per the Colorado Work Comp Treatment Guidelines for cervical spine injury, risk factors for neck injury include, 'Neck pain in the workplace is multifactorial and a combination of workplace and individual factors is necessary to cause neck pain. Repetitive or precision work accompanied by prolonged neck flexion are likely risk factors for neck pain in the workplace, sustained trapezius muscle activity predicts later neck and shoulder pain.' The treatment guidelines do not site [sic] looking up as a risk factor for neck injury and, in fact, state the opposite. Looking down is a risk factor for neck injury.

(Cl. Ex. 25, p. 26).

60. Dr. Feldman opined that Claimant suffered a natural progression of her underlying condition that was caused by the December 22, 2018 work-related injury. She opined that the activity of looking up in and itself should not cause cervical myelopathy, but that doing so in the setting of severe stenosis secondary to Claimant's work injury resulted in the progression of her condition. Dr. Feldman noted that Claimant's neck pain with cervical radiculopathy was extensively documented in the medical records prior to the July 10, 2020 incident, along with a recommendation for surgical consultation. She opined that Claimant was likely going to require a cervical fusion for her work-related neck pain regardless if the July 10, 2020 incident occurred. Dr. Feldman stated that the July 10, 2020 incident likely expedited the need for surgery, but did not cause the need for surgery.

61. Dr. Feldman opined that, per Recommendation 145 of the MTG for cervical injuries, Claimant met the requirements for a cervical fusion regardless if the July 10, 2020 incident had occurred or not. She explained that Claimant had cervical radiculopathy resulting in incapacitating pain, imaging consistent with the findings demonstrating nerve root and spinal cord compression, and persistent or recurrent arm

pain with functional limitations unresponsive to conservative treatment. Dr. Feldman opined that the cervical fusion was causally related to the December 22, 2018 work injury. She concluded Claimant should be assigned an impairment rating for the cervical fusion. (Cl. Ex. 25, pp. 25-27).

62. Claimant subsequently withdrew the September 5, 2023 AFH and refiled her AFH on at least two other occasions. (Cl. Exs. 11-16).

63. On January 3, 2024, the Director of the Division of Workers' Compensation approved a settlement agreement pursuant to which Respondents paid Claimant $70,000 in full and final settlement of the December 22, 2018 claim, including, inter alia, temporary indemnity benefits and permanent impairment. The settlement left open maintenance medical benefits. (R. Ex. BB, pp. 646-652).

64. On May 29, 2024, Claimant filed an Application for Hearing endorsing medical benefits, authorized provider, reasonably necessary, disfigurement, and "Overcome DIME, Maintenance care, whether neck surgery was reasonable necessary and causally related to her work accident." (Cl. Ex. 14, p. 181).

65. Respondents filed a Response to Application for Hearing on June 28, 2024 endorsing medical benefits, authorized provider, reasonably necessary, and "Claimant's burden of proof to overcome the DIME opinion of Dr. John Hughes by clear and convincing evidence; Causation; Relatedness; Pre-existing condition; Subsequent intervening event; Attorney fees and costs pursuant to 8-43-211(3) for requesting a hearing on an issue not ripe for adjudication."

66. Dr. Reichhardt credibly testified by post-hearing deposition on behalf of Respondents as an expert in general medicine, physical medicine and rehabilitation, and electrodiagnosis. Dr. Reichhardt testified consistent with his IME reports. Dr. Reichhardt testified that the medical records from the December 2018 work injury do not demonstrate any concerns of radiculopathy or myelopathy. He explained that the February 19, 2019 cervical MRI did not show any specific nerve root or spinal cord compression.

67. Regarding Dr. Feldman's documentation of Claimant's symptoms at the time of her March 4, 2019 examination, Dr. Reichhardt testified that he did not see anything that described a specific dermatomal pattern that would correlate with the February 2019 MRI findings. Dr. Reichhardt testified that Claimant had a positive Tinel's sign in the left elbow, suggesting the possibility of ulnar nerve entrapment or trauma at the elbow, which would produce symptoms in the third and fourth fingers. Dr. Reichhardt testified that Dr. Feldman found normal reflexes, a negative Hoffman's test, and normal strength on exam, indicating no evidence suggesting myelopathy or radiculopathy.

68. Dr. Reichhardt testified that Claimant's May 30, 2019 EMG was normal. He noted that in her EMG report, Dr. Feldman stated that Claimant's numbness was likely due to nerve irritation from tight muscles, which Dr. Reichhardt testified indicates an

opinion that Claimant's pain was basically triggered by a muscular problem. Dr. Reichhardt testified that nerve irritation from tight muscles describes myofascial thoracic outlet syndrome or disputed thoracic outlet syndrome, which is muscle tightness in the neck and shoulder girdle region resulting in irritation of the lower brachial plexus. He explained that this typically results in numbness into digits three, four, and five and has a normal EMG by definition and was overall consistent with Claimant's presentation. Dr. Reichardt further testified that the treatments Claimant received prior to July 2020, including dry needling, trigger point injections, and consideration of Botox, were to treat Claimant's muscular disorder as opposed to radiculopathy or myelopathy.

69. Regarding Dr. Meredith's June 5, 2019 neurology evaluation, Dr. Reichhardt testified that Claimant was not having any radicular pain at that time. He further testified that Dr. Meredith assessed a number of things that would potentially evaluate for radiculopathy or myelopathy, including strength, reflexes, sensory deficits, Romberg's sign, coordination and gait, which were all normal.

70. Dr. Reichhardt explained nerve root distribution and how symptoms would likely present with issues at specific levels in the cervical spine. Dr. Reichhardt testified that, between the December 22, 2018 work injury and the July 10, 2020 incident, good correlation did not exist between Claimant's symptoms, clinical presentation and the objective findings on diagnostic studies. He explained that the February 19, 2019 cervical MRI demonstrated significant narrowing at the C5-6 level but that, for the most part, Claimant did not have symptoms in a C6 distribution. He testified that there was a little overlap between Claimant's symptoms in the middle finger and the C7 nerve root, but overall the distribution was not convincing for a C7 radiculopathy and neither Claimant's neurologic exam nor the EMG showed evidence of a C7 radiculopathy. Dr. Reichhardt testified that the C8 nerve root was the best fit for the symptoms Claimant was demonstrating at the time, but that level, as noted by the radiologist, was unremarkable.

71. Dr. Reichhardt further testified that the predominant findings on Claimant's February 19, 2019 cervical MRI – the disc bulges – are age-indeterminate in nature. He testified that the most common cause of disc bulges are normal age-related degenerative changes and it is not uncommon to see such findings in an individual in Claimant's age category.

72. Dr. Reichhardt testified that, based on the information documented in the medical records, Claimant's work-related diagnosis prior to the July 10, 2020 incident was a cervical strain without a specific identified pain generator and probable associated myofascial pain. Dr. Reichhardt explained that there are multiple possible pain generators in the cervical spine, including the muscles, the tendons, the ligaments, the facet joints, the uncovertebral joints, the discs, and spinal cord. Dr. Reichhardt opined that, prior to July 10, 2020, the most likely cause of Claimant's arm symptoms was myofascial involvement or myofascial-related thoracic outlet syndrome. Dr. Reichhardt testified that, prior to July 10, 2020, there were no recommendations for surgery or even a diagnostic epidural steroid injection ("ESI") in consideration of

surgery. Dr. Reichhardt opined that, from a medical perspective, this indicates that surgery was not necessary at the time.

73. Dr. Reichhardt testified that Claimant's complaints and objective findings after the July 10, 2020 incident indicate a substantial change in her condition. He testified that the July 10, 2020 emergency department records document an entirely different presentation than on her prior exams, with neurologic exam limited due to complaints of severe pain despite aggressive pain treatment. Dr. Reichhardt explained that the July 2020 cervical MRI demonstrated mild spinal stenosis at C6-7 and severe spinal stenosis at C5-6, now with mild compression. He explained that the study had worsened and the mild cord compression at C5-6, which was not present on the February 2019 MRI, put Claimant at risk for myelopathy and resulted in her need for surgery.

74. Dr. Reichhardt testified that Dr. Finn's October 12, 2020 evaluation further indicates a change in Claimant's condition as a result of the July 10, 2020 incident. Dr. Reichhardt explained that, as documented in Dr. Finn's report, Claimant was now complaining of dysesthetic pain on both sides, which he described as an uncomfortable, often burning sensation typically related to some sort of nerve involvement, which is different than the numbness-and-tingling type sensation Claimant reported prior to July 10, 2020. He noted Claimant also had clumsiness with fine motor coordination deficit, suggestive of myelopathy, something Claimant mentioned prior to July 10, 2020. Claimant further had a positive Lhermitte's sign, which is specific for spinal cord compression and is a sign of myelopathy. Dr. Reichhardt testified that on physical examination, Dr. Finn documented left triceps weakness and a dramatic increase in reflexes, which were normal prior to the July 10, 2020 incident, indicating spinal cord involvement. Dr. Reichhardt explained that, when there is involvement of the spinal cord, there can be spreading of the reflex to other muscles. He testified that, in Claimant's case, there was a dramatic increase of reflexes such that there was not just spreading to the other muscles, but also to the other side. Dr. Reichhardt testified that at the time of Dr. Finn's October 12, 2020 neurosurgical evaluation, it was clear that Claimant had a myelopathy related to the C5-6 disc.

75. Dr. Reichhardt testified that, per the December 17, 2020 operative report, Dr. Finn listed the reason for the surgery as cervical stenosis with myelopathy at C5-6. He testified that, even if there was not a concern about symptoms originating from level C6-7, it was reasonable to include the C6-7 as it was a neighboring segment with significant degenerative changes.

76. Dr. Reichhardt testified that the cervical fusion, while reasonably necessary, was not related to Claimant's December 22, 2018 work injury. He explained that the surgery was required due to cervical myelopathy at C5-6, evidenced by the July 2020 MRI and Claimant's symptoms and exam findings. Dr. Reichhardt testified that there was not evidence of myelopathy prior to the July 10, 2020 incident. He reiterated that, to the extent Claimant reported radiating symptoms prior to the July 10, 2020 incident, such symptoms were more consistent with myofascial involvement.

77. Dr. Reichhardt further testified that the July 10, 2020 incident constituted a subsequent injury that was separate and distinct from the December 22, 2018 work injury. He opined that the December 22, 2018 work injury did not cause or contribute to the occurrence of the July 10, 2020 injury.

78. Regarding Dr. Feldman's opinion, Dr. Reichhardt testified that cervical extension can be a mechanism of injury and was clearly the cause of Claimant's July 10, 2020 injury and myelopathy, as Claimant reported experiencing a cracking or popping in her neck at the time of looking up with an onset of severe symptoms immediately thereafter. He testified that, although Claimant had neck pain from the work injury leading up to the July 10, 2020 incident, there was nothing establishing it was medically probable that the C5-6 level was the pain generator at that time. He testified that, given the wide range of potential pain generators and the inability to localize the pain generator to either a particular structure or a particular level, it is medically probable that the changes seen on the February 19, 2019 cervical MRI pre-existed Claimant's December 2018 work injury. Dr. Reichhardt opined that the most likely cause of the cervical stenosis demonstrated on the February 2019 MRI is chronic age-related degenerative changes. Dr. Reichhardt further testified that the section of the MTG that Dr. Feldman quoted regarding cervical flexion/extension as risk factors for neck injuries is inapplicable to Claimant's case, as such section specifically discusses cumulative trauma over time, not mechanisms of acute injury.

79. Dr. Reichhardt testified that, contrary to Dr. Feldman's opinion, Claimant did not meet the requirements for cervical fusion prior to the July 2020 incident. Dr. Reichhardt explained that Dr. Feldman was referring to criteria set forth in the MTG under Recommendation 145. He explained that there are three major criteria which must be met to qualify for surgery, and that Claimant did not meet any of the criteria prior to July 10, 2020. Regarding the criteria of "cervical radiculopathy resulting in incapacitating pain", Dr. Reichhardt testified that Claimant did not have incapacitating pain as a result of cervical radiculopathy. He explained that Claimant did have significant neck pain, but the MTG is referring to arm pain in this context. Dr. Reichhardt testified that, in Claimant's case, prior to July 10, 2020, there were only reports of intermittent numbness and tingling with some reports of pain. Dr. Reichhardt testified Claimant did not previously meet the second criteria of "imaging studies consistent with clinical findings demonstrating nerve root or spinal cord compromise," as the imaging findings did not isolate a correlating nerve root. He explained that Claimant had symptoms most prominently in digits four and five, sometimes in digit three, and rarely in digit one. Dr. Reichhardt opined that there was thus not good correlation between the prior MRI findings, which predominantly showed narrowing around the C6 nerve root and would correlate with digit one. He explained that the prior MRI demonstrated findings that would explain Claimant's reported symptoms in digits three through five.

80. Dr. Reichhardt further testified that Claimant did not meet any of the items listed under the third criteria: progressive function neurological deficit; persistent motor deficit; persistent or recurrent arm pain with functional limitations unresponsive to conservative treatment, or static neurologic deficit associated with significant radicular pain. He

explained that, while Claimant did have some arm symptoms, there is not documentation of functional limitations related to the arm symptoms separate from the neck symptoms. He testified that Claimant's neurologic examinations failed to demonstrate static neurologic deficit.

81. Dr. Reichhardt testified that Claimant went from not being a candidate for surgery prior to July 2020 to clearly being a candidate after the July 10, 2020 injury. He opined that, after the July 10, 2020 injury, surgery was mandatory in order to protect Claimant's spinal cord and prevent permanent neurologic dysfunction. Dr. Reichhardt testified that the February 2019 MRI findings did not support a diagnosis of radiculopathy and there was no documented discussion, concern, physical findings or symptoms of a myelopathy prior to the July 2020 incident.

82. On cross-examination, Dr. Reichhardt testified that, while it was possible the December 22, 2018 work assault caused Claimant's C5-6 disc bulge, it was not probable. Dr. Reichhardt testified that untreated moderate to severe spinal canal stenosis may progress over time, but that it is not unusual for individuals to also become less symptomatic or stable over time. Dr. Reichhardt testified it is possible, but not probable, the work assault aggravated any preexisting underlying stenosis. Dr. Reichhardt testified it is not medically probable the work assault caused Claimant's cervical stenosis, which he opined was most probably caused by age-related degenerative changes. Dr. Reichhardt acknowledged that Dr. Mistry did recommend a neurosurgical evaluation prior to the July 10, 2020 incident, but at that time Dr. Mistry did not indicate a specific need for surgery to protect Claimant's spinal cord. He testified that it was not unreasonable for Dr. Mistry to make that referral considering Claimant's cervical stenosis, but that the recommendation was not necessary based on the neurologic examinations.

83. Dr. Reichhardt acknowledged that EMGs are not one hundred percent accurate and that normal EMG results in 2019 do not mean a nerve injury could not have progressed. He testified that Dr. Feldman recommended a follow-up EMG in 2020 due to suspicions of a nerve injury. Dr. Reichhardt testified that Claimant was probably in a weakened state on July 10, 2020 due to her age-related degenerative changes, and without the pre-existing spinal canal stenosis she probably would not have needed surgery as a result of the July 10, 2020 incident. He, however, reiterated his opinion that it was not probable the spinal canal stenosis and other findings on Claimant's February 2019 MRI are related to the December 22, 2018 the work injury.

Ultimate Findings

84. The ALJ credits the opinions of Drs. Hughes and Reichhardt, as supported by the medical records, over the opinions of Drs. Feldman and Mistry.

85. Claimant failed to overcome Dr. Hughes' DIME opinion on causation.

86. The July 10, 2020 injury was causally unrelated to Claimant's December 22, 2018 work injury and constitutes an intervening injury.

87. The December 17, 2020 cervical fusion was not causally related treatment to cure and relieve the effects of the December 22, 2018 work injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

True Opinion of the DIME

When a DIME physician issues conflicting or ambiguous opinions, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

DIME physician Dr. Hughes opined that Claimant sustained a "substantial and permanent aggravation" of her cervical spine injury as a result of the activities at home on July 10, 2020, with progressive spinal cord compression leading to the December 2020 cervical fusion. The ALJ notes Dr. Hughes' use of the term "substantial and permanent aggravation" is inapplicable in Claimant's case, as such term only applies when there is an occupational disease in the first instance, and to determine liability with respect to multiple employers or insurers. *See, e.g*., *In re Claim of Laurienti*, WC 5-058-824 (ICAO, Feb. 11, 2020); *Broughton v. Kaiser Foundation Health Plan*, WC 4-702-777 (ICAO, Apr. 29, 2009). Here, there is no finding nor allegation that Claimant's original industrial injury is an occupational disease, nor is there an issue regarding liability of a successive employer or insurer.

Nonetheless, to the extent Dr. Hughes' DIME opinion could be considered ambiguous or conflicting based on his use of such terminology, as determined by the ALJ, Dr. Hughes' true opinion is that Claimant sustained a new injury on July 10, 2020 and that such injury, Claimant's resulting condition and need for surgery are not causally related the work injury. Dr. Hughes specifically stated he agreed with Dr. Reichhardt, who clearly opined in both of his IME reports that the July 10, 2020 incident was a new injury that substantially changed Claimant's condition and caused her need for surgery. Dr. Hughes noted that he reviewed Dr. Mistry's March 29, 2023 report in which Dr. Mistry clearly set forth his opinion that the July 2020 incident and resulting cervical fusion are related to Claimant's December 2018 work injury. Dr. Hughes nonetheless agreed with Dr. Reichhardt's opinion on causation with respect to the July 10, 2020 injury and did not assign any permanent impairment for the cervical fusion.

Applicable Burden of Proof – DIME

The party seeking to overcome the DIME physician's finding regarding MMI and whole person impairment bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). 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, *eg. Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo.App. 1998). Consequently, when a party challenges the DIME physician's MMI or permanent impairment determination, the court has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Id.; Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998).

"Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial 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 (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*., WCs 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's determination regarding MMI or impairment is not being challenged, the Courts have held that the heightened burden of proof does not apply. *Yeutter v. Indus. Claim Appeals Office*, 487 P.3d 1007 (Colo. App. 2019) (DIME physician's opinion on causation not entitled to presumptive effect where the issue was permanent total disability and maintenance medical benefits); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002) (DIME physician's opinion not entitled to presumptive effect where the issue was the cause of worsened condition on reopening); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000) (heightened burden of proof did not apply when the issue involved the "threshold requirement" that the claimant establish a compensable injury) *; Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995) (DIME physician's determination of MMI did not preclude a change of physician order where only maintenance medical benefits sought).

The Courts and the Panel, however, have distinguished cases in which a party is not challenging MMI or impairment (e.g. permanent total disability, maintenance medical benefits, reopening, compensability) from those involving constructive challenges to MMI or impairment where the issues are intertwined with or inextricably tied to the DIME's findings on MMI or impairment. *See Yeutter, supra; Leprino Foods v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005); *Martinez v. Senior Resource Center*, WC 4-748-216 (ICAO, Oct. 14, 2009), *aff'd, Martinez v. Industrial Claim Appeals Office*, 09CA2258 (Colo.App. June 24, 2010) (NSOP) (where the issue before the DIME and the ALJ was the extent of the work injury, the cause of the claimant's condition and need for additional treatment was properly before the DIME and his opinions on causation should be given presumptive weight).

Here, Claimant does not argue the DIME erred with respect to the MMI date, nor does she seek a different impairment rating. Instead, Claimant seeks to challenge the DIME physician's opinion on causation as it relates to the July 10, 2020 injury and resulting cervical fusion. Claimant requests that the ALJ find the December 2020 surgery reasonable, necessary and causally related to the work injury. Dr. Hughes' DIME opinion on causation is inextricably linked to his opinion on MMI and impairment.

MMI, as defined in § 8-40-201(11.5), refers to the point when any "impairment as a result of injury, has become stable and when no further treatment is reasonably expected to improve the condition." The issue before Dr. Hughes was the extent of Claimant's admitted December 22, 2018 work injury, which inherently required determination of whether Claimant's cervical condition, need for curative treatment in the form of surgery, and any impairment subsequent to the July 10, 2020 incident was causally related to the work injury. *See, e.g., Williams v. City Express,* W.C. No. 4-374-517 (ICAO, Apr. 24, 2001) (affirming the ALJ's denial of a request for surgery where the issue before the DIME physician and the ALJ was whether the claimant's need for treatment was causally related to the industrial injury or an intervening motor vehicle accident, applying the higher burden of proof to the DIME's opinion on causation). Accordingly, the ALJ concludes that Dr. Hughes' DIME opinion on causation is entitled to presumptive weight in this case.

Overcoming the DIME Opinion

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. C.R.S. § 8-42-101(3.7); C.R.S. §8-42-107(8)(c). Ultimately, the questions of 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. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Adams v. Manpower, supra*. Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Claimant argues that the work injury left her in a weakened condition, which played a causative role in the July 10, 2020 injury and need for surgery. Claimant contends that Dr. Hughes thus erred in determining that the July 10, 2020 injury and need for surgery is causally unrelated to the work injury. As found, there is insufficient evidence demonstrating Dr. Hughes' DIME opinion on causation is highly probably incorrect.

Dr. Hughes performed a thorough review of Claimant's medical records, and was aware of Claimant's reported symptoms, objective findings, and need for treatment as of the date of the December 22, 2018 work injury, the July 10, 2020 injury, and thereafter. Dr. Hughes' opinion that the July 10, 2020 injury and resultant surgery is causally unrelated to the work injury is supported by the records and Dr. Reichhardt's comprehensive reports and testimony. The records clearly demonstrate a significant and substantial change in Claimant's reported symptoms and need for treatment resulting from the July 10, 2020 incident. Claimant testified to, and has consistently

reported, that she felt a pop or snap in her neck on July 10, 2020 with the immediate onset of severe, debilitating upper extremity symptoms, suggesting a specific, traumatic injury occurred. The records demonstrate an objective change in Claimant's condition following the July 10, 2020 injury, with new mild cord compression on MRI, as well as new and different exam findings evidencing myelopathy. As determined by Dr. Hughes, and credibly explained by Dr. Reichhardt, the cord compression and resulting myelopathy caused Claimant's December 2020 surgery.

While there is documentation of complaints of numbness and tingling prior to July 10, 2020, as Dr. Reichhardt credibly testified, such complaints were intermittent and, by mid to late 2019, had largely resolved. Regarding normal EMG results in May 2019, Dr. Feldman opined that Claimant's upper extremity symptoms were likely due to nerve irritation from tight muscles. Dr. Reichhardt extensively explained Claimant's symptoms, objective findings and their correlation, or lack thereof, as related to the work injury and the July 10, 2020 injury. Dr. Reichhardt credibly and persuasively explained that Claimant's work-related diagnosis was a cervical strain with myofascial pain, which was the likely cause of her intermittent arm symptoms prior to July 10, 2020.

Dr. Reichhardt further credibly testified that, although the mechanism of work injury could result in disc bulges and stenosis, it was not medically probable the pathology demonstrated on Claimant's February 2019 MRI was caused by the work injury. Dr. Reichhardt credibly explained that the July 10, 2020 injury and resultant surgery are not causally related to the work injury. While Dr. Mistry's records document his recommendation for a surgical consultation prior to July 2020, and Dr. Feldman opined Claimant met the requirements for a cervical fusion prior to the July 10, 2020 injury, Dr. Reichhardt credibly explained Claimant was not a candidate for surgery prior to July 10, 2020. He explained that due to the new, causally unrelated injury Claimant sustained on July 10, 2020, surgery became mandatory for Claimant to protect Claimant's spinal cord and prevent permanent neurologic dysfunction. Dr. Reichhardt's opinion provides convincing evidence in support of Dr. Hughes' ultimate opinions.

Drs. Feldman and Mistry offer detailed opinions and the ALJ acknowledges the medical evidence is subject to highly conflicting inferences on the cause of Claimant's condition and need for treatment. Nonetheless, their opinions represent mere differences of opinion with the DIME physician that do not rise to the level of clear and convincing evidence.

Intervening Cause

An 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. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). Thus, if an industrial injury leaves the body in a weakened condition and the weakened condition proximately causes a new injury, the new injury is a compensable consequence of the original industrial injury. *Price Mine Service, Inc. v. Industrial Claim Appeals Office,* 64 P.3d 936 (Colo. App. 2003); *Lanuto v. Amerigas Propane, Inc.,* WC 4-818-912, (ICAO,

July 20, 2011). The preceding principle constitutes the "chain of causation analysis" and provides that a subsequent injury is compensable if the "weakened condition played a causative role in the subsequent injury." *In Re Fessler*, WC 4-654-034 (ICAO, Dec. 19, 2007); *see Martinez v. City of Colorado Springs*, WC 5-073-295 (ICAO, Sept. 12, 2019) (an infection that resulted from claimant's weakened condition was compensable because it was a natural, although not necessarily a direct, result of the work-related injury).

The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Indus. Claim Appeals Off.,* 49 P.3d 1187, 1188 (Colo. App. 2002); *Martinez v. Thoutt Bros. Concrete Contractors, Inc.*, WC 5-139-017-001 (ICAO, June 2, 2022). The existence of an intervening event is an affirmative defense to the respondents' liability. *In Re Granados*, WC 5-146-480 (ICAO, Dec. 5, 2022). Consequently, it is the respondents' burden to prove that the claimant's disability is attributable to the intervening injury or condition and not the industrial injury. *See Owens v. Indus. Claim Appeals Off.*, 49 P.3d 1187 (Colo. App. 2002).

To the extent it is Respondents burden of proof to establish the July 10, 2020 injury was an intervening event, Respondents have met their burden. While Drs. Feldman and Mistry opine that the work injury placed Claimant in a weakened condition that played a causative role in Claimant's July 10, 2020 injury and resultant need for surgery, Drs. Hughes and Reichhardt credibly and persuasively opined that the July 10, 2020 injury and surgery are causally unrelated to the work injury. As found and discussed above, Claimant sustained a new, specific injury unrelated to the work injury, which caused a substantial change in Claimant's condition and resulted in the need for the December 2020 surgery. The totality of the credible and persuasive evidence establishes that the July 10, 2020 injury was not caused by the work injury and was an efficient intervening event.

Medical Treatment

Respondents are liable for medical treatment that is causally related and 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 Off.,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist. #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As discussed, there is insufficient evidence demonstrating the December 2020 cervical fusion is casually related to the work injury. While it is not disputed the surgery itself was reasonable and necessary to treat Claimant's condition at the time, such condition was the result of the July 10, 2020 injury, and performed to cure and relieve the effects of the July 10, 2020 injury, which have been found causally unrelated to the December 22, 2018 work injury.

ORDER

1. Claimant failed to overcome Dr. Hughes' DIME opinion on causation.

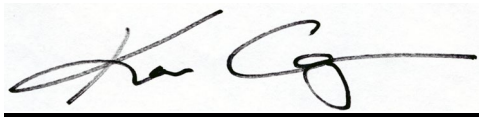
2. Respondents proved the July 10, 2020 injury was an intervening event.

3. Claimant's request that the December 2020 cervical fusion be deemed compensable is denied and dismissed.

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

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

DATED: March 7, 2025



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

ISSUES

- Did Claimant prove the admitted average weekly wage (AWW) should be adjusted based on the wages paid by Employer?

- Did Claimant prove the AWW should be increased by earnings from concurrent employment?

FINDINGS OF FACT

1. Employer operates storage rental facilities in the Denver metro area. Claimant worked for Employer as a site manager. He suffered an admitted work-related injury on August 15, 2024, when he slipped in mud and fell.

2. Respondents filed a General Admission of Liability (GAL) on October 3, 2024. The GAL admitted for TTD benefits commencing August 16, 2024, based on an AWW of $300. The GAL does not indicate how the admitted AWW was calculated.

3. Claimant earned $13,305.51 in the 16-week period from April 14, 2024 through August 3, 2024.[1] This equates to an AWW of $831.59. Claimant proved his base AWW is $831.59.

4. Claimant has operated a business as a DJ for events such as parties and weddings since August 2017. He charged $200 per hour for DJ services but occasionally discounted the rate to $150 per hour for repeat customers. Each engagement typically lasts approximately 5 hours. Claimant averaged two DJ engagements per month before the injury.

5. The DJ work is physically demanding and requires Claimant to move heavy sound equipment and stand for prolonged periods. Claimant could not continue working as a DJ after the accident because of injury-related symptoms and limitations. He had to cancel two contracts for DJ services in September 2024, which would have paid a total of $1,800.

6. Claimant's testimony is credible.

7. Claimant proved his AWW should include wages from concurrent employment, to fairly compensate for the actual wage loss caused by the industrial injury.

8. The two cancelled contracts provide a reasonable measure of the average earnings Claimant lost each month from his DJ business because of the work injury. This

[1] The pay period ending August 3, 2024 is the last full period that was unaffected by missed work from Claimant's injury.

equates to an AWW of $415.39 from concurrent employment ($1,800 x 12 / 52 = $415.39).

9. Claimant proved his aggregate AWW is $1,246.98, with a corresponding TTD rate of $831.32 ($831.59 + $415.39 = $1,246.98 x 2/3 = $831.32).

CONCLUSIONS OF LAW

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." For non-salaried workers, the standard convention is to average their earnings over a reasonably representative period immediately preceding the injury. Here, Claimant proved the AWW from his job with Employer is $831.59, based on the 16-week period from April 14, 2024 through August 3, 2024.

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). To that end, § 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 discretionary authority to calculate a "fair" AWW includes the ability to consider wages from concurrent employment. *St. Mary's Church & Mission v. Industrial Commission*, 735 P.2d 902 (Colo. App. 1986).

As found, Claimant proved the AWW should include concurrent earnings from his DJ business. Claimant's business was operating long before the work accident and produced a regular stream of income. The industrial injury disabled Claimant from the DJ work and proximately caused a wage loss. Under the circumstances, Claimant's AWW should include wages from concurrent employment to fairly compensate for the actual wage loss caused by the industrial injury. Claimant proved his AWW from concurrent employment is $415.39.

Adding these components together produces an aggregate AWW of $1,246.98, with a corresponding TTD rate of $831.32.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $1,246.98, with a corresponding TTD rate of $831.32.

2. Insurer shall pay Claimant TTD benefits at the rate of $831.32 per week, commencing August 16, 2024, and continuing until terminated by law.

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

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(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 7, 2025

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 5-276-337-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period June 5, 2024 until terminated by statute.

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

FINDINGS OF FACT

1. On June 4, 2024 Claimant sustained an admitted work injury as a result of a Motor Vehicle Accident (MVA). The MVA occurred while Claimant was driving a company truck in her position as a Traffic Control Supervisor with Employer.

2. Claimant testified she initially believed the crash had occurred based on a loss of consciousness due to exhaustion. However, in August 2024 Claimant's diagnosis reflected a loss of consciousness attributable to a flattened pituitary gland.

3. Following the MVA, Claimant received medical treatment at the Denver Health Emergency Room. She was assessed with neck pain and acute right-sided thoracic pain. Claimant underwent a drug test in the emergency room that yielded a negative result. Approximately seven hours later Claimant underwent a second drug test that was also negative.

4. Approximately one hour after the MVA, the truck was towed back to Employer's facility. During a search and inventory of the vehicle, Employer's Todd Billington discovered a THC smoking pen with a substance inside and an empty container for THC gummies. Based on Claimant's possession of the THC pen and gummies container she was terminated from employment.

5. On June 5, 2024 Authorized Treating Provider (ATP) Medicine Business Industry diagnosed Claimant with (1) sprains of the ligaments in the thoracic and lumbar spine; (2) strains of the muscle, fascia and tendons of the left and right hip and; (3) sprains of the left and right wrist. The ATP assigned restrictions against lifting, pushing, or pulling more than 20 pounds, with sitting and standing as tolerated. Claimant subsequently underwent conservative medical treatment.

6. On August 2, 2024 Claimant's ATP tightened her restrictions because her diagnosis became more neurological. Specifically, Claimant was restricted from lifting, carrying,

pushing, and pulling more than 15 pounds. She was also directed to avoid the use of both upper extremities overhead. Finally, Claimant was prohibited from driving until cleared by her primary care provider or neurologist due to intermittent loss of consciousness.

7. By September 19, 2024 Claimant's ATP continued to recommended restricted duty. The restrictions included no lifting, carrying, pushing, and pulling in excess of 15 pounds. She was also directed to avoid the use of both upper extremities overhead and prohibited from driving.

8. Mr. Billington testified at the hearing in this matter. He addressed Employer's policy regarding illegal substances including marijuana and THC products. Mr. Billington commented that the mere fact that the empty vaporizer and gummies container were found in Employer's truck would have been enough to violate the policy. Specifically, the termination notice cited section 63.4 of the policy for the prohibition against possession of any intoxicants. However, on cross-examination, the section did not appear to exist. Furthermore, although page 12 of Employer's policy specifies that the possession of any intoxicants is prohibited, Mr. Billington acknowledged that it did not cover empty containers. He simply could not cite a specific policy that mere possession of an empty container would lead to termination.

9. Claimant testified at the hearing in this matter that the lunch cooler she brought to work had many pockets. She and her boyfriend both use the cooler. Claimant explained that the containers found in Employer's truck were not hers, but instead belonged to her boyfriend. He uses medical marijuana for bulging discs in his back. Claimant was simply unaware of the existence of the containers in the cooler.

10. Claimant has established it is more probably true than not that she is entitled to receive TTD benefits for the period June 5, 2024 until terminated by statute. The medical records demonstrate that she was either unable to work or under restrictions that rendered her unable to perform her job duties and impaired his earning capacity. Notably, on June 5, 2024 the ATP diagnosed Claimant with (1) sprains of the ligaments in the thoracic and lumbar spine; (2) strains of the muscle, fascia and tendons of the left and right hip and; (3) sprains of the left and right wrist. The ATP assigned restrictions against lifting, pushing, or pulling more than 20 pounds, with sitting and standing as tolerated. On August 2, 2024 Claimant's ATP tightened her restrictions that prohibited her from lifting, carrying, pushing, and pulling more than 15 pounds. She was also directed to avoid the use of both upper extremities overhead. Finally, Claimant was prevented from driving until cleared by her primary care provider or neurologist due to intermittent loss of consciousness. Finally, by September 19, 2024 Claimant's ATP continued to recommended restricted duty that included no lifting, carrying, pushing, and pulling in excess of 15 pounds. She was also directed to avoid the use of both upper extremities overhead and prohibited from driving. Claimant has thus been unable to perform her job duties or earn wages since her June 4, 2024 MVA. The record thus reflects that Claimant's 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. Accordingly, Claimant has proven that that she is entitled to receive TTD benefits for the period June 5, 2024 until terminated by statute.

11. The record reveals that Employer terminated Claimant effective June 4, 2024.

Notably, Mr. Billington commented that the mere fact that the empty vaporizer and gummies container were found in the truck would have been enough to violate Employer's policy. Specifically, the termination notice cited section 63.4 of the policy for the prohibition against possession of any intoxicants. However, on cross-examination, the section did not appear to exist. Furthermore, although page 12 of Employer's policy specifies that the possession of any intoxicants is prohibited, Mr. Billington acknowledged that it did not cover empty containers. He simply could not cite a specific policy that mere possession of an empty container would lead to termination. Moreover, Claimant explained that the lunch cooler she brought to work had many pockets and was simply unaware that the THC containers had been in the cooler. Claimant commented that the containers found in Employer's truck were not hers, but instead belonged to her boyfriend. He uses medical marijuana for bulging discs in his back. Claimant thus did not know that she possessed the empty containers found in Employer's truck

12. Respondents have failed to prove it is more probably true than not that Claimant was responsible for her termination from employment under the termination statutes and is not precluded from receiving TTD benefits. Respondents have not established that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. Importantly, an employee is "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. Here, Mr. Billington acknowledged that Employer's policy did not apply to empty containers and Claimant was unaware that they were in her possession. Claimant's actions thus do not demonstrate that she exercised some control over her termination under the totality of the circumstances. The record reveals that Claimant did not precipitate her employment termination by volitional acts that he would reasonably expect to cause the loss of employment. She is thus not precluded from receiving TTD benefits subsequent to her June 4, 2024 termination from employment.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or

unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

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

5. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that a claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

6. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive TTD benefits for the period June 5, 2024 until terminated by statute. The medical records demonstrate that she was either unable to work or under restrictions that rendered her unable to perform her job duties and impaired his earning capacity. Notably, on

June 5, 2024 the ATP diagnosed Claimant with (1) sprains of the ligaments in the thoracic and lumbar spine; (2) strains of the muscle, fascia and tendons of the left and right hip and; (3) sprains of the left and right wrist. The ATP assigned restrictions against lifting, pushing, or pulling more than 20 pounds, with sitting and standing as tolerated. On August 2, 2024 Claimant's ATP tightened her restrictions that prohibited her from lifting, carrying, pushing, and pulling more than 15 pounds. She was also directed to avoid the use of both upper extremities overhead. Finally, Claimant was prevented from driving until cleared by her primary care provider or neurologist due to intermittent loss of consciousness. Finally, by September 19, 2024 Claimant's ATP continued to recommended restricted duty that included no lifting, carrying, pushing, and pulling in excess of 15 pounds. She was also directed to avoid the use of both upper extremities overhead and prohibited from driving. Claimant has thus been unable to perform her job duties or earn wages since her June 4, 2024 MVA. The record thus reflects that Claimant's 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. Accordingly, Claimant has proven that that she is entitled to receive TTD benefits for the period June 5, 2024 until terminated by statute.

7. As found, the record reveals that Employer terminated Claimant effective June 4, 2024. Notably, Mr. Billington commented that the mere fact that the empty vaporizer and gummies container were found in the truck would have been enough to violate Employer's policy. Specifically, the termination notice cited section 63.4 of the policy for the prohibition against possession of any intoxicants. However, on cross-examination, the section did not appear to exist. Furthermore, although page 12 of Employer's policy specifies that the possession of any intoxicants is prohibited, Mr. Billington acknowledged that it did not cover empty containers. He simply could not cite a specific policy that mere possession of an empty container would lead to termination. Moreover, Claimant explained that the lunch cooler she brought to work had many pockets and was simply unaware that the THC containers had been in the cooler. Claimant commented that the containers found in Employer's truck were not hers, but instead belonged to her boyfriend. He uses medical marijuana for bulging discs in his back. Claimant thus did not know that she possessed the empty containers found in Employer's truck.

8. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant was responsible for her termination from employment under the termination statutes and is not precluded from receiving TTD benefits. Respondents have not established that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. Importantly, an employee is "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. Here, Mr. Billington acknowledged that Employer's policy did not apply to empty containers and Claimant was unaware that they were in her possession. Claimant's actions thus do not demonstrate that she exercised some control over her termination under the totality of the circumstances. The record reveals that Claimant did not precipitate her employment termination by volitional acts that he would reasonably expect to cause the loss of employment. She is thus not precluded from receiving TTD benefits subsequent to her June 4, 2024 termination from employment.

ORDER

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

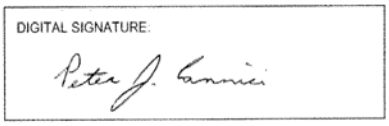
1. Claimant shall receive TTD benefits for the period June 5, 2024 until terminated by statute.

2. Claimant was not responsible for her June 4, 2024 termination from employment with Employer.

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

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

DATED: March 7, 2025.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-276-337-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period June 5, 2024 until terminated by statute.

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

FINDINGS OF FACT

1. On June 4, 2024 Claimant sustained an admitted work injury as a result of a Motor Vehicle Accident (MVA). The MVA occurred while Claimant was driving a company truck in her position as a Traffic Control Supervisor with Employer.

2. Claimant testified she initially believed the crash had occurred based on a loss of consciousness due to exhaustion. However, in August 2024 Claimant's diagnosis reflected a loss of consciousness attributable to a flattened pituitary gland.

3. Following the MVA, Claimant received medical treatment at the Denver Health Emergency Room. She was assessed with neck pain and acute right-sided thoracic pain. Claimant underwent a drug test in the emergency room that yielded a negative result. Approximately seven hours later Claimant underwent a second drug test that was also negative.

4. Approximately one hour after the MVA, the truck was towed back to Employer's facility. During a search and inventory of the vehicle, Employer's Todd Billington discovered a THC smoking pen with a substance inside and an empty container for THC gummies. Based on Claimant's possession of the THC pen and gummies container she was terminated from employment.

5. On June 5, 2024 Authorized Treating Provider (ATP) Medicine Business Industry diagnosed Claimant with (1) sprains of the ligaments in the thoracic and lumbar spine; (2) strains of the muscle, fascia and tendons of the left and right hip and; (3) sprains of the left and right wrist. The ATP assigned restrictions against lifting, pushing, or pulling more than 20 pounds, with sitting and standing as tolerated. Claimant subsequently underwent conservative medical treatment.

6. On August 2, 2024 Claimant's ATP tightened her restrictions because her diagnosis became more neurological. Specifically, Claimant was restricted from lifting, carrying, pushing, and pulling more than 15 pounds. She was also directed to avoid the

use of both upper extremities overhead. Finally, Claimant was prohibited from driving until cleared by her primary care provider or neurologist due to intermittent loss of consciousness.

7. By September 19, 2024 Claimant's ATP continued to recommended restricted duty. The restrictions included no lifting, carrying, pushing, and pulling in excess of 15 pounds. She was also directed to avoid the use of both upper extremities overhead and prohibited from driving.

8. Mr. Billington testified at the hearing in this matter. He addressed Employer's policy regarding illegal substances including marijuana and THC products. Mr. Billington commented that the mere fact that the empty vaporizer and gummies container were found in Employer's truck would have been enough to violate the policy. Specifically, the termination notice cited section 63.4 of the policy for the prohibition against possession of any intoxicants. However, on cross-examination, the section did not appear to exist. Furthermore, although page 12 of Employer's policy specifies that the possession of any intoxicants is prohibited, Mr. Billington acknowledged that it did not cover empty containers. He simply could not cite a specific policy that mere possession of an empty container would lead to termination.

9. Claimant testified at the hearing in this matter that the lunch cooler she brought to work had many pockets. She and her boyfriend both use the cooler. Claimant explained that the containers found in Employer's truck were not hers, but instead belonged to her boyfriend. He uses medical marijuana for bulging discs in his back. Claimant was simply unaware of the existence of the containers in the cooler.

10. Claimant has established it is more probably true than not that she is entitled to receive TTD benefits for the period June 5, 2024 until terminated by statute. The medical records demonstrate that she was either unable to work or under restrictions that rendered her unable to perform her job duties and impaired his earning capacity. Notably, on June 5, 2024 the ATP diagnosed Claimant with (1) sprains of the ligaments in the thoracic and lumbar spine; (2) strains of the muscle, fascia and tendons of the left and right hip and; (3) sprains of the left and right wrist. The ATP assigned restrictions against lifting, pushing, or pulling more than 20 pounds, with sitting and standing as tolerated. On August 2, 2024 Claimant's ATP tightened her restrictions that prohibited her from lifting, carrying, pushing, and pulling more than 15 pounds. She was also directed to avoid the use of both upper extremities overhead. Finally, Claimant was prevented from driving until cleared by her primary care provider or neurologist due to intermittent loss of consciousness. Finally, by September 19, 2024 Claimant's ATP continued to recommended restricted duty that included no lifting, carrying, pushing, and pulling in excess of 15 pounds. She was also directed to avoid the use of both upper extremities overhead and prohibited from driving. Claimant has thus been unable to perform her job duties or earn wages since her June 4, 2024 MVA. The record thus reflects that Claimant's 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. Accordingly, Claimant has proven that that she is entitled to receive TTD benefits for the period June 5, 2024 until terminated by statute.

11. The record reveals that Employer terminated Claimant effective June 4, 2024. Notably, Mr. Billington commented that the mere fact that the empty vaporizer and gummies container were found in the truck would have been enough to violate Employer's policy. Specifically, the termination notice cited section 63.4 of the policy for the prohibition against possession of any intoxicants. However, on cross-examination, the section did not appear to exist. Furthermore, although page 12 of Employer's policy specifies that the possession of any intoxicants is prohibited, Mr. Billington acknowledged that it did not cover empty containers. He simply could not cite a specific policy that mere possession of an empty container would lead to termination. Moreover, Claimant explained that the lunch cooler she brought to work had many pockets and was simply unaware that the THC containers had been in the cooler. Claimant commented that the containers found in Employer's truck were not hers, but instead belonged to her boyfriend. He uses medical marijuana for bulging discs in his back. Claimant thus did not know that she possessed the empty containers found in Employer's truck

12. Respondents have failed to prove it is more probably true than not that Claimant was responsible for her termination from employment under the termination statutes and is not precluded from receiving TTD benefits. Respondents have not established that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. Importantly, an employee is "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. Here, Mr. Billington acknowledged that Employer's policy did not apply to empty containers and Claimant was unaware that they were in her possession. Claimant's actions thus do not demonstrate that she exercised some control over her termination under the totality of the circumstances. The record reveals that Claimant did not precipitate her employment termination by volitional acts that he would reasonably expect to cause the loss of employment. She is thus not precluded from receiving TTD benefits subsequent to her June 4, 2024 termination from employment.

CONCLUSIONS OF LAW

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

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

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

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

5. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that a claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital*

Equipment, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

6. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive TTD benefits for the period June 5, 2024 until terminated by statute. The medical records demonstrate that she was either unable to work or under restrictions that rendered her unable to perform her job duties and impaired his earning capacity. Notably, on June 5, 2024 the ATP diagnosed Claimant with (1) sprains of the ligaments in the thoracic and lumbar spine; (2) strains of the muscle, fascia and tendons of the left and right hip and; (3) sprains of the left and right wrist. The ATP assigned restrictions against lifting, pushing, or pulling more than 20 pounds, with sitting and standing as tolerated. On August 2, 2024 Claimant's ATP tightened her restrictions that prohibited her from lifting, carrying, pushing, and pulling more than 15 pounds. She was also directed to avoid the use of both upper extremities overhead. Finally, Claimant was prevented from driving until cleared by her primary care provider or neurologist due to intermittent loss of consciousness. Finally, by September 19, 2024 Claimant's ATP continued to recommended restricted duty that included no lifting, carrying, pushing, and pulling in excess of 15 pounds. She was also directed to avoid the use of both upper extremities overhead and prohibited from driving. Claimant has thus been unable to perform her job duties or earn wages since her June 4, 2024 MVA. The record thus reflects that Claimant's 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. Accordingly, Claimant has proven that that she is entitled to receive TTD benefits for the period June 5, 2024 until terminated by statute.

7. As found, the record reveals that Employer terminated Claimant effective June 4, 2024. Notably, Mr. Billington commented that the mere fact that the empty vaporizer and gummies container were found in the truck would have been enough to violate Employer's policy. Specifically, the termination notice cited section 63.4 of the policy for the prohibition against possession of any intoxicants. However, on cross-examination, the section did not appear to exist. Furthermore, although page 12 of Employer's policy specifies that the possession of any intoxicants is prohibited, Mr. Billington acknowledged that it did not cover empty containers. He simply could not cite a specific policy that mere possession of an empty container would lead to termination. Moreover, Claimant explained that the lunch cooler she brought to work had many pockets and was simply unaware that the THC containers had been in the cooler. Claimant commented that the containers found in Employer's truck were not hers, but instead belonged to her boyfriend. He uses medical marijuana for bulging discs in his back. Claimant thus did not know that she possessed the empty containers found in Employer's truck.

8. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant was responsible for her termination from employment under the termination statutes and is not precluded from receiving TTD benefits. Respondents have not established that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. Importantly, an employee is

"responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. Here, Mr. Billington acknowledged that Employer's policy did not apply to empty containers and Claimant was unaware that they were in her possession. Claimant's actions thus do not demonstrate that she exercised some control over her termination under the totality of the circumstances. The record reveals that Claimant did not precipitate her employment termination by volitional acts that he would reasonably expect to cause the loss of employment. She is thus not precluded from receiving TTD benefits subsequent to her June 4, 2024 termination from employment.

ORDER

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

1. Claimant shall receive TTD benefits for the period June 5, 2024 until terminated by statute.

2. Claimant was not responsible for her June 4, 2024 termination from employment with Employer.

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

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

DATED: March 7, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-256-925-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the requests for prior authorization for radiofrequency ablation and right shoulder surgery were "deemed authorized" pursuant to Rule 16-7-1(C), WCRP.

2. Whether Claimant proved by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Schnell was reasonably necessary to cure and relieve Claimant of the effects of her September 29, 2023 injury.

3. Whether Claimant proved by a preponderance of the evidence that the radiofrequency ablations performed by Nicholas Olsen were reasonably necessary to cure and relieve her of the effects of her September 29, 2023 injury.

FINDINGS OF FACT

The Injury

1. Claimant was a customer service representative for Respondent-Employer when, on September 29, 2023, she slipped and fell on a metal ramp, sustaining an injury.

Prior History

2. On June 3, 2021, Claimant complained to her clinician of chronic neck pain. Several months later, on September 20, 2021, Dr. Amy Rinner noted that Claimant's neck pain had not changed and that Claimant had pain in the right shoulder, particularly when raising the right shoulder. On June 22, 2022, Claimant was again seen by Dr. Rinner with complaints of neck pain, noted to be across both sides of the neck, left side worse than the right. Claimant also complained of chronic right shoulder pain at that visit. Claimant had similar complaints a month later on July 6, 2022, when she continued to complain of chronic neck pain and continued right shoulder pain. On March 8, 2023, at a visit with Dr. Rinner, and roughly seven months prior to the date of her work injury, Claimant complained of worsening shoulder pain, noting that Claimant began to have left shoulder pain as well. At a March 20, 2023 visit with Dr. Rinner, Claimant presented with chronic cervical axial pain with radiation and paresthesia to her bilateral upper extremities and left shoulder pain, reporting that the pain began insidiously in 2015. A cervical MRI was significant for multilevel disc protrusions and facet arthropathy. She was taking Gabapentin for her pain complaints. Her neck pain was bilateral, aching, burning, tight, and numb in nature. At that visit, Dr. Rinner noted on physical

examination that Claimant exhibited tenderness to palpation bilaterally over C4, C5, and C6. The treatment recommendation included ESI injection at C7-T1.

Post-Injury Treatment

3. Claimant returned to her personal care provider, Mountain View Pain Specialists, on October 10, 2023, where she was attended by Brianna O'Connor, PA-C. Claimant complained of chronic cervical axial pain with radiation and paresthesia to her bilateral upper extremities as well as left shoulder pain. It was noted in the report that the pain began insidiously in 2015 while Claimant worked as a CNA and server. Claimant also mentioned that she had a slip-and-fall accident at work two weeks earlier and sustained an aggravation of her cervical spine and left shoulder pain as well as bilateral knee pain. Claimant reported radicular pain involving both upper extremities and increased myofascial pain. Claimant reported that her worst symptoms involved her neck and right shoulder pain. The report noted that a prior cervical MRI from June 2022 showed multilevel degenerative changes with mild multilevel spinal canal stenosis and moderate left neural foraminal stenosis at C5-C6. The report also noted that Claimant had a prior left shoulder MRI in July 2022 that showed apparent significant echondroma seen in the proximal left humerous, moderate supraspinatus and mild infraspinatus tendinopathy or strain, mild-to-moderate subachromial and subdeltoid bursitis, some edema at the supraspinatus myotendinous junction, and mild acromioclavicular arthropathy. Claimant was referred for cervical and left shoulder MRIs to assess any worsening pathology.

4. Claimant first obtained treatment under the claim for her work injury on October 25, 2023, at Colorado Occupational Medicine Partners. The clinician noted Claimant's mechanism of injury and that the initial injuries included an abrasion to her right knee, neck pain, and left shoulder pain. Claimant reported that she had worsening pain and function in her left shoulder as well as tightness in her neck. The clinician noted that Claimant was already seeing a pain management doctor at Mountainview for her preexisting left shoulder tendinitis who had recommended MRIs of the neck and shoulder.

5. Claimant returned to Colorado Occupational Medicine Partners on November 6, 2023, where she was attended by Dr. Bryan Alvarez. Claimant complained of worsening symptoms. Dr. Alvarez reviewed the recent MRIs of the cervical spine and left shoulder, which he noted to show a new facet injury at C4-C5 and worsening C5-C7 endplate changes in the cervical spine and a new rotator cuff tear in the left shoulder. Dr. Alvarez recommended holding off on therapy pending an orthopedic referral.

6. Claimant saw Dr. Lucas Schnell at Front Range Orthopedics & Spine on November 17, 2023, at Dr. Alvarez's referral. Dr. Schnell reviewed Claimant's history and recommended Claimant undergo left shoulder arthroscopic rotator cuff repair and debridement. Claimant underwent that procedure with Dr. Schnell on December 18, 2023.

7. Claimant also saw Dr. Eric Shoemaker on November 20, 2023, for her neck symptomology. Dr. Shoemaker reviewed Claimant's pre-injury history, which included chronic neck pain and aching pain down both arms with numbness and tingling into the hands from the first through third digits with multiple injections. He noted that Claimant had not undergone an EMG. Dr. Shoemaker also noted that since Claimant's work injury, the neck pain is more intense, particularly on the left, with no change in location or distribution. Though, he noted, Claimant's pre-injury pain was fairly symmetrical. Dr. Shoemaker also reviewed Claimant's MRI results, which showed right-sided C4-C5 facet edema and type-one endplate Modic changes at C4 through C6 when compared to an MRI from a year prior. Dr. Shoemaker noted, "It is unclear if this is related to the fall given that her worsened pain is all left-sided." Dr. Shoemaker recommended medial branch blocks and consideration of radiofrequency neurotomy for her neck as well as a bilateral upper extremity EMG to assess for carpal tunnel syndrome. However, with regard to Claimant's work injury, and not the prior symptoms, Dr. Shoemaker felt that Claimant's left-sided axial neck pain warranted monitoring for improvement following therapy with some consideration as to whether medial branch blocks would be appropriate under the workers' compensation claim. Claimant was to follow up with Dr. Shoemaker to review her recovery from her shoulder surgery.

8. At a January 17, 2024 follow-up with Dr. Shoemaker, Claimant reported increased neck pain while wearing a sling following her left shoulder surgery. Dr. Shoemaker anticipated that the neck pain should return to baseline once Claimant is out of the sling.

9. Claimant again returned to Dr. Shoemaker on March 6, 2024, reporting that her shoulder was getting better but still occasionally an issue for her. Regarding her neck, Claimant stated that her neck pain was not going away, reporting diffuse pain from the occiput to the base of the cervical region. Dr. Shoemaker noted that Claimant then proceeded to provide contradictory statements to Dr. Shoemaker as to whether her neck pain was actually worsened by the work injury. Claimant also described new symptoms that included anterior chest wall pain as well as upper chest wall pain bilaterally below the clavicles, equal on both sides. Claimant also reported that she had undergone medial branch blocks at C5-C6 and C6-C7 through Mountain View Pain Center for her chronic neck pain but that she did not have a positive diagnostic response. Claimant reported that Mountain View wished to do medial branch blocks higher up and to consider a radiofrequency neurotomy. Claimant also reported an onset of tinnitus since the fall, which Dr. Shoemaker opined as "cervicogenic tinnitus that is probably facet mediating and does predate her fall as well." Dr. Shoemaker felt that "nearly all of her current symptoms are attributed to pre-existing chronic issues. It would not be appropriate to pursue treatment for the cervical issues through the [workers' compensation] system." Regarding Claimant's numbness and tingling in her fingers, Dr. Shoemaker suspected carpal tunnel syndrome unrelated to Claimant's work injury. Dr. Shoemaker clarified that he would not endorse interventional treatment for Claimant's neck through the workers' compensation system and that Claimant had

reached maximum medical improvement with regard to her neck in the context of her work injury. Nevertheless, he felt that upper cervical level medial branch blocks or radiofrequency neurotomy would be appropriate treatment for Claimant's pre-existing neck symptoms.

10. Claimant reported at an April 9, 2024 physical therapy visit that her left shoulder was feeling about the same but that her right shoulder was bothering her more, which she believed was due to compensation. Similarly, at an April 11, 2024 physical therapy visit, Claimant reported that her right shoulder was bothering her even more and she attributed the new pain to use of the weight machine, a complaint she reiterated at her April 30, 2024 visit with Dr. Schnell, reporting that she had injured her right shoulder a week earlier while lifting weight during physical therapy. Claimant also reported at her April 17, 2024 visit with Dr. Alvarez that she had been doing some exercises the previous week during physical therapy and she believed that she had injured her right shoulder.

11. Claimant underwent bilateral medial branch blocks at C4 through C6 with Dr. Nicholas Olsen on May 28, 2024, with positive diagnostic results. Dr. Olsen had copies of the report of the procedure sent to Dr. Alvarez and to Respondent-Insurer.

12. Claimant returned to Dr. Schnell on June 19, 2024, for what Dr. Schnell described as a formal evaluation of Claimant's right shoulder. He noted that Claimant reported injuring her right shoulder during physical therapy while performing lat pull-downs and had severe pain in the lateral deltoid ever since. Dr. Schnell wrote in his report that "She had no prior issues with her shoulder prior to this event." Claimant would later testify that it must have been her that told Dr. Schnell this. Dr. Schnell reviewed an MRI of Claimant's right shoulder from several days earlier which showed a full-thickness supraspinatus tendon tear with a 1.5 cm retraction and no atrophy as well as a SLAP lesion of the glenoid. Dr. Schnell opined that the rotator cuff tear was directly related to her shoulder rehabilitation. He recommended a right shoulder arthroscopic rotator cuff pair, subacromial decompression, and possible open long head biceps tenodesis. Dr. Schnell felt that performing the procedure was urgent in order to reduce the likelihood of permanent limitations.

13. On June 25, 2024, Claimant underwent a radiofrequency neuroablation at the C4-C5 and C5-C6 levels with Dr. Olsen. Dr. Olsen had copies of the report of the procedure sent to Dr. Alvarez and to Respondent-Insurer.

14. Respondents obtained a medical records review as conducted by Dr. Qing-Min Chen on July 3, 2024. Dr. Chen reviewed Claimant's medical records and provided his opinions as to the various body parts injured and the appropriate treatment. Regarding Claimant's left shoulder condition, Dr. Chen opined that Claimant's left shoulder surgery and postoperative physical therapy were related to the original injury. However, he felt that Claimant's ongoing neck symptoms were not related to the work injury. He felt that Claimant sustained a cervical strain

in the work injury and that it should have resolved within six weeks to three months from the date of injury. He pointed out that Claimant had a pre-existing history of chronic neck pain and prior MRI findings. The only new finding in the recent cervical MRI, he noted, was bone marrow edema at the right C4-C5 facet joint, which Dr. Chen felt would not be related to Claimant falling to the left. He attributed the edema to pre-existing degeneration rather than the work injury, and he therefore felt that the medial branch blocks and radiofrequency ablation for the right side were not related to the work injury. Dr. Chen also reviewed the relatedness of Claimant's right shoulder pathology and its relationship to the work injury. Dr. Chen felt that it was not related, reasoning that Claimant fell to her left side, which would not explain a right shoulder injury, and that Claimant did not have any complaints of right shoulder pain until April 30, 2024. He felt that a compensatory injury to the right shoulder during physical therapy was not a mechanism supported by the *AMA Guides for the Evaluation of Disease and Injury Causation, 2nd edition*, and that the right shoulder pathology was therefore not likely the result of compensation.

15. Several months later, on January 9, 2025, Dr. Chen signed an attestation that he spent two and a half hours preparing the record review report and that the charges complied with § 8-42-101(3)(a)(I), C.R.S., and Rule 16-8, WCRP.

16. Claimant testified at hearing that she had prior problems with right arm and right shoulder soreness, some biceps tendinitis, and some tennis elbow, but nothing major. While Claimant did not have any prior surgeries or major tears, she testified that she had undergone injections in the right arm several years earlier and had received physical therapy.

17. Claimant testified that she first began to have problems with her right shoulder in April 2024 when she was undergoing physical therapy. She explained that she had just progressed to the strength portion of physical therapy for the left shoulder and that she was using the lat pull-down machine when she believed she injured her right shoulder. She testified that she experienced a gradual onset of pain after that, specifically along the right shoulder joint. Claimant further clarified that when she began to treat for the right shoulder symptoms under her workers' compensation claim, she and Dr. Schnell did not have a new conversation about her prior medical history, so there was no new discussion about her prior right shoulder symptoms. Regarding the onset of pain in her right shoulder, Claimant denied in her testimony that the onset was sudden, though she reported that it was severe. Claimant also acknowledged that around Thanksgiving 2022, prior to her work injury, she had problems with her right shoulder, but those problems resolved prior to the date of injury.

18. Claimant acknowledged in her testimony that she had neck problems going back to 2015 due to having worked as a server, including arthritis and stenosis, for which she was under the care of Dr. Gray. Claimant testified that her neck did not hurt prior to the date of injury the way it did after. That is, Claimant explained that it had been the upper part of her neck that hurt her previously, but it was the lower

part of her neck that hurt her after the injury, and that it has been painful on both sides of the neck with a pinching sensation since the date of injury. Claimant also testified that the C5-C7 medial branch blocks did not provide any relief, but the later medial branch blocks of C4-C6 did.

19. The Court finds Claimant's testimony credible.

20. Claimant also called Dr. Alvarez to testify at hearing. Dr. Alvarez testified that as a part of the Level II certification program, he was taught to evaluate whether or not an injury has aggravated an underlying condition or accelerated the need for medical treatment, thus becoming part of a compensable injury. Dr. Alvarez also testified at hearing that it was his opinion that Claimant's ongoing neck issues were most likely aggravated by her work injury, and that the left-sided ablation requested by Dr. Olsen was reasonable under the circumstances. He also testified that the right shoulder MRI demonstrated an acute tear of the right rotator cuff and that it was reasonable to conclude that the right shoulder rotator cuff tear occurred during the physical therapy that was being performed for the rehabilitation of the left shoulder and that the surgical repair as suggested by Dr. Schnell was reasonable.

21. The Court finds Dr. Alvarez's testimony credible. However, due weight is given to Dr. Alvarez's opinions as noted below.

22. Dr. Chen testified by deposition. In his testimony, Dr. Chen opined that although radiofrequency ablation is a medically reasonable and necessary treatment, it is not related to Claimant's work injury. He noted that Claimant's MRI showed no significant changes in the left side of her neck between 2022 and 2023, which is the area where she reported pain. The only new finding was soft tissue edema on the right C4-C5 facet joint. But, because Claimant's complaints were on the left, Dr. Chen concluded that there was no correlation between her work injury and the need for ablation. Dr. Chen testified that he agreed with Dr. Shoemaker in that the radiofrequency ablation was not related to the work injury and recommended that such treatment be pursued outside of the worker's compensation system.

23. Dr. Chen also testified that the right shoulder surgery recommended by Dr. Schnell was not related to Claimant's work injury. Dr. Chen pointed out that Claimant had a long history of right shoulder complaints dating back to at least 2020, and that her MRI showed chronic degenerative changes rather than an acute injury. Dr. Chen highlighted the inconsistent timeline of Claimant's right shoulder complaints, noting that she initially reported right shoulder pain as compensatory pain from her left shoulder surgery, later attributed it to an aggravation during physical therapy while performing lat pull-downs, and then described it as acute onset pain in a medical note dated April 30, 2024. In his testimony, Dr. Chen rejected the idea that performing lat pull-downs could have caused a rotator cuff tear, stating that such an exercise does not engage the rotator cuff muscles in a way that would cause a tear, and that there was no documentation in physical therapy notes supporting an acute injury. Dr. Chen found no clear mechanism of injury in

Claimant's medical records, stating that neither physical therapy records nor contemporaneous medical notes documented an acute injury to the right shoulder.

24. The Court finds Dr. Chen's testimony credible. However, due weight is given to Dr. Chen's opinions as noted below.

25. The Court finds that the need for Claimant's radiofrequency ablations for the cervical spine is not causally related to the work injury. Claimant had a well-documented history of chronic cervical pain predating the September 29, 2023, injury, including bilateral axial pain with radiation into both upper extremities, numbness, tingling, and multilevel degenerative changes confirmed on imaging. The medical evidence demonstrates that Claimant's cervical pathology, including facet arthropathy and disc protrusions, was long-standing, with documented symptoms dating back to at least 2015.

26. Following the work injury, Claimant reported increased neck pain. However, her subjective complaints did not align with the objective imaging findings. The post-injury MRI revealed new right-sided C4-C5 facet edema and Modic changes at C4-C6, yet Claimant's primary complaints were of left-sided worsening. Dr. Shoemaker questioned the relationship between the MRI findings and the reported increase in symptoms, noting that the pre-injury pain had been fairly symmetrical and that post-injury, there was no change in location or distribution. Similarly, Dr. Chen opined that the MRI showed no significant left-sided changes between 2022 and 2023 and that the only new finding—right-sided C4-C5 facet edema—was more likely attributable to preexisting degeneration rather than trauma from the fall.

27. Further, Claimant's treatment course does not support a causal connection between the work injury and the need for radiofrequency ablation. Claimant underwent medial branch blocks at C5-C7, which failed to provide relief, but later found success with blocks at C4-C6. Dr. Shoemaker, while acknowledging that upper cervical medial branch blocks might be appropriate for Claimant's chronic condition, persuasively opined that nearly all of her symptoms were attributable to preexisting cervical pathology and that pursuing interventional treatment under the workers' compensation claim was not appropriate. Dr. Chen concurred, opining that Claimant sustained no more than a temporary cervical strain in the work injury, which would have resolved within a matter of weeks to months.

28. Accordingly, the Court finds that Claimant's work injury did not cause or aggravate her underlying cervical condition so as to necessitate radiofrequency ablation. Her cervical complaints and imaging findings are consistent with her pre-injury condition and that the work injury did not significantly alter the course of her cervical pathology. Therefore, the Court finds the opinions of Drs. Shoemaker and Chen more persuasive than that of Dr. Alvarez with regard to whether radiofrequency ablations of the cervical spine, as performed by Dr. Olsen, was reasonably necessary to cure and relieve Claimant of the effects of her work injury. The Court finds that the radiofrequency ablations were in fact not reasonably necessary to cure and relieve Claimant of the effects of her work injury.

29. The Court does find, however, that Claimant's need for right shoulder rotator cuff surgery did arise from Claimant's September 29, 2023 injury insofar as it arose out of and in the course of her treatment for her left shoulder injury.

30. Dr. Alvarez's credible testimony that the June 2024 MRI exhibited an acute rotator cuff tear, bolstered by the absence of atrophy evident on the June 2024 MRI, suggests that the progression to a full-thickness tear was at least recent at that time and would coincide with the period of time when Claimant had begun strength training in physical therapy for her left shoulder. Although there is an absence of evidence of complaints by Claimant of an acute onset of pain, Dr. Chen credibly testified that an acute-on-chronic progression to a full-thickness tear would not necessarily result in an acute onset of pain. Dr. Chen credibly ruled out lat pull-downs as a plausible mechanism for injuring the supraspinatus tendon. However, insofar as Claimant was involved in strength training during physical therapy, it appears likely, in the absence of an alternate explanation, that Claimant sustained an aggravation of a chronic partial-thickness supraspinatus tear in her right shoulder during physical therapy with only a gradual onset of right shoulder pain.

31. While Claimant does not know the cause of her right rotator cuff tear, the Court finds that the subjective accounts Claimant provided to her providers regarding the mechanism of injury for her right shoulder merely document Claimant's speculation as to what might have caused the rotator cuff tear. The Court does not find Claimant's inconsistency among her hypotheses to be significant. However, the Court does find the objective findings and the chronology to be informative.

32. Therefore, the Court finds the opinions of Drs. Alvarez and Schnell more persuasive than that of Dr. Chen with regard to causation of the right shoulder rotator cuff tear. The Court finds that the right shoulder rotator cuff surgery recommended by Dr. Schnell is reasonably necessary to cure and relieve Claimant of the effects of her September 29, 2023 injury.

CONCLUSIONS OF LAW

Generally

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

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

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

Constructive Authorization

Claimant argues that Respondents, in denying prior authorization for the radiofrequency ablations and the right shoulder surgery, relied on Dr. Chen's July 3, 2024 report, and that Dr. Chen's report did not comply with Rules 16 and 18, WCRP, resulting in a constructive authorization for both procedures. Specifically, Claimant argues that Dr. Chen was required to provide an attestation that the billed charges for his review were consistent with the fee schedule as set out in Rule 18. Claimant relies on Rule 18-7(G)(5), which provides that "All IME reports must include an attestation that the billed charges comply with § 8-42-101(3)(a)(I) and Rule 16-8, as well as document the total time spent." Because, as Claimant argues, Dr. Chen's report did not contain such an attestation at the time of the denials, Respondents constructively authorized the procedures pursuant to Rule 16-7-1(C), which provides in relevant part that "Failure of the Payer to timely comply in full with all Prior Authorization requirements outlined in this rule shall be deemed authorization for payment of the requested treatment . . . ."

Importantly, the Court notes that Rule 16-7-1, WCRP, distinguishes between a "medical review" and an "independent medical examination (IME) report." Furthermore, Rule 18-7(G)(5), which requires the attestation, applies only to IMEs. That same rule defines an IME as "an objective medical *examination of an injured worker* performed by a Physician who has not previously treated the injured worker, in order to evaluate prior, current, or proposed treatment, or current condition." (Emphasis added.) In this case, Dr. Chen's report did not arise from an IME as defined by Rule 18-7(G)(5), as Dr. Chen did

not *examine* Claimant. Rather, Dr. Chen reviewed Claimant's medical records and issued a written report as to his opinions. This is plainly a "medical review" as contemplated by Rule 16-7-1. Therefore, the Court concludes that Dr. Chen's report did not violate Rule 18-7(G)(5), as that rule does not require any such attestation for a "medical review."

In any case, the Court notes that the "deemed authorization" provision of Rule 16-7-1(C) applies only where a denial of prior authorization fails to comply with "requirements of this rule," referring to Rule 16 itself. Requirements for a Rule 16 denial of a request for prior authorization are as set forth in Rule 16-7-1(B)(2). No part of that provision requires that there be an attestation of compliance with Rule 18 by a physician performing a medical review—nor an IME for that matter. Therefore, the Court concludes, even if Dr. Chen's report were required to be accompanied by a Rule 18-7(G)(5) attestation, the failure to include such an attestation would not constitute a violation of Rule 16-7-1(B)(2) so as to "deem" the request for prior authorization as "authorized." The Court therefore concludes that Respondents' reliance on Dr. Chen's July 3, 2024 medical records review report in denying the procedures did not result in a constructive authorization as set forth in Rule 16-7-1(C).

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.

In a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. *Snyder v. Indus. Claim Appeals Off. of the State of Colo.*, 942 P.2d 1337 (Colo. App. 1997). However, the burden remains with the claimant to prove by a preponderance of the evidence a causal relationship between the work injury and the condition for which benefits are sought. *Id*.

As found, Claimant's work injury did not cause or aggravate her underlying cervical condition so as to necessitate radiofrequency ablation. The Court concludes that the radiofrequency ablations were in fact not reasonably necessary to cure and relieve Claimant of the effects of her work injury.

However, as found, Claimant's need for right shoulder rotator cuff surgery did arise from Claimant's September 29, 2023 injury insofar as it arose out of and in the course of her treatment for her left shoulder injury. The Court therefore concludes that the right shoulder rotator cuff surgery recommended by Dr. Schnell is reasonably necessary to cure and relieve Claimant of the effects of her September 29, 2023 injury.

ORDER

It is therefore ordered that:

1. Claimant has not proved by a preponderance of the evidence that the requests for prior authorization for radiofrequency ablation and right shoulder surgery were "deemed authorized" pursuant to Rule 16-7-1(C), WCRP.

2. Claimant has proved by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Schnell was reasonably necessary to cure and relieve Claimant of the effects of her September 29, 2023 injury. Respondents shall pay for the right shoulder surgery consistent with Rule 18, WCRP.

3. Claimant has failed to prove by a preponderance of the evidence that the radiofrequency ablations performed by Nicholas Olsen were reasonably necessary to cure and relieve her of the effects of her September 29, 2023 injury.

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 7, 2025.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-117-992-007

ISSUES

1. Determination of the attorney fees and expenses to which Counsel is entitled for his representation of Claimant.[1]

FINDINGS OF FACT

Case History

1. Claimant is a now-61-year-old man Spanish-speaker who sustained an admitted injury arising out of the course of his employment with Employer on August 10, 2019. (Ex. 2). Claimant was initially represented by Janie Castaneda, Esq., who assisted Claimant in procuring benefits including permanent partial disability (PPD) benefits.

2. On November 5, 2021, Claimant engaged Counsel, and the parties entered into a Contingent Fee Agreement. (Ex. 1). After execution of the Contingent Fee Agreement, Ms. Castaneda continued to represent Claimant with respect to his claim. The primary purpose of Counsel's representation was to assist Claimant in procuring permanent total disability (PTD) benefits. The record does not contain evidence demonstrating work performed by Counsel until June 2022.

3. On June 2, 2022, Respondents filed a Final Admission of Liability (FAL) admitting for a whole person permanent impairment rating and for PPD benefits totaling $55,887.74 less an asserted overpayment of $18,258.65. (Ex. 2).

4. On June 8, 2022, Counsel filed a Substitution of Counsel and entered his appearance as counsel for Claimant with the Division. (Ex. 3).

5. On June 24, 2022, Counsel filed an Objection to the June 2, 2022 FAL, indicating that he would file an Application for Hearing (AFH) within 30 days of the FAL. (Ex. 4).

6. On July 1, 2022, Counsel filed an AFH with the OAC seeking PTD benefits on Claimant's behalf. (Ex. 5).

7. The July 1, 2022 AFH proceeded to a two-day hearing at the OAC, beginning on March 9, 2023 and concluding on June 23, 2023. (Ex. 5).

8. On August 18, 2023, ALJ Elsa Martinez Tenreiro issued her Findings of Fact, Conclusions of Law, and Order (FFCLO), finding Claimant permanently and totally disabled, and ordering Respondents to pay PTD benefits beginning October 14, 2021

[1] Claimant's Position Statement identifies multiple "issues" for determination. The "issues" listed by Claimant appear to be summaries of Claimant's argument and are not the ultimate issue to be determined. Claimant's arguments will be addressed as relevant to the determination of the ultimate issue in this matter.

(the date of maximum medical improvement (MMI)) at the rate of $573.09 per week. ALJ Martinez Tenreiro further ordered that Respondents may take credit for any temporary disability or PPD benefits or other allowable offsets paid to Claimant after his date of MMI. (Ex. 6).

9. On September 8, 2023, Respondents filed a Petition to Review (PTR) to appeal the August 18, 2023 FFCLO. (Ex. 7).

10. On November 29, 2023, ALJ Martinez Tenreiro issued a Supplemental Findings of Fact, Conclusions of Law, and Order (Supp. FFCLO). The Supp. FFCLO did not change the effect of the August 18, 2023 FFCLO, and awarded the same benefits. (Ex. 8).

11. On December 19, 2023, Respondents filed a second PTR to appeal the November 30, 2023 Supp. FFCLO. (Ex. 9).

12. On January 15, 2024, Counsel filed a Brief in Opposition to the December 19, 2023 PTR (BIO to PTR). (Ex. 10). The BIO to PTR was thirty-one pages in length. Counsel testified that he spent between 20 and 25 hours working on Claimant's response to Respondents' appeal of the ALJ's Supp. FFCLO. No credible evidence was admitted demonstrating that Counsel maintained contemporaneous records of the time his firm spent responding to the appeal. However, the ALJ finds Counsel's testimony regarding the time spent to be credible and reasonable.

13. On March 7, 2024, the Industrial Claim Appeals Office issued its Final Order affirming the November 29, 2023 Supp. FFCLO. (Ex. 11).

14. On April 18, 2024, Respondents filed another FAL consistent with the November 29, 2023 Supp. FFCLO, admitting for PTD benefits at the rate of $573.09 per week, and asserting an overpayment of $67,698.79. (Ex. 13).

15. On April 25, 2024, Counsel submitted a Request for Lump Sum Payment (LSR) of Claimant's PTD benefits, requesting payment of $119,299.72 on Claimant's behalf. The LSR indicates Claimant was receiving Social Security (SSDI) benefits of $1,569 per month. (Ex. 14).

16. On April 26, 2024, Counsel submitted an Amended Lump Sum Request which corrected information related to Claimant's SSDI benefits indicating Claimant's SSDI entitlement was $1,468.70 per month, but otherwise requested the same $119,299.72 lump sum payment. (Ex. 15).

17. On May 7, 2024, Respondents filed another FAL in which Respondents asserting an offset for SSDI benefits in the amount of $169.40 per week, and asserting further offsets against PTD benefits for overpayment. The FAL indicates Respondents would take a credit of $26,548 against any lump sum payment; and a credit of $81.54 per week for recovery of the remainder of the $67,698.79 overpayment. After offsets, Respondents admitted to a weekly PTD payment of $322.09 (*i.e.*, $573.09 - $169.40 SSDI offset - $81.54 overpayment credit = $322.09). (Ex. 16).

18. On May 7, 2024, Respondents sent Counsel a check in the amount of $67,781.55, represented to be the lump sum payment minus offsets. (Ex. 17). Counsel testified he deposited the $67,781.55 in his trust account.

19. On May 17 2024, Counsel filed an Objection to the May 7, 2024 FAL, indicating that Claimant would file an AFH with the OAC within 30 days. (Ex. 34, p. 229).

20. On May 17, 2024, Counsel filed an AFH seeking to increase the lump sum payment, and asserting penalties against Respondents for late filing of the May 7, 2023 FAL. (Ex. 18). OAC records indicate the May 17, 2024 AFH was set for hearing on September 11, 2024.

21. On September 10, 2024, Respondents issued Claimant a check in the amount of $22,543.08, representing the balance of the lump sum owed, after offsets. (Ex. 19). The check was delivered to Counsel and resolved the issues related to the May 17, 2024 AFH, resulting in cancelation of the September 11, 2024 hearing. Counsel testified he deposited the $22,543.08 payment in his trust account.

22. In total, Respondents paid, and Counsel received $90,324.63 in lump sum payments for Claimant's PTD benefits (*i.e.*, $67,781.55 + $22,543.08 = $90,324.63).

The Contingent Fee Agreement

23. On May 11, 2021, Claimant and Counsel entered into a Contingent Fee Agreement (CFA) and disclosure statement. The original of the CFA is in Spanish, Claimant's native language, and executed by both Claimant and Counsel. (Ex. 1). Claimant signed the CFA and initialed it at various points throughout the document. A certified English translation of the CFA was prepared on August 26, 2024, and is included in Exhibit 1.

24. The CFA contains the following relevant terms in bold-face type, and Claimant's initials in spaces following the terms:

> **CONTINGENT FEE. As compensation for legal services, the Law Firm's fee (including any associated counsel) shall be twenty percent (20%) of the gross amount of any amount for temporary or permanent benefits, received, granted or recovered or collected by the Client before an appeal. If the case is appealed the fee the total amount will be thirty percent (30%).[2] The Client receives their part, eighty percent (80% or 70% if the case is appealed), after costs have been deducted. The contingent fee will be reduced by any amount that the Law Firm or the Client receives during this contract.**
>
> **The Client has been informed that under Colorado Workers' Compensation law, a fee in excess of twenty percent (20%) in a case that has not been appealed is not reasonable. Any party has the right**

[2] For the purposes of this Order, this provision is referenced as the "Escalation Clause."

to request the Director of the Department of Workers Compensation to make a determination of the reasonableness of a fee charged.

Client agrees to pay in advance all Attorney's fees based on a calculation of the current present value of any total amount or advance received from any permanent, partial disability or total disability of any kind, as part of a complete and final settlement including fees allocated to future structured settlement payments.[3]

Total amount received or collected means the amount collected before any subtraction of expenses, disbursements, subrogation rights, and child support withholding rights. The total amount collected also includes specially awarded attorney's fees and costs awarded to the Client. If any amount is not recovered or collected, there will be no charge to the Client, but the Client will still be responsible for the expenses.

If prior to the conclusion of this lawsuit, and before any settlement, Client or Law Firm wishes to terminate this contract, Client agrees to pay the Law Firm the value of services rendered (quantum meruit). Attorney's regular hourly rate is $300.00 and $125.00 per hour for assistant.

25. The Disclosure Statement included with the CFA describes the types of attorney fee agreements, including a time-based fee of $300.00 per hour, a fixed fee, or a contingent fee. The Disclosure Statement states: "'Contingent' means a certain established percentage or amount that is payable only upon attaining a recovery regardless of the time or effort involved." (Ex. 1 (emphasis original)).

26. In a section of the Disclosure Statement titled "Negotiation of Worker's Compensation Benefits" Claimant authorized Counsel to "request on my behalf any and all available Lump Sum benefits pertaining to my workers' compensation case," to endorse and deposit in Counsel's trust account checks for workers' compensation benefits on Claimant's behalf, and to "transmit eighty percent (80%) to [Claimant] as instructed, less fees." (Ex. 1).

Disbursements and Attorney Fee Dispute

27. Throughout the course of representation, Ms. Castaneda and Counsel prepared various disbursement statements detailing funds received on behalf of Claimant, expenses and attorney fees incurred, and how those funds would be distributed.

28. On July 11, 2022, Ms. Castaneda prepared a Disbursement Statement apparently after Counsel received a lump sum payment of $10,000 for temporary total disability (TTD) benefits on June 15, 2022. The Disbursement Statement includes an itemization of expenses incurred by Ms. Castaneda's office of $8,302.76 and supporting

[3] For the purposes of this Order, this paragraph is referenced as the "Acceleration Clause."

documentation for those expenses. The Disbursement Statement indicates that Counsel authorized Ms. Castaneda to keep $5,000 for partial payment of expenses, and $5,000 was to be distributed to Claimant. The Disbursement Statement is signed by Ms. Castaneda. The line indicating "Signature of Client" states "Sent via Quicksilver Messenger" and does not contain Claimant's signature. (Ex. 23). Ms. Castaneda issued a check to Claimant for $5,000.00 which was negotiated by Claimant on July 12, 2022. (Ex. 35). Based on the presumed payment of $5,000 toward expenses, Claimant's balance owed for expenses to Ms. Castaneda was $3,302.76 (*i.e.*, $8,302.76 - $5,000.00 = $3,303.76).

29. On August 10, 2022, Counsel prepared a "PPD Disbursement Statement" which indicates a $4,254.88 gross recovery due to a settlement. The PPD Disbursement Statement indicates that $2,000.00 would be held by Counsel for "Future Costs" and that $2,254.88 would be disbursed to Claimant. Claimant signed the PPD Disbursement Statement on August 10, 2022. (Ex. 24).

30. On November 4, 2023, Counsel prepared a statement itemizing funds received on Claimant's behalf and expenses incurred by Counsel. According to the statement, Counsel had received a PPD Lump Sum payment of $11,212.65. Including the $2,000 held by Counsel for "Future Costs," at this point in time, Counsel held $13,212.65 in Claimant's funds. (Ex. 26). The statement itemizes expenses incurred of $13,957.57. According to the statement, Claimant's "balance" as of November 4, 2023 was negative $744.92. Claimant signed the statement on November 4, 2023. (Ex. 26).

31. On April 3, 2024, Counsel prepared another statement itemizing disbursements to Claimant in the amount of $3,200.00, which includes copies of two checks issued to Claimant totaling $3,200 issued on April 27, 2023 and May 26, 2023. Based on these disbursements, Claimant's "balance" was listed as negative $3,944.92. (Ex. 26).

32. At some point, the date of which is uncertain from the record but appears to be in May 2024, Counsel prepared a "Final Disbursement Statement for Contingent Fee Agreement" (Disbursement Statement) related to Claimant's case. (Ex. 27). The Disbursement Statement is unsigned and undated. The Disbursement Statement sets forth the fees and expenses to which Counsel asserted an entitlement. Respondent calculated "Gross Recovery" as the "Present Value of PTD," as $357,231.30. The calculation was made using the Division's website form entitled "Permanent Total Disability Present Value." (Ex. 33, p. 310). The calculation was based on a weekly benefit rate of $403.63, Claimant's statutory life expectancy of 27.9 years, and a discount rate of 4%. No credible evidence was admitted explaining why the weekly benefit rate of $403.63[4] was used to calculate the present value of PTD benefits, rather than $322.09 post-offset/credit weekly benefit rate admitted in the May 7, 2024 FAL.

33. Counsel calculated the contingent fee purportedly due under the CFA of $107,169.39 (*i.e.*, 30% of $357,321.30). In addition, Counsel sought recovery of

[4] $403.63 is equal to Claimant's pre-offset PTD rate of $573.09 minus the SSDI offset of $169.46, but excludes the credit of $81.54 per week related to the recovery of overpayments.

$3,302.76 in expenses incurred by Ms. Castaneda (see ¶ 26), $744.92 in unpaid expenses incurred by his office (see ¶28), and $3,200 for "Distributions Advanced" (see ¶ 29). According to this Disbursement Statement, Counsel claimed entitlement to $114,417.07 in combined attorney fees and expenses. Counsel applied the lump sum payment of $90,324.63 to the balance, which resulted in Claimant remaining liable for $24,143.44 in attorney fees. (Ex. 27).

34. No credible evidence was admitted demonstrating that Claimant authorized Counsel to collect fees or expenses incurred by Ms. Castaneda, that Ms. Castaneda filed an attorney lien, or that Counsel had otherwise assumed responsibility for the expenses incurred by Ms. Castaneda.

35. On May 30, 2024, Claimant filed the present AFH, requesting a determination of attorney fees owed to Counsel. (Ex. 20).

Witness Testimony

36. Claimant testified at hearing that he did not recall signing the CFA, but admitted that the Spanish-language version of the CFA (Ex. 1) contains his signature and initials. Claimant testified that he did not understand the CFA when he signed it, although Counsel explained it to him and Claimant believed it was "right" so he signed it. Claimant understood Counsel's fee for his services would be 20% and he was not aware of any other fees. Claimant testified he believes Counsel is entitled to a 20% fee on the money received, and that he had been aware Counsel would retain the lump sum payment he would not have continued with the representation. Claimant met with Counsel to discuss the November 4, 2023 Disbursement Statement (Ex. 26), had no issues with the information on the document, and signed it. He further testified Counsel did not ask him to agree to send a check to Ms. Castaneda for $3,302.76.

37. Matthew Azer, Esq., the attorney who represented Respondents testified at hearing regarding the procedural history of the case, and his interactions with Counsel. Mr. Azer testified that he engaged in significant communications and negotiations with Counsel over a significant period of time to resolve issues related to Claimant's LSR.

38. Counsel is a licensed attorney who has practiced workers' compensation law for approximately 34 years and has represented approximately 4,000 workers' compensation cases in his career. Counsel testified that representing clients in PTD cases involves a substantial amount of effort and funding due to the need for testifying expert witnesses and prosecuting cases through hearing. He testified that he has handled "hundreds" of PTD cases, less than ten of which have proceeded to hearing. Because PTD cases require experts, expenses incurred by attorneys are more significant than non-PTD cases. He testified that most PTD cases require more than $10,000 in cost expenditure. For Claimant's case, Counsel incurred approximately $13,000 in expenses.

39. Counsel testified that Claimant retained him in on November 5, 2021, and that Claimant signed the CFA (Ex. 1) and initialed the relevant paragraphs in his presence. Counsel testified that he discussed the document with Claimant.

40. Counsel testified that after receiving the initial lump sum payment of $67,698.79, and depositing it in his trust account, he transferred $50,000 to his operating account, because he considered it fees earned. The balance, and the second lump sum payment of $22,543.08 remain in Counsel's trust account.

41. Counsel testified that he devoted approximately 20-25 hours to preparing the BIO to PTR related to Respondents' appeal. Outside of the appeal, he spent an additional 20-25 hours meeting with Claimant and preparing for hearing, 35 hours preparing the initial position statement related to the hearings with ALJ Martinez Tenreiro, and additional time participating in the hearing. Counsel's testimony was credible.

CONCLUSIONS OF LAW

Generally

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

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

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

Determination of Attorney Fees to Which Counsel is Entitled

Section 8-43-403 (1), C.R.S., provides that upon the request of either an employee or the employee's attorney, the director shall determine the reasonableness of the fees charged by such attorney. "In making this determination, the director shall consider the fees normally charged by attorneys for cases requiring the same amount of time and skill and may decrease or increase the fee payable to such attorney. If the director finds that a review by the industrial claim appeals office or an appeal to the court of appeals or to the supreme court was perfected or if the director finds that such attorney reasonably devoted an extraordinary amount of time to the case, the director may award or approve a contingent fee or other fee in a percentage or amount that exceeds twenty percent of the amount of contested benefits." § 8-43-403(1), C.R.S. An "ALJ [has] statutory authority to determine the reasonableness of the fee charged by" counsel in a workers' compensation case under § 8-43-403(1). *Loar v. Want Ads of Fort Collins, Inc.*, W.C. No. 4-481-416 (ICAO Jul. 8, 2004); *Roberson v. Goodwill Industries of Colo. Springs*, W.C. No. 3-804-791 (ICAO Jan. 27, 1993).

"The guiding principle with regard to attorney fees is one of reasonableness." *Newport Pacific Capital Co., Inc. v. Waste*, 878 P.2d 136, 140 (Colo. App. 1994). The burden is on the attorney to prove the reasonableness of the fee sought. *People v. Nutt*, 696 P.2d 242, 248 (Colo.1984); *People v. Mascarenas*, 103 P.3d 339 (Colo. 2003); *Bryant v. Hand*, 404 P.2d 521, (Colo. 1965). Under Colorado Rule of Professional Conduct 1.5, a number of factors are considered in determining the reasonableness of attorney fees, including: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in a locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. The weight to be given these factors depends on the circumstances of each case. Ultimately, the reasonableness of the fee is a question of fact for determination by the ALJ. *Alderin v. City of Greeley*, W.C. No. 4-167-696 (ICAO Apr. 10, 1998). "A lawyer is not prohibited from collecting a percentage fee under a contingent fee agreement simply because the fee agreement does not completely comport with Rule 1.5." *McClain v. Killmer*, 554 P.3d 29 (Colo. App. 2024).

The dispute between Claimant and Counsel involves two aspects of the CFA: 1) the "Escalation Clause;" and 2) the "Acceleration Clause."

1. <u>The CFA's "Escalation Clause."</u>

The CFA includes a clause which purports to increase Counsel's contingent fee from 20% to 30% if Claimant's case was the subject of an appeal (the "Escalation Clause"), which states:

As compensation for legal services, the Law Firm's fee (including any associated counsel) shall be twenty percent (20%) of the gross amount of any amount for temporary or permanent benefits, received, granted or recovered or collected by the Client before an appeal. If the case is appealed the fee the total amount will be thirty percent (30%).

Under the Escalation Clause, Counsel's fee increases by 50% regardless of the amount of work associated with either prosecuting or defending an appeal. Under § 8-43-403(1), a contingency fee in excess of 20% of the amount of contested benefits may be approved if an appeal is perfected. However, this provision must be read in conjunction with the mandate that all attorney fees must be reasonable. *See* 8-43-403 (1), C.R.S.; Colo. R. Prof. Conduct, 1.5; *Berra v. Springer*, 251 P.3d 567 (Colo. App. 2010)(assessing reasonableness of contingent fee). While the ALJ concludes that it is reasonable for an attorney to include an Escalation Clause in the event of an appeal, the increased fee associated with the appeal must also be reasonable under the circumstances.

Counsel has failed to meet his burden of establishing that a 50% increase in attorney fees was reasonable under the facts of this case.[5]

Counsel asserts he is entitled to a 30% fee on the present value of Claimant's PTD benefits, or $107,169.39. If no appeal were perfected, Counsel would be entitled to a 20% fee, or $71,446.26. Thus, the Escalation Clause, if enforced, would result in a $35,723.13 fee increase to Counsel for the appeal. On the other hand, if the lodestar approach is applied, Counsel's fee would be $7,500 based on the $300 hourly rate disclosed in the fee agreement (*i.e.*, $300.00/hour x 25 hours). Notwithstanding, the ALJ does not find that the novelty, difficulty, time, or work involved in responding to the appeal reasonably justifies a 50% increase in Counsel's fee.

To effectively represent Claimant and preserve his award of PTD Benefits, Counsel was required to respond to the Respondents' Appeal. In doing so, Counsel prepared the 31-page BIO to PTR, which required approximately 20-25 hours of additional work. No credible evidence was admitted indicating that defending the appeal required an excessive amount of time or that work beyond preparing the BIO to PTR was required. Counsel did not submit contemporaneous records of the time spent, and apparently did not maintain such records. However, the ALJ finds Counsel's testimony to be a credible estimate of the time he devoted to preparing the BIO to PTR.

Comparison of the BIO to PTR to ALJ Martinez Tenreiro's Supp. FFCLO demonstrates that the BIO to PTR is, in many respects, a restatement of the Supp. FFLCO. The brief incorporates slightly edited versions of the Supp. FFCLO's Findings of Fact, and Conclusions of Law sections, and includes Counsel's original arguments for upholding ALJ Martinez Tenreiro's decision. While Counsel's approach was proper, appropriate, and effective, the BIO to PTR did not involve novel questions, or require

[5] The ALJ cautions that the decision in this matter is limited to the facts of this case, and should not be interpreted as a finding that an Escalation Clause increasing a contingency fee from 20% to 30% in the event of an appeal is per se unreasonable. Such a clause may, in fact, be warranted under appropriate circumstances.

extensive research or the development of unique arguments. Moreover, responding to the appeal did not involve a significant amount of time.

While time-intensive extensive multi-level appeals, or appeals that result in a significant increase in benefits to Claimant may justify a significant increase in contingent fee percentage, Counsel presented no credible evidence establishing that a 50% increase in attorney fees is reasonable in this case. The ALJ concludes that the Escalation Clause in the CFA results in an unreasonable fee, and is therefore not enforceable in this case. A reasonable fee for Counsel's work in defending Respondents' appeal is the lodestar amount of $7,500.00. Because the ALJ finds the Escalation Clause results in an unreasonable fee in this case, Counsel is entitled to the 20% contingency specified in the CFA for work unrelated to the appeal, plus $7,500 for the appeal.

In addition to the appeal, Counsel devoted approximately 55 to 60 hours of time to Claimant's case, including meeting with Claimant, preparing for hearings, and drafting position statements. The ALJ does not find that the time or work involved constitutes an "extraordinary" amount of time and does not justify increasing his contingent fee to 30%.

2. The CFA's "Acceleration Clause."

The CFA also includes a clause which purports to entitle Counsel to collect "in advance" a contingency fee on the present value of any PTD award (the "Acceleration Clause"). Specifically, the CFA provides:

> **Client agrees to pay in advance all Attorney's fees based on a calculation of the current present value of any total amount or advance received from any permanent, partial disability or total disability of any kind, as part of a complete and final settlement including fees allocated to future structured settlement payments.**

Claimant contends this provision is unenforceable for several reasons, including that it is ambiguous and not in the "easy-to-understand" language required by §8-43-403(2), C.R.S., and that it results in an unreasonable fee. Because no credible evidence was admitted indicating that this Acceleration Clause represents the fees normally charged by attorneys for cases requiring the same amount of time and skill as the present matter, the ALJ cannot consider this information in determining the reasonableness of Counsel's claimed fee.

a. Ambiguity

Claimant contends that the CFA and Acceleration Clause are ambiguous and incapable of enforcement. The first issue in analyzing the Acceleration Clause is whether it should be enforced as argued by Counsel. Contingent fee agreements are governed by general contract interpretation principles. *Elliott v. Joyce*, 889 P.2d 43, 46 (Colo. 1994). Additionally, courts have consistently held that any ambiguity in fee agreements should be construed against the attorney who drafted the contract and in favor of the client. *Id*. A contract is ambiguous if it is reasonably susceptible of more than one meaning. *Cheyenne Mountain Sch. Dist. No. 12 v. Thompson*, 861 P.2d 711, 715 (Colo.1993). The

interpretation of a contract and the determination of whether a contract term is ambiguous are questions of law. *Piel v. Schlage Lock Co.*, W.C. No. 4-100-755 (ICAO Sep. 20, 1999). In general, the terms of a contract must be sufficiently specific to permit a court to understand the obligation assumed and enforce the promise according to its terms. *Soderlun v. Public Service Co. of Colo.*, 944 P.2d 616 (Colo. App. 1997). The ALJ concludes that the Acceleration Clause is ambiguous and cannot be enforced as interpreted by Counsel.

As written, the Acceleration Clause is ambiguous in that it lacks sufficient specificity to permit enforcement. The Acceleration Clause purports to require Claimant to pay attorney fees based on "a calculation of the current present value of any amount or advance received" in PTD benefits. Generally, "present value" means the "current value of a future payment, or series of payments, discounted at some compound or discount rate. The amount as of a date certain of one or more sums payable in the future discounted to the date certain." 1184 Black's Law Dictionary (6th Ed. 1990). However, there are multiple methods for determining present value. *See e.g., Brady v. Burlington Northern R. Co*., 752 P.2d 592 (Colo. App. 1988) (discussing "inflation-reduction" and "offset" methods for calculation of present value using both discount rate and inflation rates).

Regardless of the precise methodology, calculation of present value requires the establishment of certain key variables such as the amount of future installment payments (*e.g.*, the weekly PTD benefit), the length of the payment stream, the discount rate, and the discount date (*i.e.*, the date to which the future payments are discounted). As a practical matter, the amount of future payments, length of payment stream and discount date cannot be specified when a fee agreement is signed. However, the CFA provides no means by which the variables may be determined after execution of the CFA, leaving the Acceleration Clause subject to multiple interpretations. For example, the CFA does not indicate that the present value will be determined based on the weekly PTD payment amount after offsets and credits; it does not indicate how the discount rate is determined, or that it will be computed based on Claimant's statutory life expectancy. No credible evidence was admitted demonstrating that the parties agreed on any method of calculation at any point. Moreover, a variable such as the "appropriate discount rate constantly changes based on a variety of figures best understood by economists and Is not an appropriate item" for a court to define. *Perez v. Pappas*, 98 Wash.2d 835 (Wash. 1983). Thus, the terms cannot be supplied or enforced by a reviewing court. Because the CFA does not provide any method of calculation of present value, and no defined variables from which the calculation may be performed, it is incapable of enforcement.

Next, even if the methodology were stated, the application urged by Counsel is not supported by the CFA. Counsel's interpretation of the Clause requires discounting the stream of potential future PTD payments to present value. However, as drafted, the Clause does not apply to future payments. Instead, it purports to entitle Claimant's Counsel to a fee based on a present value calculation for "any total amount or advance <u>received</u>" of PTD benefits, rather than those to be received in the future. (Ex. 1, p. 11

(emphasis added))[6] Present value represents the current worth of future payments. The concept does not apply to received benefits, because their "present value" is simply the amount received on the date of payment. For example, the "present value" of Claimant's $90,324.63 lump sum payment was exactly $90,324.63 at the time it was received.

Even assuming the Acceleration Clause applied to future payments and set forth an appropriate method of computing present value, the remainder of the clause creates additional ambiguity. The Clause seemingly makes it applicable to future payments by indicating that the advance payment of attorney fees is "part of a complete and final settlement including fees allocated to future structured settlement payments." While his may serve to permit a fee on the present value of future structured settlement payments, it is inapplicable here, because Claimant received an award of PTD benefits not a structured settlement.

Next, requiring Claimant to pay attorney fees on amounts not yet received is inconsistent with the CFA as a whole. The CFA provides that Counsel is entitled to a 20% fee on benefits "received, granted or recovered or collected." (Ex. A, p. 11). In another section, the CFA provides that "Total amount received or collected means the amount collected before the subtraction of expenses, disbursements, subrogation rights, and child support withholding rights." (Ex. A, p. 12). The same section provides: "If any amount is not recovered or collected, there will be no charge to the Client, but the Client will still be responsible for the expenses." Moreover, the Disclosure Statement defines "contingent" fee as "a certain established percentage or amount that is payable only upon obtaining a recovery…." (Ex. A, p. 14 (emphasis added)). Nothing in the CFA clearly and unambiguously provides that Claimant would be required to pay a contingency fee on benefits prior to their receipt.

Finally, the Acceleration Clause also appears to conflict with the CFA's Disclosure Statement which authorizes Counsel to request a lump sum, deposit it into a trust account, and deduct attorney fees before transferring **80**% of the remaining funds to Claimant. (Ex. A, p. 15 (emphasis added)). A reasonable interpretation of this section is that Counsel's 20% contingent fee and expenses would be deducted from any lump sum obtained and the remainder would be disbursed to Claimant. The Disclosure Statement makes no mention of the attorney retaining the entirety of the lump sum in satisfaction of attorney fees, nor is there any indication in the CFA that Claimant would owe attorney fees in advance on payments not yet received.

Based on the foregoing, the ALJ concludes that the Acceleration Clause is ambiguous, inconsistent with the other terms of the CFA, and not enforceable as drafted.

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[6] The CFA's contingent fee clause does provide that Claimant's Counsel is entitled to attorney fees on benefits "received, granted or recovered or collected" by Claimant. The ALJ finds that this provision sets forth Claimant's Counsel entitlement to a 20% contingent fee on benefits "received, granted or recovered or collected," but does not address the means of collecting attorney fees earned for benefits "granted" but not yet "received," or entitle Counsel to a fee on unreceived benefits.

b. Reasonableness of Fee if Acceleration Clause is Enforceable

Even if enforceable, the Acceleration Clause as interpreted by Counsel, results in an unreasonable fee. Under the Act, PTD benefits are paid only during Claimant's lifetime. § 8-42-111(1), C.R.S. ("In cases of permanent total disability, [PTD benefits] shall continue until death of such person so totally disabled …." (emphasis added)).[7] Claimant's lifespan – and thus the duration of PTD benefits – is unknown. The Acceleration Clause, however, assumes PTD payments are guaranteed for Claimant's 27.9-year life expectancy. This allows Counsel to collect a 20% fee on benefits Claimant has not yet and may never receive, accelerating Counsel's fees to the present and making him the sole beneficiary of the $90,324.63 PTD lump sum payment – to Claimant's detriment. The provision also increases Claimant's attorney fee liability and delays benefits to the extent future PTD payments would be used to pay Counsel's remaining $24,143.44 balance. (*See* Finding of Fact, ¶ 33). While basing attorney fees on the present value of future PTD benefits may result in a reasonable fee in some cases, Counsel has not met his burden of proving the Acceleration Clause results in a reasonable fee in this case.

The parties have not cited, and the ALJ has not found cases squarely addressing the issue of whether an attorney may collect a contingent fee based on the present value of future PTD benefits. Cases from other jurisdictions that have permitted attorneys to collect contingent fees on the present value of other types of future payments typically do so in the context of annuities related to structured settlements. In those instances, courts differ on the methodology of calculation. Some jurisdictions permit a contingent fee on the present value of future payments, while others permit such a fee on the cost of the annuity. *See e.g., Tobias v. Autore*, 440 A.2d 1171 (N.J. 1982) (applying "cost of annuity" approach); *Nyguen v. Los Angeles County Harbor/UCLA Medical Ctr.*, 48 Cal. Rptr. 2d 302 (Cal. App. 1995)(applying present value of payments approach).

The most analogous case appears to be *Johnson v. Sears, Roebuck and Co.*, 436 A.2d 675 (PA. Super. Ct. 1981). In *Johnson*, a minor child was injured in a truck accident which resulted in a structured settlement. Under the terms of the settlement, the minor would receive a yearly annuity payment for life, which was guaranteed for a period of twenty years. *Id*. at 676. The minor's attorneys computed the present value of the annuity based on a 50-year anticipated life expectancy, and sought a contingent fee based on that computation. In evaluating the reasonableness of the attorneys' claimed fees, the Pennsylvania court noted:

> The problem we perceive with this computation method is that it provides for the attorneys' contingency fee to be based on the total amount of the Johnsons' future possible payments despite the fact that the Johnsons may never receive that amount. After the expiration of the twenty year period for which the annuity payment is guaranteed, appellants only have a right to receive an annuity payment each year that their son actually lives.

[7] Although PTD benefits may continue for six years after death in the form of death benefits for wholly dependent persons, the possibility of such benefits does not change the analysis. *See* § 8-42-116(1)(a), C.R.S. Moreover, no credible evidence was admitted demonstrating that Claimant has such dependents.

> Nevertheless, [the attorneys] avoided the inherent risk in the annuity settlement and based their attorneys' fees on the entire amount the Johnsons would receive if their son lived the normal life expectancy of a fifteen-year-old boy." *Id*.

Ultimately, the court determined that the attorney's fees should be determined based on the cost of the annuity, the price of which reflects the possibility of a longer or shorter life span. *Id*. at 630. However, as another Pennsylvania court noted, this "marketplace cost" analysis is "the acid test" in cases "with fixed, guaranteed, periodic payments not requiring actuarial assumptions as to life expectancy or survivorship." *A.C. and S. v. W.C.A.B.*, 616 A.2d 1085 (Pa. Commw. Ct. 1992).

The *Johnson* decision highlights the primary issue with permitting a contingent fee on the present value of a stream of anticipated PTD benefit payments in this matter. Presumably, because PTD benefits are similar to a non-guaranteed lifetime annuity, the equivalent of a "marketplace cost" could potentially be calculated. However, the record contains no evidence from which the theoretical "cost" of PTD benefits can be ascertained. Thus, "marketplace cost" valuation cannot be applied. Counsel has offered no credible evidence demonstrating a different or more appropriate method of valuing Claimant's PTD benefits that would result in a reasonable fee.

In sum, Counsel's claimed fee of $107,169.39 is based on a potential present value of a stream of PTD benefits for an unknown period of time which results in Counsel receiving a contingent fee significantly greater than 20% of the amounts "received" or "collected" to date. In this regard, the ALJ finds the "Acceleration Clause" to result in an unreasonable fee to Counsel, because it entitles Counsel to fees on amounts not received by Claimant and which Claimant may never receive.

Alleged Misconduct

Claimant contends Counsel engaged in misconduct justifying denying Counsel any fees in this case. The alleged misconduct relates to Counsel's handling of funds after resolution of Claimant's case which Claimant characterizes as highly irregular and improper. While a lawyer who has committed clear and serious wrongful conduct may lose the right to collect a fee, Claimant has not established such conduct on Counsel's part. *McClain v. Killmer*, 554 P.3d 29, (Colo. App. 2024). Moreover, a hearing before the ALJ is not the proper forum for resolving such assertions. *Loar, supra; In re Wimmershoff*, 3 P.3d 417, 420 (Colo. 2000) (regulation of the practice of law is a responsibility which resides exclusively with the Supreme Court). The ALJ finds no grounds for denying Counsel any fee in this matter.

Counsel's Reasonable Fee

As discussed above, Counsel has presented no credible evidence indicating that it is a generally accepted practice among similar workers' compensation practitioners to base their fee on the present value of unreceived future payments. As such, Counsel has failed to meet his burden of establishing the reasonableness of his fee. Nonetheless, the CFA does entitle Counsel to a contingent fee of 20% on the amounts Claimant receives due to Counsel's representation, this includes benefits already received, and benefits Claimant may receive in the future, as they are received. In this way, Counsel will receive the reasonable attorney fees required under the CFA for benefits Claimant actually receives now and in the future. Additionally, as found above, Counsel is entitled to an additional lodestar fee for the work performed in defending Respondents' appeal.

Expenses Counsel is Entitled to Recover

Under the CFA, Claimant is financially responsible for the expenses incurred by Counsel in his representation. The evidence demonstrates that Counsel incurred a total of $13,957.57 in expenses of which $744.92 remain unpaid. Additionally, Counsel advanced Claimant $3,200 in funds which he has not recovered. Ms. Castaneda has $3,302.76 in unpaid expenses.

Counsel has established by a preponderance of the evidence an entitlement to recover the $744.92 in previously unpaid expenses he expended on Claimant's behalf, and the $3,200 advanced to Claimant. However, the record contains no credible evidence indicating that Counsel is authorized to collect Ms. Castaneda's expenses. No evidence was admitted indicating that Ms. Castaneda has filed an attorney lien, assigned her entitlement to expenses to Counsel, that Counsel has assumed responsibility for Ms. Castaneda's expenses, or that Claimant authorized payment of Ms. Castaneda's expenses. Moreover, Ms. Castaneda is not a party to this action. Consequently, Counsel is not entitled to recover expenses incurred by another attorney. Claimant is obligated to pay Counsel $744.92 in unpaid expenses, and $3,200 for the advanced distribution.

ORDER

It is therefore ordered that:

1. Counsel's reasonable attorney fees are:
   a. Twenty percent (20%) of all amounts actually received for Claimant's PTD Benefits, including the lump sum payment;
   b. Twenty percent (20%) of all future PTD benefits Claimant receives, when they are received by or on behalf of Claimant; and
   c. $7,500 for defense of Respondents' appeal

2. Counsel is also entitled to recover from Claimant $744.92 in expenses; and $3,200 representing the advanced distribution to Claimant.

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

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

DATED: March 7, 2025

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on December 19, 2023.

2. Whether Claimant established an entitlement to temporary total disability benefits for the period of December 19, 2023 to January 6, 2024.

3. Whether Claimant established an entitlement to temporary partial disability benefits for the period of January 7, 2024 to January 14, 2024.

4. Determination of Claimant's average weekly wage.

Stipulations

The parties stipulated that if Claimant's claim is compensable, he is entitled to reasonable and necessary medical benefits to treat his work-related injury; and North Suburban Medical Center and CHPG Primary Care Northglenn are authorized treating providers.

FINDINGS OF FACT

1. Employer is a civil engineering and transportation company that designs and provides construction management, inspection, and field services for infrastructure projects. Claimant as a senior inspector. Claimant's job duties include inspecting construction projects related to roads and bridges to enforce specifications and regulations, and assist contractors. Claimant testified that his workday typically starts at 6:00 a.m., with a meeting, after which he drives to the project site, meets with the site supervisor, and assists throughout the day. At the job site, Claimant does inspections, prepares inspection reports and takes photographs. He testified that he typically uploads his reports and photographs to Employer's server from his home at the end of the work day.

2. Claimant communes to and from work in an Employer-provided pickup truck, and stores work equipment in the truck. Employer pays for the truck's fuel and insurance. Claimant uses the truck for his job duties, and drives it throughout project sites to perform inspections. Employer's representative Mark Guikema confirmed that the truck is used on project sites, and that mileage associated with that use is billed to Employer's customers.

3. On December 19, 2023, Claimant was working at a large job site near C-470 and Santa Fe Drive. After completing his work on site, including inspections, testing and photographs, Claimant left the job site in the truck to drive home at approximately 2:25 p.m. Claimant testified he was returning home to complete his inspection reports and

upload the reports and photos to Employer's server. En route, Claimant stopped briefly to use the restroom, but otherwise proceeded toward his home. Between 2:55 p.m. and 3:03 p.m., Claimant made or received three calls related to his job on his work cell phone.

4. At 3:52 p.m., Claimant was involved in a motor vehicle collision on northbound I-25 in Adams County. Claimant's Employer-provided vehicle was struck in the rear while traffic slowed due to congestion pushing Claimant's vehicle into the vehicle in front of him. (Ex. 9).

5. Following the collision, Claimant was taken to North Suburban Medical Center (NSMC) by ambulance for medical treatment. At NSMC, Claimant reported back and neck pain, dizziness, and loss of consciousness. CT scans of Claimant's head, cervical spine and thoracis spine were performed and did not demonstrate evidence of acute fracture or intracranial abnormality. He was discharged with prescriptions for Zanaflex (a muscle relaxer) and ibuprofen. Additionally, Claimant was taken off work for two days. (Ex. 14).

6. The following day, Claimant reported the collision to his employer. Claimant then sought medical treatment through CHPG Primary Care. On December 27, 2023, Claimant saw Matthey Morgan, D.O., at CHPG, reporting stiffness in the neck and shoulder areas, with some headaches. On examination, Dr. Morgan noted Claimant had decreased range of motion and tenderness to palpation of the cervical and thoracic spine. Dr. Morgan diagnosed Claimant with cervical and thoracic strains, and prescribed Zanaflex. No work restrictions were assigned. (Ex. 15).

7. Claimant was also seen at CHPG on February 13, 2024. However, this visit was for a refill of a medication (omeprazole) Claimant was initially prescribed on November 12, 2023, before the December 19, 2023 accident. The record from February 13, 2024 does not relate to any injury Claimant may have sustained in the accident. (Ex. 15).

8. On March 12, 2024, Respondents filed a Notice of Contest, contending that Claimant's injury was not work-related. (Ex. 2).

9. Claimant's next documented medical visit related to the December 19, 2023 accident was on March 14, 2024 with Dr. Morgan. Claimant continued to report neck and back pain. On examination, he noted decreased range of motion and tenderness to palpation of the cervical and thoracic spine. Dr. Morgan indicated concern for the persistent symptoms and ordered MRIs of the cervical and thoracic spine. (Ex 15)

10. The MRIs were performed on April 4, 2024. The cervical MRI showed multilevel degenerative changes, with foraminal stenosis, and spinal stenosis at the C5-6 level. The thoracic MRI showed mild spondylosis without significant canal or foraminal stenosis. (Ex. 12 & 13).

11. On March 20, 2024, Claimant filed a Worker's Claim for Compensation with the Division. (Ex. 3).

12. Claimant testified that from December 19, 2023 through January 6, 2024, he could not perform his job because he could not drive due to the inability to turn his head. He

testified that from January 7, 2024 to January 14, 2024, he returned to work at less-than-full duty, and that he missed time to attend medical visits or because of pain.. Claimant's time records show that Claimant worked 2 hours each day on December 21, 2023 and December 22, 2023, and that he did not work on December 20, 2023. Claimant's testimony was credible.

13. At the time of injury, Claimant earned $41.50 per hour, and typically worked 40 hours per week, with some overtime. Claimant's paystubs show that in the eight 2-week pay periods before December 19, 2023, he earned $27,099.50 in wages for regular hours, overtime, and "ptb." Claimant also received two bonuses totaling $2,860.00. Claimant's paystub shows that for year 2023, Claimant's total bonus received was $5,220 (inclusive of the $2,860.00). Although Claimant testified that the bonus was part of his earnings, he offered no credible evidence explaining how the bonuses were calculated or earned. The ALJ finds that Claimant's average weekly wage (AWW) at the time of injury should be based on his compensation excluding bonuses in the 16 weeks before December 19, 2023. Claimant's AWW at the time of injury was $1,693.72 (i.e., $27,099.50 ÷ 16 = $1,693.72).

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if "special circumstances" exist that demonstrate a nexus between the injuries and the employment. *Id.* at 864. In ascertaining whether "special circumstances" exist the following factors should be considered:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Id. In considering whether travel is contemplated by the employment contract the critical inquiry is whether travel is a substantial part of service to the employer. *See id.* at 865.

"Special circumstances" may be found where the employment contract contemplates the employee's travel or the employer delineates the employee's travel for special treatment as an inducement. *See Staff Administrators Inc. v. Reynolds,* 977 P.2d 866, 868 (Colo. 1999). While an employer paying for transportation is indicative of travel status, permitting an employee to drive a company vehicle does not necessarily compel the conclusion that the employee is in travel status on the way to and from work. *See Shepard v. Argus Contracting*, W.C. No. 4-512-380 (ICAO May 21, 2003); *Warren v. Olson Plumbing & Heating*, W.C. No. 4-701-193 (ICAO Aug. 24, 2007). In considering whether travel was contemplated by the employment contract, the exception applies

when an employer requires a claimant to come to work in an automobile that is then used to perform job duties. This is because the vehicle confers a benefit to the employer beyond the employee's mere arrival at work. *See Whale Communications v. Osborn,* 759 P.2d 848 (Colo. App. 1988); *Benson v. Colorado Compensation Ins. Auth.*, 870 P.2d 624 (Colo. App, 1994).

Claimant has established that he sustained a compensable injury arising out of the course of his employment with Employer. The evidence establishes that Claimant's use of the Employer-provided truck provided a benefit to Employer beyond Claimant's mere arrival at work. Specifically, Claimant uses the Employer-provided truck to perform his job duties by driving to throughout job sites to perform inspections. Moreover, Employer bills its customers for the miles Claimant drives the truck on job sites, which provides an additional benefit to Employer independent of transporting Claimant to and from work. Because Claimant was injured while transporting the Employer-provided truck from the work place to his home, the injury had its origin in Claimant's work-related functions and is sufficiently related thereto to be considered part of his service to Employer, and is therefore compensable.

Medical Benefits

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

Because Claimant has established a compensable injury, he is entitled to authorized, reasonable and necessary medical treatment to cure or relieve the effects of his work injury. Pursuant to the parties' stipulation, NSMC and CHPG are authorized providers. The treatment Claimant received at NSMC on December 19, 2023 and his evaluations and treatment at CHPG on December 27, 2023 and March 14, 2023 were related to his work injury and are compensable. Claimant's treatment on February 13, 2024 was unrelated to his work injury and is not compensable.

Temporary Disability Benefits

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

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

When Claimant was seen at NSMC on December 19, 2023, he was directed to take two days off work. Claimant's payroll records demonstrate that he did not work on December 20, 2023, and then worked 2 hours each of the next two days. Claimant credibly testified that he was unable to work until January 6, 2024, and that he worked reduced hours from January 7, 2024 to January 14, 2024. Given the nature of Claimant's injuries, and that his job duties required him to drive, the ALJ concludes Claimant has establish a disability lasting more than three days, and resulting wages loss. Claimant is entitled to TTP and/or TPD benefits for the period of December 20, 2023 to January 14, 2023.

The record, however, is insufficient to permit the ALJ to determine the precise TTD or TPD benefits to which Claimant is entitled because payroll records for the period of December 20, 2023 to January 14, 2024 are not in the record. By way of example, Claimant testified he was unable to work from December 20, 2023 until January 6, 2024. Yet, his time sheet (Ex. A-1) shows he worked two hours on December 21 & 22, 2023, and which would entitled him to TPD rather than TTD for those days. The parties shall attempt to resolve the amount of temporary benefits payable. If the parties are unable to resolve the TTD/TPD matter, either party may file an application to resolve the matter.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances 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 Claimant bears the burden of proving the right to an increase in AWW and the factual basis to support the determination of a reasonable value of benefits sought to be included in the AWW calculation. *Iler v. Indus. Claim Appeals Office*, 207 P.3d 945 (Colo. App. 2009); § 8-43-201, C.R.S. Section 8-40-201 (19), C.R.S., defines the term "wages" as the money rate at which services rendered are recompensed. The criteria for including a benefit as part of "wages" depends on "whether a 'reasonable, present-day, cash equivalent value' can be placed upon it and whether the employee has 'reasonable access on a day-to-day basis, either actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate reasonable

circumstances.'" *Meeker v. Provenant Health Partners*, 929 P.2d 26, 28 (Colo. App. 1996) *citing Russell v. Colorado Div. of Employment*, 786 P.2d 483, 485 (Colo. App. 1989). *See also e.g.*, Yex v, ABC Supply Co., W.C. No. 4-910-373-01 (ICAO May 16, 2014) (profit sharing bonus found to be fringe benefit excluded from AWW calculation because not determined until the end of calendar year and did not have a present cash value); *Cowand-Feeley v. Century Communications, Inc.*, W.C. No. 4-393-063 (ICAO Apr. 5, 2000)(sales bonus calculated on individual sales included in AWW).

Claimant has failed to meet his burden of proof to establish a basis for inclusion of his past bonuses in the calculation of AWW. Claimant established that he received $2,860.00 in bonuses in the 16 weeks prior to his injury, and testified that they were part of his compensation. Because Claimant offered no credible evidence explaining how either the value of the bonus is determined the ALJ cannot determine whether the bonuses have a "reasonable, present-day, cash equivalent value." Similarly, because no evidence was presented regarding the nature or character of the bonus (e.g., whether it is discretionary, performance-based, or based on some other metric), the ALJ cannot determine whether Claimant immediate expectation interest in receiving bonuses.

With respect to "PTB," review of Claimant's paystubs demonstrates that he was paid $41.50 per hour for items designated as "PTB." The pay periods on which Claimant was paid for PTB also include a separate entries under "Other Benefits and Information" for "PTB taken" and "Paid Time Used," which directly correlate to the hours associated with "PTB" under the "Earnings" section. The "Earnings" section of the paystubs also includes no entry for "vacation" or "PTO," although his timesheet (Ex. A), includes entries for "Pd Time Off." From this, the ALJ infers that "PTB" references "paid time off" Claimant earns and receives as part of his compensation. As such, PTB time is properly included in Claimant's AWW calculation.

As found, based on the 16 weeks before his injury for which paystubs were provided, Claimant's AWW at the time of injury was $1,693.72.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury arising out of the course of his employment with Employer on December 19, 2023.

2. Respondents shall pay for all authorized medical care that is reasonable and necessary to cure or relieve the effects of Claimant's injury according to the Workers' Compensation Medical Fee Schedule.

3. Respondents shall pay for the medical care Claimant received at North Suburban Medical Center on December 19, 2023,

and at CHPG Primary Care on December 27, 2023 and March 14, 2023 according to the Medical Fee Schedule.

4. Claimant is request for temporary total and temporary partial disability benefits for the period of December 20, 2023 to January 14, 2024 is granted. The parties are to attempt to determine the amount of TTD/TPD benefits to which Claimant is entitled during this period. If the parties are unable to resolve the issue, either party may file an application for hearing to resolve the issue.

5. Claimant's average weekly wage at the time of injury was $1,693.72.

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 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 7, 2025

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-252-319-001

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury or occupational disease to his right upper extremity arising out of and in the course and scope of his employment with employer?

FINDINGS OF FACT

1. Claimant testified at hearing that was employed with Employer in their cafeteria. Claimant's job duties included preparing meals to be served in the cafeteria. Claimant filed a work injury report with Employer on September 18, 2024, which reported the injury as follows:

> I first noticed pain in my right for-arm (sic) the first week of September which progressively got worse as the days went on. I believe I was working the grill for both breakfast and lunch from time to time on weekends. We have a new raw hamburger product that requires multiple steps and motions to prepare. Scarping the grill after each burger order is required. We only had bench scrapers until just a week ago to perform this cleaning task.
>
> I believe that having other prep duties for specials that include a lot of repetition, high volume business, long runtimes on the grill, new item cooking procedures, cleaning motions all added to the injury.

2. Respondents filed a First Report of Injury on September 20, 2024. The Employer's First Report of Injury indicated a date of injury of September 2, 2024, and listed the nature of the injuries to be "All other cumulative injuries". The Employer's First Report of Injury also indicated that the Employer was notified of the injury on September 18, 2024.

3. Claimant testified at hearing that he was working on August 24, 2024, which was a weekend. Claimant testified that on Thursday and Friday of that week he was in the back of the house doing cafeteria prep and on Saturday morning (August 24) he was working the grill. Claimant testified that on the weekend, they will have one cook that starts at 5:30 a.m. and a second cook who starts at 10:30 a.m., which is different from the weekdays, when they have 2 cooks present. Claimant testified that Employer had put a new product on the menu that he described as "Smash Burgers". Claimant testified that when he had asked another employee ("Joseph") how the burger run had gone, and Joseph advised him that the burgers stuck to the grill.

4. Claimant testified that the person who was scheduled to work at 10:30 a.m. either was late or was a no show and Claimant was responsible for cooking both breakfast and lunch in addition to putting together a "lunch special" that he was required to do for the lunch menu. Claimant testified that after finishing breakfast, his co-worker "bricked" the grill which Claimant described during his testimony as a method for cleaning the grill to get rid of all the grime from breakfast, and he began working the grill for lunch.

5. Claimant testified that people started coming through for lunch and ordering burgers. Claimant testified that the burgers were sticking to the grill and difficult to flip and began breaking apart when he tried to flip the burgers. Claimant testified he was getting aggravated because the burgers looked bad and were difficult to properly cook and began to stick to the grill. Claimant testified that in an attempt to scrape the grill, he got a bench scraper and began scraping the grill with his right upper extremity. Claimant testified that the bench scraper was not as effective as the other scraper they used, but he and his co-employee could not find the other scraper. Claimant testified that the bench scraper got caught up on the grill and stopped at which time he felt a sharp pain down his arm and up his arm. Claimant testified he screamed obscenities when this occurred.

6. Claimant testified he finished his shift and was scheduled to work the next day, but had his co-employee cook both breakfast and lunch the next day. Claimant testified he was scheduled on August 25, August 26 and August 28, 2024, before he was off for four days in order to attend a wedding out of state.

7. Claimant sought medical treatment at an Urgent Care with Nurse Practitioner ("NP") Matthew Koors on September 16, 2024. Claimant reported to NP Koors that he had right lateral elbow pain that he believed happened at work. NP Koors noted that Claimant was a Cook for Employer and developed right lateral elbow pain that radiates slightly distally. Claimant denied any type of trauma to NP Koors, but reported the pain started after he had been working and was worse at the end of the week. NP Koors noted Claimant should follow up with workers' compensation and provided Claimant with medication including Mobic (meloxicam) and instructed Claimant to ice and rest his elbow.

8. Claimant was next evaluated on September 30, 2024, by Dr. Stefanon. Dr. Stefanon noted Claimant presented with complaints of a burning type pain in his lateral elbow that will radiate down into his wrist that was anywhere from 3-8 out of 10 in intensity. Claimant reported to Dr. Stefanon that the pain was worse when he was at work, working on the grills, opening doors and turning the keys in his car. Claimant reported to Dr. Stefanon that the pain developed as more of a soreness in early September without any specific inciting event before progressively worsening. Claimant reported that he had been off of work since September 13, 2024, and had taken the Mobic a couple of times, but it did not significantly help. Claimant reported that since being off of work he continued to experience significant pain, especially with opening doors, starting his car and other activities. Claimant reported to Dr. Stefanon

that he had a roommate who had tennis elbow and provided him with a sleeve, but the sleeve was too tight.

9. Claimant reported to Dr. Stefanon that he was a full-time employee that worked from approximately 5:30 – 6:00 a.m. until 2:00 p.m. five days per week. Claimant reported that around mid-August there was a change in their burger product that required Claimant to pull out the burger patties, separate them and remove the parchment paper, but sometimes the burgers are stuck together, or the paper is stuck on the burger patty. Claimant described to Dr. Stefanon the method of cooking the burgers and scaping and cleaning the grill while constantly using his upper extremities and continuing to perform other activities such as cooking chicken breast and other items.

10. Dr. Stefanon noted that Claimant's symptoms and physical examination were consistent with lateral epicondylitis. However, Dr. Stefanon opined that based on Claimant's history and examination, the mechanism of injury was not consistent with a work-related injury. Dr. Stefanon noted that based on a review of normal scope and duties of his job, as it relates to the Colorado Division of Worker's Compensation Medical Treatment Guidelines with regards to cumulative trauma conditions, Dr. Stefanon did not feel the Claimant would be at the criteria for six (6) hours of exposure to force and repetition/duration awkward posture and repetition/duration or use of vibratory tools. Dr. Stefanon further noted that based on the history, Claimant likely would not meet the criteria for three (3) hours of exposure given the fact that he does quite a bit of load sharing with the left arm and does a variety of tasks with at least micro breaks in between tasks while waiting for food to cook. Dr. Stefanon opined that any further medical treatment should be pursued through Claimant's primary insurance carrier due to the fact that his condition was likely not work related.

11. Claimant was examined by Dr. Weum on October 7, 2024. Dr. Weum noted that Claimant maintained that his lateral epicondylitis was related to his work, but was not supported by Claimant's evaluation with occupational medicine. Dr. Weum discussed with Claimant general cares for lateral epicondylitis including Voltaren, bracing and ice/heat. Dr. Weum referred Claimant for physical therapy.

12. Claimant began his physical therapy on October 23, 2024. Claimant reported to his physical therapist upon his initial evaluation that in August, while scraping the grill, he felt a sharp pain from his elbow to the neck/back. Claimant reported that grasping or lifting aggravated his shoulder and shortly after the injury he was taken off of work for one month. Claimant reported that during rest his symptoms have been improving but also noted soreness, pain and weakness increase with activity. Claimant reported difficulty with basic everyday tasks such as brushing hair, teeth, lifting a coffee cup, toileting and hygiene.

13. The physical therapist noted that Claimant presented with signs and symptoms consistent with lateral elbow tendinopathy and recommended Claimant continue with therapy one time per week for 8 weeks.

14. Claimant had follow up physical therapy appointments on November 4, 2024, December 11, 2024, December 19, 2024, January 6, 2025, January 13, 2025, January 20, 2025, January 29, 2025, and February 19, 2025

15. Respondents arranged for a job assessment evaluation be performed by Joe Blythe on December 18, 2024. Mr. Blythe authored a report in connection with his job assessment evaluation in which he reviewed the job duties of Claimant's position with Employer. Mr. Blythe observed a co-worker of Claimant performing the job duties in connection with his job assessment evaluation. Mr. Blythe concluded in connection with the job site evaluation that Claimant's did not meet the requisite minimum criteria to develop a repetitive trauma injury resulting in a finding of lateral epicondylitis as a result of his work duties.

16. Mr. Blythe testified at hearing consistent with his report. Specifically, Mr. Blythe testified that while his job site evaluation determined Claimant spent 76% of his day performing tasks with tools, the tools did not meet the criterial of being over 2 pounds. Additionally, while Claimant would have been required to use a lot of hand force, Claimant did not meet the minimum time criteria for developing a cumulative trauma injury.

17. Respondents obtained an Independent Medical Examination ("IME") with Dr. Cebrian on January 30, 2025. In connection with the IME, Dr. Cebrian provided an IME report dated February 13, 2025. Dr. Cebrian reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME report. Dr. Cebrian noted in his recitation of the history involving Claimant's injury that Claimant reported he was working as a cook for Employer in late August 2024 and was having to clean a grill that was particularly difficult due to the new smash burgers that they were using that created a lot of grease on the grill. Dr. Cebrian noted that Claimant reported he was using a putty type knife to clean the grill, and it was very hard to get the grease to come off, and at one point, the putty type knife came to a stop and Claimant felt a sharp pain in his right lateral elbow. Claimant reported to Dr. Cebrian that he thought he had pulled a muscle, but he was not getting better. Dr. Cebrian noted that Claimant indicated his roommate gave him a strap for tennis elbow, but that did not help. Claimant reported to Dr. Cebrian that he looked up tennis elbow online and it said that tennis elbow was from repetitive issues, and so he told his doctors that his symptoms were from repetitive work as a cook.

18. Dr. Cebrian noted that this accident history was not supported by the medical records which did not document a traumatic episode. Dr. Cebrian noted that Claimant's medical history was consistent with a diagnosis of right lateral epicondylitis. Dr. Cebrian reviewed the job site analysis from Mr. Blythe and determined that when comparing Claimant's work duties with the Primary Risk Factor Definition Table in the Medical Treatment Guidelines for cumulative trauma claims, Claimant's job duties did not require Claimant to engage in a forceful and repetitive activity for an amount of time that meets the minimum threshold in the guidelines. Dr Cebrian further found in his report that in evaluating Claimant's job duties set forth in the job site analysis,

Claimant did not have a secondary risk factor that would be related to Claimant's diagnosis in this case.

19. Dr. Cebrian ultimately opined in his IME report that it was not medically probable that Claimant's right lateral epicondylitis was related to his activities at work for Employer.

20. Dr. Cebrian testified at hearing consistent with his IME report.

21. In this case, Claimant bears the burden of proof to establish he sustained a compensable injury or occupational disease arising out of and in the course and scope of his employment with Employer. Claimant's testimony at hearing that he injured his right upper extremity on August 24, 2024 when he was pressing hard to scrape grease off the grill and felt immediate pain in his elbow that went down his arm and up his arm to such an extent that he screamed obscenities is not supported by the medical records in which he specifically denied trauma when reporting the injury.

22. Insofar as Claimant's testimony conflicts with the accident history Claimant initially reported to his medical providers and the history provided to Employer on September 18, 2024, the ALJ credits the medical records and the records from Employer over Claimant's testimony at hearing. The ALJ notes that these histories were provided at a time contemporaneously closer to the events in question and were somewhat consistent with each other. The ALJ therefore finds Claimant's testimony at hearing regarding the events leading up to his injury to be not persuasive.

23. The ALJ credits the testimony and opinions expressed by Dr. Cebrian in his IME report and testimony and finds that Claimant has failed to establish that it is more probable than not that he sustained either a work-related injury on August 24, 2024, that resulted in the need for medical treatment. The ALJ further credits the testimony and opinions expressed by Dr. Cebrian in his IME report and testimony and finds that Claimant has failed to establish that it is more probable than not that he sustained a compensable occupational disease related to his work duties with Employer.

24. Based on these findings, the ALJ finds that Claimant has failed to establish that it is more probable than not that he sustained a compensable injury or occupational disease arising out of and in the course and scope of his employment with Employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016.

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

3. To qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of his employment at the time of the injury. *See* Section 8-41-301(1)(b), C.R.S. 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 the employment and during an activity that had some connection with the work-related function. *See Triad Painting Co. v. Blair*, 812 P.2d 638 641 (Colo. 1991). The "arising out of" requirement is narrower than the "in the course of" requirement. *See Id.* For an injury to arise 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. *See Id.* at 641-642.

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

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the

employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

7. 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).

8. As found, Claimant's testimony as to the facts giving rise to a claim for an injury occurring on August 24, 2024, while at work is found to be not credible. Based on the finding that Claimant's testimony regarding this incident is not credible, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer on August 24, 2024.

9. As found, the testimony and opinions expressed by Dr. Cebrian at hearing and in his IME report are found to be credible with regard to the issue of whether Claimant sustained a compensable occupational disease arising out of and in the course of his employment with Employer. Insofar as the testimony and opinions of Dr. Cebrian are found to be credible, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with Employer with a date of onset of September 2, 2024.

10. As found, Claimant has failed to prove by a preponderance of the evidence that the medical treatment related to Claimant's right upper extremity is related to an occupational disease with an onset date of September 2, 2024 or a specific injury of August 24, 2024.

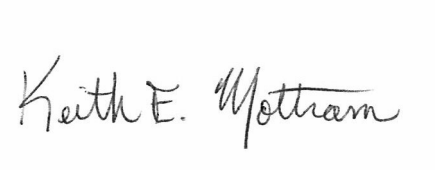
ORDER

It is therefore ordered that:

1. Respondents are not liable for Claimant's claim for medical treatment based on an injury of August 24, 2024, or an occupational disease with a date of onset of September 2, 2024, and Claimant's claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (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 petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 11, 2025



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-183-433-002

PROCEDURAL BACKGROUND

The present matter involves a remand from the Industrial Claim Appeals Office (ICAO). The parties had a prior hearing before ALJ Cannici on September 21, 2023. The issues in that hearing were Temporary Partial Disability (TPD) benefits and penalties for non-payment of TPD. ALJ Cannici issued Findings of Fact, Conclusions of Law, and Order (FFCLO) on November 9, 2023. The ALJ awarded TPD benefits totaling $30,900.44 and penalties in the amount of $25.00 per day from March 29, 2022 through July 19, 2023 totaling $11,950.00.

On December 4, 2023 Respondents filed a Petition to Review (PTR) the November 9, 2023 FFCLO. Respondents filed their Brief in Support of Petition to Review (BIS) on January 4, 2024. Claimant filed his Brief in Opposition to the Petition to Review (BIO) on January 24, 2024. Claimant's BIO asserted that Respondents' PTR appealed the ALJ's award of penalties but failed to support their position with any argument in their BIS. The failure to brief the penalties issue thus violated §8-43-301(14), C.R.S. and C.R.C.P. 11(a) and warranted the recovery of attorney's fees.

The ICAO issued its opinion on April 1, 2024. The ICAO affirmed the ALJ's award of TPD. On the issue of attorney's fees, the ICAO determined that Respondents had not had an adequate opportunity to respond to the issue. The ICAO thus remanded the matter to the ALJ with instructions to conduct appropriate proceedings to resolve Claimant's request for attorney's fees and costs.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that Respondents' challenge of the ALJ's award of penalties, but failure to brief the issue in their BIS before the ICAO, violated §8-43-301(14), C.R.S. and C.R.C.P. 11(a).

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to recover attorney's fees and costs for Respondents' violation of §8-43-301(14), C.R.S. and C.R.C.P. 11(a).

FINDINGS OF FACT

1. Respondents' PTR appealing the ALJ's November 9, 2023 FFCLO provided, in relevant part, "[t]he Order finding that Respondents shall pay a penalty of $25 per day from March 29, 2022, through July 19, 2023, or 478 days, totaling $11,950 is not supported by the evidence and applicable law."

2. However, Respondents did not address the ALJ's penalty award in their BIS. Respondents listed only the following issue for consideration:

> Whether ALJ Cannici erred in finding that Claimant proved by a preponderance of the evidence that he is entitled to recover Temporary Partial Disability (TPD) benefits for the period October 5, 2021, through August 20, 2023, except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022, and October 20, 2022; and whether ALJ Cannici abused his discretion in denying Respondents' right to call Mr. Bartz, Respondents' employer representative, as a rebuttal witness.

3. The BIS did not assert that a reversal of the penalty award was well-grounded in fact or warranted by existing law. The BIS also did not contend or argue that existing law should be extended, modified, or reversed, to permit the reversal of the ALJ's penalty award. At the conclusion of their BIS, Respondents specifically requested the ICAO to determine that ALJ Cannici's FFCLO regarding TPD was not supported by the evidence and he abused his discretion in denying Respondents the right to call Mr. Bartz as a rebuttal witness. Respondents did not ask the ICAO to reverse, remand, or in any way disturb the ALJ's award of penalties.

4. Upon receipt of Respondents' BIS, Claimant's counsel e-mailed Respondents' counsel on January 11, 2025. Counsel asserted that Respondents had not identified or argued any issue in the BIS appealing the penalty imposed by the ALJ. Because that portion of the FFCLO was not appealed, Respondents were required to comply with the ALJ's penalty award. Specifically, Respondents owed a total of $11,950 penalties that was apportioned 50% to Claimant and 50% to the Colorado Uninsured Employer (CUE) fund. Claimant's counsel further asserted "[p]ayment needs to be issued to both identified parties immediately…If Respondents are somehow contenting they are continuing an appeal of the ALJ's penalty order without raising the issue" in the BIS, then Claimant would be seeking attorney's fees and costs for a violation of §8-43-301(14), C.R.S

5. On January 18, 2024 Respondents' counsel stated that "identifying or arguing an issue in a brief is not a prerequisite for a review as long as the issue was identified in the petition to review. As such the penalties issue has been appealed, whether argued or not, and that portion of the order is not final." Claimant's counsel responded on the same day that the purpose of appealing the penalty award was "simply to avoid that part of the order becoming final. Respondents have not identified a single legal or factual problem with the ALJ's award of penalties in this situation." He noted Claimant would be seeking attorney's fees.

6. On January 24, 2024 Claimant filed a BIO to the BIS. Counsel argued that the ALJ's award of penalties was lawful and not subject to reversal. Over three pages, Claimant's counsel discussed the standard of review for penalties. She mentioned the two-step analysis under §8-43-304(1), C.R.S. to determine whether penalties may be

imposed. Counsel also addressed how Respondents' failure to pay TPD violated W.C.R.P. 5-5(B).

7. Regarding the matter of penalties, the ICAO stated "the respondents do not address the penalty issue in the brief in support of the petition to review. Although a failure to file a brief is not jurisdictional, in view of the respondents' failure to make any argument or allegation of error, we will not search the record for potential errors so as to assume the role of advocate for an appealing party."

8. Alonit Katzman, Esq. testified at the hearing in the present matter. From 2011 until March, 2024 she was a Workers' Compensation attorney at the Elliott Law Offices. She was accepted as an expert in Workers' Compensation law in Colorado. Ms. Katzman was the lead attorney in responding to Respondents' BIS. She was unable to identify any specific issues or concerns that Respondents had with the penalties award in the FFCLO. Respondents' merely made the generic claim that the penalties awarded were "not supported by the applicable law."

9. Ms. Katzman explained that she was required to respond to Respondents' endorsement of the penalty award referenced in their PTR, even though they failed to argue the issue in their BIS. She remarked that

> I absolutely had to brief the issue. If it's raised in a petition to review, even if it's preserved, even if it's not argued, it is my [job] as an advocate and in the best interest of my client, to brief the issue. I cannot waive an argument just because the opposing counsel waived it, if they have not officially withdrawn it. Therefore, I was forced as a representative of my client to respond to the issue, even though it was not addressed in the [BIS].

10. Ms. Katzman explained that under §8-43-301(14), C.R.S. an attorney must assert a well-grounded argument in fact or existing law. Notably, "although you can write anything in a petition to review, you have to sign it saying that, you know, you have a well-founded argument. That is not imposed- and it can't be imposed for any improper purposes, which includes delay or unnecessary increase in cost of litigation."

11. Ms. Katzman stated that the PTR was filed for purposes of delay because Respondents were not paying the penalty at the time. Respondents' retention of the penalty funds allowed them to earn interest. She concluded that the PTR was filed in violation of §8-43-301(14). Notably, even if it was not originally a violation, when opposing counsel failed to withdraw the penalty issue after notification, it became a violation of §8-43-301(14). Ms. Katzman reasoned that "[c]ase law, and the interpretation of §8-43-301(14) would say that, yes, you need to create an argument for it to be a well-founded in fact and warranted in existing law for a good faith argument."

12. Claimant's counsel sought attorney's fees for the time it took to address Respondents' penalty issue in drafting the BIO. Ms. Katzman testified that her submitted time was specific to addressing Respondents' appeal of the penalties award. She

contemporaneously kept track of her time responding to the issue of penalties. Ms. Katzman charged $300 per hour because that was the rate she charged in other cases that involved representation on an hourly basis. She spent 3.8 hours addressing Respondents' appeal of the penalty award. Multiplying 3.8 times $300.00 per hour yields a total of $1,140.00 in attorney's fees.

13. At the conclusion of the hearing, Claimant's counsel advised that he would be submitting an affidavit for the time he spent preparing for the hearing, attending the hearing, and drafting a position statement. Affidavits reflect that Mark Elliott's spent 3 hours on the matter, at $300.00 per hour, for a total of $900.00 in attorney's fees. Erin Montgomery's spent 7.8 hours drafting Claimant's proposed FFCLO in this matter. Multiplying 7.8 times $300.00 per hour yields a total of $2,340.00 in attorney's fees.

14. Claimant has established it is more probably true than not that Respondents' challenge of the ALJ's award of penalties, but failure to brief the issue in their BIS before the ICAO, violated §8-43-301(14), C.R.S. and C.R.C.P. 11(a). The record reveals that the penalty issue in the PTR was not well-grounded in fact, warranted by existing law or based on a good faith argument for the extension, modification or reversal of existing law. Despite preserving the penalty issue in the PTR, Respondents presented no legal argument supporting their position in the BIS.

15. The record reflects that Respondents' generically asserted the penalty issue in their PTR. They simply noted that the evidence and applicable law did not support the penalty award. As the ICAO has made clear, they cannot and should not search the record for potential factual disputes or legal errors. If Respondents had factual or legal grounds to support the reversal of the penalty award, they were required by §8-43-301(14), C.R.S. and C.R.C.P. 11(a) to provide support in their BIS. Here, the ICAO stated, "the respondents do not address the penalty issue in the brief in support of the petition to review."

16. Respondents seem to conflate the concepts of preserving an issue on appeal and presenting a good faith argument in support of their position based on the requirements of 8-43-301(14). Respondents' endorsed the penalty issue in the PTR and preserved it for appeal. However, they failed to develop their position in the BIS. The absence of any argument to support their position suggests their contenion was not well-grounded in fact and did not present a good faith basis for the extension, modification or reversal of existing law. Moreover, even after being apprised that their actions might violate §8-43-301(14), C.R.S. they did not withdraw the PTR. Respondents then essentially abandoned the penalty claim in the BIS. Respondents' actions suggest an improper purpose of delaying payment of the penalties as ordered by the FFCLO.

17. Ms. Katzman provided expert testimony that the PTR and subsequent lack of development in the BIS constituted a violation of §8-43-301(14), C.R.S. She credibly explained that under §8-43-301(14), C.R.S. an attorney must assert a well-grounded argument in fact or existing law. Ms. Katzman remarked that the PTR was filed for

purposes of delay because Respondents were not paying the penalty at the time. Respondents' retention of the penalty funds allowed them to earn interest. She concluded that the PTR was filed in violation of §8-43-301(14). Notably, even if it was not originally a violation, when opposing counsel failed to withdraw the penalty issue after being notified by Claimant's counsel about the matter, it became a violation of §8-43-301(14), C.R.S.

18. Respondents' endorsement of the penalty issue required Claimant to address the matter and defend against its reversal in the BIO. Ms. Katzman credibly explained that she was required to respond to Respondents' endorsement of the penalty award in their PTR, even though they failed to develop the issue in their BIS. She spent 3.8 hours addressing Respondents' appeal of the penalty award. Multiplying 3.8 times $300.00 per hour yields a total of $1,140.00 in attorney's fees. Furthermore, Mr. Elliott spent 3 hours on the matter at $300.00 per hour for a total of $900.00 in attorney's fees. Similarly, Ms. Montgomery spent 7.8 hours drafting Claimant's proposed FFCLO in this matter. Multiplying 7.8 times $300.00 per hour yields a total of $2,340.00 in attorney's fees. Combining all the hours yields a total of $4380.00 in attorney's fees in drafting a BIO, preparing for and conducting this remand hearing, and drafting a proposed FFCLO.

19. The record reflects that Respondents endorsed the issue of penalties in their PTR, but failed to present any argument in support of their position in the BIS. A reasonable inference is that Respondents' endorsed the penalty issue for the improper purpose of delaying payment of funds ordered in the FFCLO. The record reveals that Respondents' filing of a PTR was only designed to preserve the penalty issue and cause delay. It was not well-grounded in fact and did not present a good faith argument for the extension, modification or reversal of existing law in violation of §8-43-301(14), C.R.S. and C.R.C.P. 11(a). Claimant's counsel is thus entitled to an award of reasonable attorney's fees totaling $4380.00.

CONCLUSIONS OF LAW

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

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

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

4. The reasonableness of an insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Indus. Claim Appeals Off.,* 107 P.3d 965 (Colo. App. 2003) ("reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact.") *In Re Claim of Murray*, W.C. No. 4-997-086-02 (ICAO, Aug. 16, 2017). The question of whether a party's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005); *see Paint Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). Where the violator fails to offer a reasonable factual or legal explanation for its actions, the ALJ may infer the opposing party sustained its burden to prove the violation was objectively unreasonable. *Human Resource Co. v. Indus. Claim Appeals Off.*, 984 P.2d 1194, 1197 (Colo. App. 1999).

5. Section 8-43-301(14), C.R.S. provides in relevant part:

> The signature of an attorney on a petition to review constitutes a certificate by the attorney that such attorney has read the petition and that, to the best of the attorney's knowledge, information, or belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not imposed for any improper purpose, such as to harass, cause delay, or unnecessary increase the cost of litigation. If a petition or brief is signed in violation of this subsection (14), the director, the administrative law judge, or the panel shall award reasonable attorney fees and costs to the party incurring the fees and costs as a result of the improper actions.

§8-43-301(14), C.R.S; CRCP 11(a). *See Jiminez*, 107 P.3d at 967 (noting that §8-43-301(14), C.R.S authorizes attorney's fees and costs against party litigating appeal that is not well-grounded in fact and law or is not a good faith argument for extension, modification, or reversal of existing law). However, "[r]easonable expenses, including a reasonable attorney's fee, shall not be assessed if, after filing, a voluntary dismissal or withdrawal is filed as to any claim, action, or defense within a reasonable time after the attorney . . . knew or reasonably should have known, that he would not prevail." C.R.C.P. 11(a). The party asserting a violation of §8-43-301(14), C.R.S bears the burden of proof. *See City & County of Denver v. Indus. Claim Appeals Office,* 58 P.3d 1162 (Colo. App. 2002) (the burden of proof rests upon the party asserting the affirmative of a proposition).

6. Resort to an appellate forum is not taken in bad faith when there is a reasonable basis for the legal challenge to payment of the claim. *BCW Enters., Ltd. v. ICAO*, 964 P.2d 533 (Colo. App.1997); *see Tozer v. Scott Wetzel Servs*., Inc., 883 P.2d 496 (Colo.App.1994) (appeal is unreasonable or frivolous only if it has no rational basis in law or fact). Furthermore, the failure to file a brief does not bar the Panel from ruling on a timely petition to review. *See Ortiz v. Indus. Comm'n,* 734 P.2d 642 (Colo.App.1986) (failure to file a brief or the untimely filing of a brief is not a jurisdictional defect).

7. A party must advance sufficient legal argument to indicate a basis for claims for relief. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186, 191 (Colo. App. 2002). When a party does not brief his argument in support of his petition to review, the effectiveness of the appellate tribunal's review is very limited. *In the Matter of the Claim of Gregorio Unzueta Soto*, No. W.C. No. 4-995-225-003 (ICAO, Mar. 1, 2021). When a party fails to file a brief including arguments with supporting legal authority as contemplated by the Rules, the appellate tribunal is not required to search for citations and authorities that might support the party's vague legal position. *In the Matter of the Claim of J.C. Huddleston*, W.C. No. 4-606-660 (ICAO, July 29, 2005). Failure to brief an issue on appeal may constitute abandonment of the issue. *In the Matter of the Claim of John L. Welch*, No. W.C. Nos. 4-486-960 & 4-487-243 (ICAO, Dec. 24, 2002).

8. As found, Claimant has established by a preponderance of the evidence that Respondents' challenge of the ALJ's award of penalties, but failure to brief the issue in their BIS before the ICAO, violated §8-43-301(14), C.R.S. and C.R.C.P. 11(a). The record reveals that the penalty issue in the PTR was not well-grounded in fact, warranted by existing law or based on a good faith argument for the extension, modification or reversal of existing law. Despite preserving the penalty issue in the PTR, Respondents presented no legal argument supporting their position in the BIS.

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essentially abandoned the penalty claim in the BIS. Respondents' actions suggest an improper purpose of delaying payment of the penalties as ordered by the FFCLO.

11. As found, Ms. Katzman provided expert testimony that the PTR and subsequent lack of development in the BIS constituted a violation of §8-43-301(14), C.R.S. She credibly explained that under §8-43-301(14), C.R.S. an attorney must assert a well-grounded argument in fact or existing law. Ms. Katzman remarked that the PTR was filed for purposes of delay because Respondents were not paying the penalty at the time. Respondents' retention of the penalty funds allowed them to earn interest. She concluded that the PTR was filed in violation of §8-43-301(14). Notably, even if it was not originally a violation, when opposing counsel failed to withdraw the penalty issue after being notified by Claimant's counsel about the matter, it became a violation of §8-43-301(14), C.R.S.

12. As found, Respondents' endorsement of the penalty issue required Claimant to address the matter and defend against its reversal in the BIO. Ms. Katzman credibly explained that she was required to respond to Respondents' endorsement of the penalty award in their PTR, even though they failed to develop the issue in their BIS. She spent 3.8 hours addressing Respondents' appeal of the penalty award. Multiplying 3.8 times $300.00 per hour yields a total of $1,140.00 in attorney's fees. Furthermore, Mr. Elliott spent 3 hours on the matter at $300.00 per hour for a total of $900.00 in attorney's fees. Similarly, Ms. Montgomery spent 7.8 hours drafting Claimant's proposed FFCLO in this matter. Multiplying 7.8 times $300.00 per hour yields a total of $2,340.00 in attorney's fees. Combining all the hours yields a total of $4380.00 in attorney's fees in drafting a BIO, preparing for and conducting this remand hearing, and drafting a proposed FFCLO.

13. As found, the record reflects that Respondents endorsed the issue of penalties in their PTR, but failed to present any argument in support of their position in the BIS. A reasonable inference is that Respondents' endorsed the penalty issue for the improper purpose of delaying payment of funds ordered in the FFCLO. The record reveals that Respondents' filing of a PTR was only designed to preserve the penalty issue and cause delay. It was not well-grounded in fact and did not present a good faith argument for the extension, modification or reversal of existing law in violation of §8-43-301(14), C.R.S. and C.R.C.P. 11(a). Claimant's counsel is thus entitled to an award of reasonable attorney's fees totaling $4380.00.

ORDER

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

1. Respondents' endorsement of the penalty issue in their PTR but failure to develop the argument in their BIS constituted a violation of §8-43-301(14), C.R.S. and C.R.C.P. 11(a).

2. Respondents shall pay $4,380.00 in attorney fees to Claimant's counsel on behalf of Claimant.

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

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

DATED: March 11, 2025.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

I. Whether Respondents established, by a preponderance of the evidence, that they are entitled to withdraw their May 7, 2024, General Admission of Liability (GAL) on the basis that Claimant did not suffer a compensable injury.

II. Whether Respondents are entitled to recover the costs of all medical and indemnity benefits paid under the claim on the basis that Claimant induced the award of benefits through fraud.

FINDINGS OF FACT

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

1. Employer operates an excavation company that provides irrigation services to the agricultural community, including irrigation system installation and maintenance. Claimant worked as a general laborer for the company.

2. On April 8, 2024, Claimant alleges that he and his foreman, Rick Barrow, were pulling pipe from the company's lay down yard[1] and placing it onto a trailer for transport to finish a repair job in Hawley, Colorado. Claimant explained that he and Mr. Barrow were lifting a 20 foot long section of 12 inch PVC pipe[2] onto the trailer when he injured his left shoulder/arm. According to Claimant, as he and Mr. Barrow were loading the pipe, his shoulder gave out and he dropped his end of the pipe before he could place it on the trailer. Claimant testified that he was able to catch the pipe before it fell to the ground but in the process he felt a popping/pulling sensation in his left arm resulting in a very sore biceps. Claimant testified that when the alleged injury occurred he shouted, "Ow, that hurt Boss!" to Mr. Barrow. Per Claimant he finished the work day and retired home for the evening where he watched TV before going to bed around 10:00 p.m.

3. Claimant would report this version of events to his medical providers on April 11, 2024 and to Employer's secretary, Stacey, who on April 19, 2024 completed and submitted the first report of injury to the insurer at his request. (RHE B, Bates 75).

4. Relying on Claimant's representations to his medical providers and employer that his injury occurred at work on April 8, 2024, Insurer accepted liability for Claimant's left upper extremity injuries.

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[1] Described as an outdoor area adjacent to Employer's shop where large parts and long sections of pipe where stored.
[2] Weighing 90-95 pounds.

5. In mid-June 2024, shortly after the Father's Day holiday, Insurer was contacted by Matthew Carrigan, Employer's Training and Safety Officer, who raised concern that Claimant had actually suffered a non-work related injury to his left shoulder and arm on Saturday, April 6, 2024 and that Claimant fabricated the injury he alleged occurred at work on April 8, 2024.

6. Dylan Lang, an investigator for Insurer for more than six years, undertook an investigation into the veracity of Claimant's assertion that he was injured while lifting and loading pipe at work on April 8, 2024. Mr. Lang testified that he contacted several persons known to have information regarding Claimant's alleged work injury including Matthew Carrigan, Rick Barrow, Lara Woods, Ruby Mason, and Claimant himself. Each of these individuals testified at the hearing.

7. Mr. Lang testified that his investigation led him to the conclusion that Claimant probably had not injured himself at work loading pipe but instead had injured himself on April 6, 2024, while helping his dad install carpet at his dad's home.

8. Lara Woods is Claimant's former girlfriend and the mother of Claimant's minor son, Mikey, over whom they share custody. In April 2024, Ms. Woods testified that she and Claimant had a very amicable relationship and that they communicated every day in person, by phone, and by text message about a variety of subjects. Ms. Woods explained that while she and Claimant were no longer together as a couple at the time of Claimant's alleged injury, they had remained friends, and that she frequently provided Claimant with financial support. At the time of the hearing, Claimant and Ms. Woods were involved in a custody dispute over their son, which began around Father's Day 2024. However, she testified that her appearance was not driven by this dispute but rather because she was subpoenaed by Respondents.

9. On April 8, 2024, at 5:56 p.m., following his workday wherein he claimed to have injured his left shoulder/arm, Claimant sent a text message to Ms. Woods stating:

> I hurt my shoulder this weekend helping my dad. Thought it was good but nope FML so I probably won't get Mikey tonight my shoulder is hurting bad"

(RHE C, Bates 78). Claimant requested that Ms. Woods arrange to bring him some "pain patches". *Id*. at Bates 78-79.

10. Claimant did not reference any injury or injury event occurring at work on that date; only that he had injured himself at this dad's the weekend before. Although she could not recall the exact date, Ms. Woods testified that in the next couple of days when Claimant was either picking up or dropping off their son, she had an in-person conversation with him about his left shoulder and arm. Claimant explicitly told Ms. Woods that he had hurt his left shoulder and arm while helping his dad lay carpet.

Similarly, Claimant told Ruby Mason that he'd hurt his shoulder while helping out his dad over the weekend. Ms. Mason is the mother of Lara Woods and grandmother of Mikey. She and Ms. Woods reside in the same house. She recalls that in the early part of the week beginning April 8, 2024, Claimant was at her residence either picking up or dropping off Mikey, when she noticed Claimant grimacing and rubbing his left shoulder and expressing that his left arm really hurt. She asked Claimant what had happened and he reported that he hurt left shoulder and arm while helping his dad. Claimant never said anything to Ms. Mason about an alleged work related injury.

11. On Tuesday, April 9, 2024, at 2:28 p.m., Claimant sent a text message to Ms. Woods stating that Employer was "on a firing kick today, already fired 2 people. I am next". (RHE C, Bates 79). There is no mention of any injury having occurred at work in this text message.

12. On April 10. 2024, at 6:05 p.m., when texting with Ms. Woods about assembling a bed for their son, Claimant specifically writes that his "[a]rm is getting better" but that it still hurts when [he] pick[ed] shit up". (RHE C, Bates 79). This is in direct contradiction to Claimant's testimony that he was much more sore on Tuesday, April 10, 2024, than he had been over the weekend, that his shoulder and arm were getting worse with increased swelling, and that he was experiencing excruciating pain.

13. On April 11, 2024 at 9:40 a.m., Claimant sent a text message to Ms. Woods reporting that he tore the big muscle of his bicep. (RHE C, Bates 81). This is the same date that Claimant first sought medical treatment. Indeed, Claimant presented to the Prowers Medical Center emergency department on April 11, 2024 at 8:19 a.m. where he reported that he was lifting PVC pipe on Monday [April 8, 2024] when he felt his arm give out. He described that he had experienced some initial soreness and that when he would flex the left bicep muscle he could see a deformity in the muscle, but he denied any numbness, tingling, or weakness. (RHE A, Bates 3). Nowhere in the history that Claimant gave to the ER providers did he reference the injury he sustained on Saturday, April 6, 2024 while helping his dad lay carpet. Additionally, nowhere in Claimant's description of the mechanism of injury did he describe that he had dropped the pipe, only that he was lifting it. *Id*. Claimant was diagnosed with a left biceps tear/strain and instructed to rest his arm in a sling. The ER provider also assigned light duty activities with the left hand and wrist and no lifting with the left upper extremity. He also referred claimant for an orthopedic evaluation. *Id*. at Bates 5.

14. Matthew Carrigan testified that he spoke with Claimant by telephone while he (Claimant) was at the ER on April 11, 2024, and that when he asked Claimant whether he had hurt himself at work, Claimant told Mr. Carrigan that he had not. Mr. Carrigan explained that in the next several days, he began receiving medical records from Claimant's medical providers indicating that Claimant had sustained a work injury to his left shoulder and arm. Mr. Carrigan also learned that the insurer had filed a general admission accepting liability for the claim. Mr. Carrigan explained that he was very confused and even a little shocked by this. When asked why he didn't contact the

insurer for clarification and/or to inform them of Claimant's statement to him that he had not been injured at work, Mr. Carrigan explained that: (1) this was the first workers' compensation claim he had encountered as the Safety Officer in the five years he'd been with Employer, (2) that he has little to no experience with workers' compensation claims, (3) that he reached out to business partners for advice and was told to defer to the insurer. Mr. Carrigan explained further that he felt that the doctors and insurer were more knowledgeable and experienced and that he did not know that he had the ability to provide any input to the claims representative particularly since the medical providers had listed this as a work related injury.

15. As part of his text message conversation with Ms. Woods on April 11, 2024 at 9:40 a.m., after he checked in to the ER and probably after he spoke with Mr. Carrigan, Claimant sent a text message to Ms. Woods noting: "Carrigan is going to fire me". (RHE C, Bates 82).

16. When asked about the text message sent on April 16, 2024, from Claimant to Ms. Woods in which Claimant wrote, "Fuck carrigans,"[3] Mr. Carrigan explained that while he was disheartened to read this, he did not find it surprising because based on his discussions with Claimant about his work performance and work attendance, Claimant likely knew that his employment was coming to an end. Mr. Carrigan explained that Claimant had not been a good employee. According to Mr. Carrigan, Claimant was unskilled and his performance was poor, he had a significant number of absences and would frequently call off at the very last minute, and that at one point he had had consecutive no call/no show violations that would have otherwise resulted in termination but for the fact that he (Mr. Carrigan) was trying to "do right" by Claimant and help him get back on his feet.

17. Eight days after his April 11, 2024 conversation with Mr. Carrigan while Claimant was in the ER and writing that "Carrigan was going to fire [him]" and three days after writing "Fuck carrigans", the first report of injury was filed, commencing claimant's workers' compensation claim. (RHE B).

18. After receiving work restrictions, Claimant told Ms. Woods that since he was not able to work that he might as well go ahead and file a workers' compensation claim. Ms. Woods asked Claimant why he would file a workers' compensation claim since he hadn't really injured himself at work and that it wasn't a good idea to do this. Claimant merely brushed her off. Ms. Mason overheard this conversation between Claimant and Ms. Woods and immediately thought to herself, in agreement with Ms. Woods, that what Claimant was doing wasn't right.

19. Rick Barrow was a foreman for the Employer at the time of Claimant's alleged injury. As a foreman, Mr. Barrow testified that he used a Daytimer to record information about the jobs which he was involved in each day. This included the crew performing the work, the equipment used on the job and the parts used for the job among other things. He was clear that if there was ever an injury on his jobsite that he

[3] See RHE C, p. 85.

would absolutely record that in his Daytimer. Mr. Barrow explained that in addition to documenting all injuries in his Daytimer, he would either notify the Safety Officer or the office, or he would refer injured employee to the Safety Officer and/or the office to report the injury, and this too would be documented in his Daytimer.

20. Mr. Barrow could not state definitively whether he returned to the lay down yard with Claimant to retrieve additional pipe on April 8, 2024, because eight months had expired between Claimant's alleged injury and the hearing and because the time spent returning to the lay down yard during a job is not something that is billed to the customer. Thus, he testified that he wouldn't routinely document such visits in his Daytimer. However, he was very clear to testify that if he and Claimant had returned to the yard on April 8, 2024 and Claimant was injured while loading pipe onto the trailer shouting, "Ow, that hurt, Boss!", he, without question, would have documented that in his Daytimer, testifying further that he would have referred Claimant to the Safety Officer (Matthew Carrigan) and/or to the office to speak with Stacey to initiate a report of injury.

21. Mr. Barrow clearly recalled being contacted by Insurer's investigator, Mr. Lang, in regard to Claimant's alleged April 8, 2024 work injury, and that he was in possession of his Daytimer during that contact. He testified that during his conversation, with Mr. Lang, he reviewed his Daytimer for April 8, 2024. Mr. Barrow testified that there were no notes indicating that Claimant was injured or reported any injury to him on April 8, 2024.

22. Claimant contends that he told Mr. Barrow again on April 9, 2024 and April 10, 2024 that his left arm was hurting and that Mr. Barrow's only reaction was to ask Claimant what he (Mr. Barrow) was supposed to do about it. Mr. Barrow emphatically stated that he would never have said anything like that to Claimant or any other employee, and that if Claimant had been complaining of ongoing pain from an event that was purported to have occurred at work, he would have sent Claimant to the Safety Manager and/or to the office, and that he would have documented this in his Daytimer. Mr. Barrow testified that he was confident that Claimant was not involved in an injury event on April 8, 2024. He was extremely surprised to learn that claimant had filed a workers' compensation claim and stated that he thinks Claimant is trying to "put one over on the company."

23. As referenced above, Mr. Lang spoke with Claimant by phone on June 26, 2024. When asked to recount what had occurred, Claimant reiterated that he injured his left shoulder while working with Mr. Barrow lifting pipe onto a trailer to complete a repair job. Unbeknownst to Claimant, Investigator Lang had already reviewed the April 8, 2024 text message that Claimant had sent to Ms. Woods wherein he told her that he had injured his left upper extremity laying carpet at his dad's the weekend prior. Having that information, Investigator Lang specifically asked Claimant whether he had hurt his shoulder, arm, or any other body part outside of work prior to April 8, 2024. Claimant unequivocally denied sustaining an injury outside of work.

24. Respondents continued to rely on Claimant's statement and version of events surrounding his alleged work injury, and, as a result of Claimant's representations, Insurer continued to pay lost wages and medical benefits to Claimant up to and including authorization of surgery directed to Claimant's left shoulder and arm. (RHE A).

25. Claimant continued to assert that he was injured at work and not at his dad's the weekend prior throughout the claim and even attempted to do so at the hearing itself. Indeed, Claimant asserted that he informed Ms. Woods prior to April 8, 2024 that he had injured his shoulder at his dad's house and that the text message he sent to Ms. Woods on April 8, 2024, was about the work injury. He further claimed to have spoken to Ms. Woods directly on April 8, 2024 either in person or by phone and told her that he'd hurt himself at work earlier that same day. Ms. Woods contradicted Claimant, testifying that she had no such conversation with Claimant on April 8, 2024, either in person or by phone. Per Ms. Woods, the only communication from Claimant on April 8, 2024, regarding an injury was the text message, he sent at 5:56 p.m., in which Claimant stated that he had injured his shoulder at his father's house. (See generally, RHE C, Bates 78). Ms. Woods testified that it was not until days after April 8, 2024, that Claimant presented her with a new story that he had hurt himself at work on April 8, 2024. Notably, Ms. Woods pointed out that claimant had shared this alternate version of events with her days after he had already told her he had hurt himself at his father's house and after he had expressed his concerns to Ms. Woods that he was likely to be fired. *Id*. at Bates 79, 82.

26. Based upon the evidence presented, the ALJ finds Claimant's testimony regarding his alleged work injury contradictory and unreliable. Indeed, Claimant alleges that the injury that occurred at his dad's did not cause significant pain, which is why he did not seek medical treatment on April 6, 2024 or April 7, 2024. Yet he also testified that when was helping his dad with carpeting on April 6, 2024 that he felt a "very sharp pain," like he pulled a muscle in his left arm when lowering the roll of carpet to the ground, and that he shouted, "Ow, that hurt!" (notably the same words he shouted to Mr. Barrow when asserting the alleged work injury in this case). Claimant also testified at hearing that following the alleged work injury on April 9, 2024 that he was in "excruciating pain" but despite this, he did not seek medical attention. Likewise, Claimant testified that his shoulder and arm were still very sore on April 10, 2024 and that he complained to Rick Barrow all day about his pain. Yet, contrary to Claimant's assertions at hearing that his pain was excruciating and ongoing, in real time Claimant was reporting to Ms. Woods, in the text message that he sent her on April 10, 2024 at 6:05 p.m., that his "arm [was] getting better." (RHE C, Bates 79).

27. Claimant's responses to interrogatories further serve to expose the unreliable nature of his statements/testimony. In his original interrogatory answers submitted on November 11, 2024, Claimant was very specifically asked if he had sustained any injury or done anything to hurt himself over the weekend preceding Monday, April 8, 2024 and Claimant's response was unequivocally no, that he had done nothing over the weekend and furthermore, that he did not help his dad in any way with

the carpeting project. As the hearing drew closer, Claimant submitted his first supplemental responses to interrogatories on January 10, 2025 in which he admits that he was at his dad's helping with the carpeting project but continued to deny that he sustained any injury. Claimant subsequently submitted a second set of supplement responses to interrogatories on January 13, 2025, on the eve of hearing. Approximately one week earlier, Claimant called Ms. Woods by telephone in an attempt to find out why Ms. Woods and Ms. Mason were testifying against him and what they were going to say. Ms. Woods advised Claimant that she was not comfortable talking with him about it. This apparently was enough for Claimant to realize that his assertion of injuring himself at work was under heavy scrutiny and come clean about the injury that occurred at his father's house for when he submitted his second set of interrogatories on the last day before hearing, Claimant admitted that he injured his left upper extremity while helping his dad with a carpeting project. Indeed, the following testimony concerning Claimant's the injury occurring at his father's house was elicited during hearing:

Q: And just to be very clear, do you remember Mr. Lang 8 asking you if you had hurt yourself over the weekend before 9 April 8th?

A: I don't recall.

Q: And you did not tell him that you hurt yourself the 12 weekend before, that Saturday, which would have been April 6th, 13 helping your dad with carpeting, correct?

A: Correct.

Q: In fact, you didn't tell -- you didn't tell anybody that until you recently, just yesterday, provided your second responses to interrogatories, correct?

A: Correct.

Q: Your second supplement to interrogatories.

A: Correct.

Q: Now, I guess my question to you is: I sent interrogatories, my Respondents sent interrogatories to you for the very first time, that you answered on the 11th of November 24 of 2024. And very specifically, you were asked if you had done anything to hurt yourself before, over the weekend, before April 8th. And your specific response was no, that you didn't do anything, that you didn't help with your dad, with carpeting or anything. Do you recall that answer?

A: Yes.

Q: Okay. And then, do you recall that you then provided your first supplemental responses to interrogatories? Those are dated -- and sent to me, or sent to Respondents, on the 10th day 11 of January. So, about two weeks ago. You had an opportunity to truthfully respond that you hurt yourself at work -- I mean, sorry, hurt yourself on helping your father with carpeting, but you didn't provide that information then either, did you?

A: No.

Q: Why not?

A: I'm not sure.

Q: So, why all of a sudden yesterday, in the second set of supplemental interrogatory answers, did you finally come 20 clean about hurting yourself while helping your dad with carpeting?

A: Because I've been really depressed over this whole deal, and I wanted to come out clean and not lie on oath.

Q: Okay. So, do you agree that you were lying before then?

A: Yes.

Q: And the truth of the matter is, you did hurt yourself while helping your father with carpeting over the weekend before April 8th, 2024, correct?

A: Yes.

(Hearing Transcript (HT) p. 154, l. 7 – p. 156, ll.1-5). Nonetheless, Claimant now maintains that he was injured both at his father's house and at work two days later on April 8, 2024. Indeed, Claimant testified that the injury at his father's house was "the start" and when the pipe fell, it ripped the biceps completely from his shoulder. (HT, p. 138 ll. 5-13).

28. Claimant also seemed to have difficulty in recalling whether he spoke with his employer and Safety Officer, Matthew Carrigan, on April 11, 2024 or what he might have said. Claimant first stated that he texted Mr. Carrigan the morning of April 11, 2024 to advise Mr. Carrigan that he was going to the emergency department and that Mr. Carrigan responded with a text asking him if he had injured himself at work. The

very next question asked of Claimant was what he had told Mr. Carrigan about the alleged injury, and Claimant's response, directly opposite from his first response, was that he never talked to Mr. Carrigan about the injury and that he'd only talked with the foreman, Rick Barrow. (HT p. 131). In claimant's continued testimony he is clearly confused whether he spoke with Mr. Carrigan at all and if so if it was by phone, whether it was only text messaging with Mr. Carrigan, and whether he (Claimant) walked Mr. Carrigan through the whole scenario in the lay down yard with Claimant and Mr. Barrow. (HT p. 131, l. 7-9), or whether he just told Mr. Carrigan where the pipe had dropped in the lay down yard. (HT p. 132, l. 11-13).

CONCLUSIONS OF LAW

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

Generally

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

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

Compensability and Respondents' Request to Withdraw their General Admissions of Liability

C. Insurers are permitted to "obtain relief from improvident or erroneous admissions." *H.L.J. Management v. Kim*, 804 P.2d 250 (Colo. App. 1990). Respondents are bound by their GAL and required to continue paying benefits until the law permits them to terminate said benefits, or they obtain an appropriate order from the ALJ. *Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997).* Once

an admission has been filed, the employer may not unilaterally modify that admission if the employer comes to believe an injury is not compensable. See C.R.S. §§ 8-43-201(1) and 8-43-303(4). Rather, the Respondents must request a hearing before an ALJ and continue to make benefits payments until the ALJ enters an order allowing modification of the admission, in full or in part. *Id.*, see also *Rocky Mtn. Cardiology* v. *ICAO*, 94 P.3d 1182 at 1185 (Colo. App. 2004).

D. Pursuant to § 8-43-201(1), C.R.S., Respondents bear the burden of proof regarding any attempt to modify an issue that has previously been determined by the filing of a general or final admission of liability or an order. Section 8-43-201(1), C.R.S.; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also, Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1) and (2), C.R.S. was added to § 8-43-201 in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.
>
> (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

E. The principal aim of the 2009 amendment to § 8-43-201, C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, such respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. specifically placed the burden on the party seeking to modify an issue determined by a general admission and made the withdrawal of an admission of liability the procedural equivalent of a reopening. In this case, Respondents are seeking to modify an issue determined by their previously filed GAL, namely compensability. Consequently, the burden rests with Respondents to prove that Claimant did not sustain a compensable injury.

F. A compensable injury is one that arises out of and in the course of employment and requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable “injury.” *Romero*, supra; § 8-41-301, C.R.S.

G. The phrases "arising out of” and "in the course of" are not synonymous

and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injuries, assuming they occurred on April 8, 2024, happened within the time and place limits of his employment and during an activity connected to his job-related functions as a laborer for Employer. Regardless, the question of whether Claimant's alleged injuries "arose out of" his employment must be answered in the affirmative before the injury can be found compensable. The "arising out of" element required to prove compensability is narrow and requires a claimant to show a causal connection between his/her employment and the injury such that the injury is shown to have its origins in work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the claimant's injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

H. The fact that Claimant may have experienced an onset of pain while performing his job duties does not mean that he sustained a work-related injury. Indeed, an incident which merely elicits pain symptoms without a causal connection to a claimant's work duties does not compel a finding that the claimed injury is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, the persuasive evidence demonstrates that Claimant likely injured his left shoulder/arm, including tearing his biceps while assisting his father with a carpeting project on April 6, 2024. Indeed, after initially lying about hurting himself during this project, Claimant subsequently admitted that he and two others, i.e. his father and uncle were removing a 10 foot roll of carpet from the back of a pick-up truck when he strained his left arm. According to Claimant, he had his arms underneath the carpet roll as if he were cradling it and as he and the others were lowering the roll to the ground it felt as though he pulled a muscle in his left arm originating from the shoulder.[4] (HT, pp. 109-110). While Claimant did not provide an estimate regarding the weight of this carpet roll, the evidence presented supports a

[4] Claimant described "very sharp" pain as though he had turned wrong or tweaked something.

conclusion that it took 3 men to slide it from the truck and lower it to the ground. Accordingly, it is reasonable to infer that it was quite heavy. Based upon the evidence presented, the ALJ is also convinced that the full extent of Claimant's April 6, 2024 injury was unknown until the bruising and deformity associated with the muscle tearing associated with this April 6, 2024 injury manifest itself on April 10, 2024. (RHE C, pp. 79-80). The testimony of Dylan Lang, Rick Barrow, Matthew Carrigan, Lara Woods and Ruby Mason convincingly contradicts Claimant's assertions that he injured his shoulder on April 8, 2024, while loading pipe onto a trailer to complete a repair job in Hawley, Colorado. Because the totality of the evidence supports a conclusion that Claimant's left upper extremity injuries and need for treatment are, more probably than not, rooted in the April 6, 2024 non-work related incident involving a heavy roll of carpet rather than his April 8, 2024 work duties, the ALJ is convinced that Respondents have proven that Claimant did not sustain compensable left upper extremity injuries.

I. Having concluded that Respondents have established that Claimant probably did not suffer compensable injuries to his left shoulder/arm on April 8, 2024, the ALJ turns his attention to Insurer's contention that Claimant induced the filing of a GAL and the award of medical and indemnity benefits reflected thereon through fraud. Fraud may justify reopening an otherwise final award of benefits. *See Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995). In cases where an ALJ finds that an admission of liability was induced by fraud, an insurer may be permitted to retroactively withdraw its admission. *Vargo v. Colorado Industrial Commission*, 626 P.2d 164 (Colo. App. 1981). In *Stroman v. Southway Services, Inc*., W.C. No. 4-366-989 (August 31, 1999), the Industrial Claims Appeals Office (ICAO) interpreted *Vargo* and subsequent statutory amendments to permit retroactive withdrawal of admissions, and construed those authorities as permitting the ALJ to order repayment of compensation and benefits, including medical benefits. Specifically, in *Stroman*, the ICAO stated that "[a]lthough the *Vargo* decision does not expressly state that a Claimant may be ordered to repay the insurer for benefits obtained prior to withdrawal of the fraudulently induced admission, the court's reference to "retroactive withdrawal" of the admission indicates that repayment is the intended remedy." *See HLJ Management Group, Inc. v. Kim, 804 P.2d 250* (Colo. App. 1990) (holding that admission may not be withdrawn retroactively unless procured by fraud, but permitting prospective withdrawal of an erroneous admission). Similarly, in *West v. Lab Corp*., W.C. No. 4-684-982 (February 27, 2009), the ICAO reiterated that in a circumstance of fraud, the ALJ did not err in ordering the withdrawal of the respondents' admissions and repayment of compensation and medical benefits. In *West*, the ICAO further indicated that "[w]e perceive nothing in the language of [section] 8-43-304(2) indicating that the legislature intended the respondents' only recourse to be an offset against future payments in cases where the claim was fraudulently filed and there will therefore be no future payments." *Id*. Therefore, an ALJ has authority to order a claimant who has committed fraud to repay the insurer and any previously filed admission of liability is considered "*void ab initio*." *See Fuentes v. Rivera Construction,* W.C. No. 4-810-095 (July 12, 2010); *Vargo v. Colorado Industrial Commission*, supra; C.R.S. § 8-43-207(1)(q).

J. The elements of fraud were set forth by the Colorado Supreme Court in

Morrison v. Goodspeed, 100 Colo. 470, 68 P.2d 458 (1937). In Goodspeed, the Court stated: "The constituents of fraud, though manifesting themselves in a multitude of forms, are so well recognized that they may be said to be elementary. They consist of the following:

(1) A false representation of a material existing fact, or representation as to a material existing fact made with a reckless disregard of its truth or falsity; or concealment of a material existing fact, that in equity and good conscience should be disclosed.

(2) Knowledge on the part of the one making the representation that it is false; or utter indifference to its truth or falsity; or knowledge that he is concealing a material fact that in equity and good conscience he should disclose.

(3) Ignorance on the part of the one to whom representations are made or from whom such fact is concealed, of the falsity of the representation or the existence of the fact concealed.

(4) The representation or concealment made or practiced with the intention that it shall be acted upon.

(5) Action on the representation or concealment resulting in damages."

As noted by ICAO in *Essien v. Metro Cab*, W.C. Number 3-853-693 (August 22, 1991), "[t]he existence of the elements [of fraud] is generally a question of fact for the determination of the ALJ", and because proof of fraud is a factual issue, the ALJ may base his/her decision on inferences drawn from circumstantial or direct evidence. *See Essien*, supra, citing *Electric Mutual Liability Insurance Co. v. Industrial Commission*, 154 Colo. 491, 391 P.2d 677 (1964). The existence of "fraud" does not necessarily require an intent to deceive. *See Pattridge v. Youmans*, 109 P.2d 646 (Colo. 1941); *Morrison*, 68 P.2d at 458 (fraud requires a false representation or representation made with disregard for the truth); *Alexander v. Midwest Barricade Co., Inc.*, W.C. No. 3-842-739 (I.C.A.O. March 30, 1992).

K. Based upon the evidence presented, the ALJ agrees with Respondents that the elements of fraud have been proven in this case. In reaching this conclusion, the ALJ is mindful of the fact that the false representation must involve the omission of a material fact inducing another to act to his or her detriment. See *Wolford v. Pinnacol Assurance*, 107 P.3d 947 (Colo. 2005). According to Black Law's Dictionary, a material fact is one which is crucial to the interpretation of a phenomenon or a subject matter, or to the determination of an issue at hand. *Black's Law Dictionary* (10th Ed. 2014). Here, the evidence supports a conclusion that Claimant made false representations of material existing fact, and concealed (omitted) material existing facts, which in equity and good conscience should be disclosed. Indeed, Claimant denied helping his dad lay carpet at his dad's house and purposefully failed to disclose, to his medical providers, Employer or Insurer that he injured his left shoulder and arm while doing so. A fact which he later admitted. Moreover, the evidence presented supports a reasonable

inference that Claimant also misrepresented to Respondents that he injured his left shoulder and arm on April 8, 2024, while loading pipe at work because he knew the effects of his April 6, 2024 injury were serious, that he was hurting "bad" and that his continued employment was in jeopardy. Indeed, by April 9, 2024, Claimant suspected that he was going to be terminated and by April 10, 2024, when he was still having trouble picking things up with his left arm and his left biceps was "2 times bigger" than the right, he initiated trying to sell a car because he needed the money. (RHE C, pp. 79-80). After seeing the doctor on April 11, 2024, it was clear to Claimant that his biceps was torn; that it couldn't be fixed and that he would need work accommodations and rest his left arm in a sling. It was also clear to him that his employment was going to be terminated, so despite telling Mr. Carrigan that he did not injure himself at work, Claimant continued to press a claim for workers' compensation benefits telling Ms. Woods that since he couldn't work, he might as well file for workers' compensation. When Ms. Woods asked Claimant why he would file a workers' compensation claim since he hadn't really injured himself at work, Claimant simply brushed her off. Because Claimant was unable to see a medical "specialist", based on the April 11, 2024 referral from Prowers Medical Center, he seemingly doubled down on his alleged injury claim by texting "Fuck carrigans" to Ms. Woods. (RHE C, p. 85). Three days later, Claimant requested that a first report of injury be completed.

L. Insurer, Employer and Claimant's medical providers were ignorant of the falsity of Claimant's representations and of the existence of the prior injury on April 6, 2024. Based upon the evidence presented, the ALJ credits the testimony of Mr. Lang, Mr. Barrow, Mr. Carrigan, Ms. Woods and Ms. Mason to find/conclude that Claimant's misrepresentations and concealments were made with the intention that they be acted upon by initiating and continuing medical care and workers' compensation income benefits. Indeed, the desired action was taken by Claimant's providers and by Insurer as a result of Claimant's material omissions and misrepresentation. Specifically a GAL was filed and medical and indemnity benefits were paid. In fact, temporary total disability benefits are still being paid to Claimant under the asserted claim. Accordingly, the ALJ finds and concludes that actual damages have resulted to Respondents in this case in the form of significant medical and temporary benefits being paid to Claimant under false presences. Based upon the totality of the evidence presented, the ALJ concludes that Respondents have proven that Claimant's assertion that he was injured while loading pipe onto a trailer for Employer on April 8, 2024 was fraudulent and that the GAL that Respondents filed was induced by fraud and erroneously issued. Accordingly, Insurer's request to withdraw the admission based upon fraud is granted.

ORDER

It is therefore ordered that:

1. Respondents have demonstrated, by a preponderance of the evidence, that Claimant did not sustain a compensable injury to his left arm/shoulder on April 8, 2024. Accordingly, Claimant's claim for compensation is denied and dismissed.

2. Respondents have established, by a preponderance of the evidence, that

the GAL, which admitted liability for indemnity and medical benefits was induced by Claimant's conscious withholding of material information and his fraudulent misrepresentations. Accordingly, the GAL is *void ab initio* and Respondents are permitted to withdraw the GAL. As Claimant was not entitled to the medical and indemnity benefits that he received based upon his fraud, Insurer is entitled to recover the total amount of indemnity and medical benefits they paid to or on behalf of Claimant.

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

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

DATED: March 11, 2025

/s/ Richard M. Lamphere

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

SUMMARY ORDER

Hearing was held before Stephen Abbott, Administrative Law Judge (ALJ), on February 6, 2025, in Denver, Colorado. Claimant was present and represented by Sheila Toborg, Esq. Respondent Employer Murillo's Drywall and Finishing was not present. The hearing was recorded by the Office of Administrative Courts.

At hearing, Claimant's Exhibits 1-11 were admitted into evidence.

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

1. The issues raised for consideration at hearing are the following: compensability, medical benefits, average weekly wage, temporary total disability benefits from January 11, 2024, to September 2, 2024, payment of medical bills, and penalties for failure to carry workers compensation insurance on the date of injury. Respondent-Employer Murillo's Drywall and Finishing was provided with proper notice of the February 6, 2025 hearing.

2. Claimant was employed by Murillo's Drywall and Finishing to install drywall.

3. Based upon the evidence presented at hearing, Claimant's exhibits 1 through 11 and Claimant's credible testimony, it is found that Claimant sustained a compensable work-related injury to his low back on January 11, 2024, while installing drywall. Following this work injury, Claimant was transported from the work site via ambulance to Denver Health on January 11, 2024.

4. It is found that Claimant is entitled to reasonable, necessary medical care for his work-related injury. Also, it is found that the Denver Medical Paramedic medical bill (Claimant's Exh No. 10) resulted from care provided based upon Claimant's January 11, 2024 work-related injury.

5. Based upon the evidence presented at hearing, it is found and concluded that Claimant's average weekly wage is based on employment for five days of work per week at $120.00 per day for an average weekly wage of $600.00.

6. It is further found and concluded that Claimant was unable to work based upon his work-related injury from January 11, 2024, through September 2, 2024—a period of 33 5/7 weeks—and is entitled to an award of temporary total disability benefits for that period at a weekly rate of $400.00, totaling $13,485.71 in temporary total disability benefits.

7. It is found and concluded that Respondent-Employer Murillo's Drywall and Finishing failed to carry workers' compensation insurance on January 11, 2024, as required by § 8-44-101, C.R.S.

8. Section 8-43-408(5), C.R.S., provides for a penalty in the amount of twenty-five percent of the compensation or benefits due where an employer fails to carry workers' compensation insurance as required by § 8-44-101, C.R.S. Section 408(5) further clarifies that the penalty is to be paid to the Colorado uninsured employer fund; it does not provide for any amount of the penalty to be paid to any other party or entity.

9. Respondent-Employer Murillo's Drywall and Finishing was not covered under any workers' compensation insurance policy with any insurer effective on Claimant's January 11, 2024 date of injury. Therefore, on January 11, 2024, Respondent employer Murillo's Drywall and Finishing was uninsured for workers' compensation injuries on January 11, 2024, in violation of § 8-44-101. Pursuant to § 8-43-408(5), Respondent-Employer shall pay to the Colorado uninsured employer fund a penalty in the amount of $3,371.43, a sum representing 25% of the value of the compensation benefits owed to Claimant.

10. Respondent-Employer Murillo's Drywall and Finishing shall pay statutory interest at the rate of eight percent per annum on all amounts due and not paid when due.

11. Respondent-Employer Murillo's Drywall and Finishing is financially responsible for payment of Claimant's reasonable and necessary medical expenses for treatment of his low back injury.

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

13. Any and all issues not determined herein are reserved for future determination.

DATED: March 11, 2025.

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

This decision is final and not subject to appeal unless a Request for Specific Findings of Fact and Conclusions of Law is filed at the Office of Administrative Courts, 633 17th Street Suite 1300, Denver, CO 80202 within seven working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. (as amended, SB07-258). Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-140-435-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence entitlement to temporary disability benefits after reopening of his claim.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of his employment with Employer on May 18, 2020. On August 24, 2023, Claimant attended a Division independent medical examination (DIME), with Ranee Shenoi, M.D., who placed Claimant at maximum medical improvement (MMI) effective April 26, 2023, and assigned a 12% whole person impairment rating and a 9% scheduled rating for his hip. (Ex. D).

2. Respondents filed a Final Admission of Liability on September 27, 2023. At the time Claimant was placed at MMI, he had received TTD benefits totaling $102,658.16. Respondents asserted an overpayment of $20,100.13. At the time, the statutory cap on combined TTD and PPD benefits applicable to Claimant was $94,330.19.[1] (Ex. H).

3. Subsequently, the matter proceeded to a hearing wherein Claimant and Respondents challenged the DIME physician's opinion. After hearing, a Final Order was issued finding that neither party had overcome the DIME, and Claimant remained at MMI effective April 26, 2023. (Ex. D).

4. On September 23, 2024, Claimant underwent a total hip replacement surgery. The parties stipulated that the hip surgery was reasonable and necessary medical treatment to cure or relieve the effects of his May 18, 2020 injury. The parties further stipulated that as September 23, 2024, Claimant was no longer at MMI, and that his case was reopened on that date.

5. Respondents have paid Claimant's medical expenses, including surgery, but have not resumed payment of temporary total disability (TTD) payments. Respondents assert that Claimant has exceeded the statutory cap on combined TTD and permanent partial disability (PPD) payments, and is not entitled to additional indemnity benefits unless he receives a permanent impairment rating of 26% or greater.

6. The parties have stipulated that if it is found that Claimant is entitled to TTD benefits after September 23, 2024, Respondents are entitled to offset the $20,100.13 claimed overpayment against TTD benefits until exhausted.

[1] Although the Claimant's whole person and schedule rating do not technically "combine" under the AMA Guides, the parties do not dispute that Claimant's impairment rating does not exceed 25% for the purposes of this matter.

CONCLUSIONS OF LAW

Generally

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

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

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

Temporary Total Disability Benefits

Claimant reached MMI on April 26, 2023, with an impairment rating below 25%, capping combined TTD and PPD benefits at $94,330.19 under § 8-42-107.5, C.R.S.[2] Because Claimant had already received TTD benefits exceeding this cap, Respondents did not pay PPD benefits. Claimant's condition later worsened, necessitating hip replacement surgery, which the parties agree is compensable. The parties also agree Claimant was no longer at MMI as of September 23, 2024. Respondents do not dispute that absent the statutory cap Claimant would be entitled to TTD benefits until terminated by statute. However, Respondents assert that Claimant is ineligible for further TTD

[2] At the time of Claimant's injury, the upper and lower caps on TTD and PPD benefits were $94,330.19 and $188,658.00.

benefits after reopening because he already exceeded the $94,330.19 cap. Thus, the issue before the ALJ is whether the cap under § 8-42-107.5, C.R.S., applies to TTD benefits after reopening. The ALJ finds it does not.

Claimant's Entitlement to Post-Reopening TTD Benefits.

Generally, TTD benefits continue until MMI is reached, the claimant returns to work, receives a written release, or fails to return to work after offered modified employment consistent with a physician's modified employment release. § 8-42-105(3)(a)-(d), C.R.S. Once a claimant reaches MMI, the right to TTD benefits ends, and a medical impairment rating is determined. *See* § 8-42-107 (8)(c), C.R.S.

A claimant whose condition worsens after MMI causing a greater impact on his ability to work than existed at the original MMI date, the claimant may reopen the case and resume TTD benefits. *Root v. Great American Ins. Co.*, W.C. No. 4-534-254 (2009) (ICAO Apr. 15, 2009), *citing City of Colorado Springs Disposal v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). In the present case, it is undisputed that Claimant's condition worsened, that he was no longer at MMI effective September 23, 2024, and that he is entitled to TTD benefits based on earnings lost after his September 23, 2024 surgery. As such, Claimant has established by a preponderance of the evidence an entitlement to post-reopening TTD benefits.

Applicability of the Statutory Cap

Respondents contend Claimant is ineligible for TTD benefits after reopening because he already exceeded the $94,330.19 cap. The statutory cap is an affirmative defense that must be proven by the party asserting the right to the offset. *Plitz v. Quality Mitsubishi*, W.C. No. 4-351-844 (ICAO Dec. 20, 2001). Respondents have failed to meet their burden of establishing that the statutory cap is applicable to post-reopening TTD benefits.

The version of section 8-42-107.5, C.R.S., in effect at the time of Claimant's injury states:

> No claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. No claimant whose impairment rating is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payments and permanent partial disability payments.

The cap is a limit on "combined" TTD and PPD benefits and based on the claimant's permanent impairment rating . *United Airlines v. Indus. Claim Appeals Office*, 312 P.3d 235 (Colo. App. 2013). Thus, only after the claimant has reached MMI and an impairment rating is established can the applicable cap be determined. *See Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005); *Bowers v. North American Property*, W.C. 4-154-629 (May 20, 1999); *Kelly v. SEMA Construction*, W.C. No. 4-520-988 (ICAO Jan. 19, 2007); *Jones v. United Airlines*, W.C. No. 4-733-270-01 (ICAO Jun. 21, 2012). Once an impairment rating is established and the appropriate

cap determined, a claimant's total combined TTD and PPD benefits become subject to the cap. *United Airlines v. Indus. Claim Appeals Office*, 312 P.3d 235 (Colo. App. 2013).

In circumstances where the claimant's condition worsens, and they become entitled to additional TTD benefits after combined TTD and PPD benefits are paid, the respondents may offset previously-paid PPD benefits against any new TTD benefits. *Donald B. Murphy Contractors, Inc. v. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). The effect of *Murphy* is to treat PPD payments paid before reopening as a theoretical "overpayment" that can be offset against post-reopening TTD benefits. However, to the extent Murphy mandates an offset of PPD benefits, the parties' stipulation permitting Respondents to offset $20,100.13 in previously paid TTD benefits against post-reopening TTD benefits renders it inapplicable.

Respondents assertion that *Murphy* does not mandate the resumption of TTD upon reopening or make the cap inapplicable, while accurate, is immaterial. *Murphy* also does not limit post-reopening TTD benefits or impose a statutory cap.

If accepted, Respondents' position would impose the lower statutory cap on future TTD benefits without a final impairment rating. While *Murphy* does not mandate resumption of TTD on reopening, it does clarify that, after reopening, a claimant's "medical impairment rating cannot be determined while the claimant is still undergoing medical treatment," and only after the claimant returns to MMI and his impairment rating is established can the applicability of § 8-42-107.5 be determined. *Murphy*, 916 P.2d at 613. Because Claimant is not at MMI, application of the cap is premature. Only after Claimant is placed at MMI again, and his impairment rating determined will the cap apply.

Moreover, the TTD benefits are not independently subject to the cap. *United Airlines v. Indus. Claim Appeals Office*, 312 P.3d 235 (Colo. App. 2013). *United Airlines* makes clear TTD benefits compensating a claimant for lost earnings pre-MMI are not subject to the cap. *United Airlines*, 312 P.3d at 239. *Murphy* further supports this. In *Murphy*, the claimant had received combined PPD and TTD benefits equal to the lower cap. However, the Court of Appeals found that "no further payment [of TTD was] *currently* required," and instead ordered that previously-paid PPD benefits be offset against future TTD benefits. *Murphy*, 916 P.2d at 612 (emphasis added). The court therefore recognized the potential for future TTD benefit payments beyond the cap, because TTD benefits up to the cap were to be offset against PPD payments. Moreover, the court also noted that "a claimant ordinarily would not be limited in receiving temporary total disability benefits upon the reopening of the claim." *Id*. (emphasis added), citing *Mesa Manor v. Indus. Claim Appeals Office*, 81 P.2d 443 (Colo. App. 1994). Thus, Murphy acknowledged the possibility of payment of TTD benefits beyond the cap and the lack of a limitation on post-reopening TTD benefits. Respondent has cited no authority indicating that a statutory cap may be imposed based on TTD benefits alone after reopening.

Based on the foregoing, the ALJ concludes that Claimant is entitled to TTD disability benefits effective September 23, 2024, until terminated by law, and that such benefits are not subject to § 8-42-107.5, C.R.S. Because of the parties' stipulation, Respondents are entitled to offset $20,100.13 against any future TTD benefits to which Claimant is entitled.

ORDER

It is therefore ordered that:

1. Claimant is entitled to temporary disability benefits effective September 23, 2024, until terminated by statute. Such benefits are not subject to § 8-42-107.5, C.R.S.

2. Respondents may offset $20,100.13 against any future temporary disability benefits to which Claimant is entitled.

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

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

DATED: March 12, 2025

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that the right total knee arthroplasty, as recommended by Dr. Nathan Faulkner, is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted March 5, 2024 work injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a laborer. His job duties included stacking materials, sweeping, and general clean up of the work site. On March 5, 2024, Claimant was performing his normal job duties working for Employer when he suffered an injury. On that date, Claimant and a coworker were using a bucket on a bobcat to assist with clean up. The individual operating the bobcat made a turn and the bucket struck Claimant's right knee.

2. Following the incident Claimant's symptoms included pain, swelling, bruising, and small cuts. Claimant testified that the bruising was on the left (inner/medial) side of his right knee and into his right calf. In the days following the incident, Claimant noted increased swelling in his right calf and ankle.

3. Claimant further testified that prior to the March 5, 2024 incident, he was having no pain or any other issues in his right knee. Claimant testified that he is very active and engages in various recreational hobbies, including tennis, softball, handball, and basketball. Claimant also testified regarding undergoing a prior right knee surgery in 2020. That procedure involved arthroscopic repair of Claimant's meniscus. Claimant testified that following the surgery in 2020 he was able to engage in all of his preferred recreational activities and work full-time without issue.

4. On March 11, 2024, Claimant was seen at Medicine for Business and Industry (MBI) by Dr. Alan Shackelford. At that time, Claimant described his mechanism of injury and reported his symptoms as right knee pain and swelling, and the inability to put weight on his right leg. On examination, Dr. Shackelford noted moderate edema to Claimant's right knee and calf that extended into the ankle, pitting edema of the pretibial area, two small superficial abrasions in the upper and mid tibia. Dr. Shackelford ordered magnetic resonance imaging (MRI) of claimant's right knee, and instructed Claimant to use crutches and a knee brace.

5. The right knee MRI was performed on March 11, 2024, and reviewed by Dr. Virginia Scroggins Young. The MRI showed complex tearing of the medial and lateral menisci, with advanced cartilage loss in both the medial and lateral compartments. Dr. Scroggins Young also noted chondral fissuring in the patellofemoral

compartment, joint effusion along the patellofemoral joint, and mild proximal patellar tendinopathy.

6. On March 13, 2024, Claimant returned to Dr. Shackelford. At that time, Claimant reported ongoing pain and swelling. Dr. Shackelford discussed the MRI results and referred Claimant for an orthopedic consultation.

7. On March 29, 2024, Claimant was seen by Dr. Sean Baran at Western Orthopaedics. At that time, Claimant described his mechanism of injury. Dr. Baran noted Claimant's report that he was "not having painful mechanical symptoms or instability. Dr. Baran ordered x-rays that were performed on that same date. Dr. Baran reviewed x-rays and noted "bone-on-bone chondral loss in the medial compartment with severe lateral compartment joint space narrowing." Dr. Baran also reviewed the March 11, 2025 MRI. Dr. Baran opined that the pre-existing osteoarthritis in Claimant's right knee was exacerbated by the work injury. However, Dr. Baran further opined that Claimant would not benefit from a knee arthroscopy or meniscus repair. Dr. Baran referred Claimant for physical therapy. In addition, Dr. Baran recommended an intraarticular injection. That injection was performed on that same date.

8. On April 10, 2024, Respondent filed a General Admission of Liability admitting for the March 5, 2024 work injury, temporary total disability (TTD) benefits, and reasonable and necessary medical treatment.

9. On April 18, 2024, Claimant was seen at Orthopedic Centers of Colorado by Dr. Cary Motz for a second opinion. Claimant reported symptoms of mild to moderate right knee pain that was aching and sharp. Dr. Motz diagnosed Claimant with right knee osteoarthritis and recommended a steroid injection with aspiration. Dr. Motz administered the injection and aspirated 70 cc of clear fluid from Claimant's right knee. Dr. Motz noted that Claimant was not a candidate for arthroscopy, and referred him to physical therapy.

10. On April 19, 2024, Claimant was seen by Dr. Shackelford. At that time, Claimant reported that both specialists found that Claimant's right knee pain is due to osteoarthritis. Dr. Shackelford noted Claimant's report that he was "fully functional without knee pain" prior to the work injury. Dr. Shackelford further noted that the March 5, 2024, bobcat incident caused the acute complex meniscus tear in Claimant's right knee.

11. On April 20, 2024, Claimant was seen at MBI by Dr. Alicia Feldman. At that time, Claimant reported continued pain and swelling, with severe pain in the right medial knee. Dr. Feldman opined that Claimant's right knee pain was work related combined with aggravated osteoarthritis. Dr. Feldman referred Claimant for a platelet right plasma (PRP) injection. Dr. Feldman noted that if such an injection was not beneficial, Claimant would likely need a total knee replacement.

12. Following a referral from Dr. Feldman, on May 13, 2024, Claimant was seen by Dr. Eric Shoemaker at Mile High Sports and Rehabilitation Medicine. Claimant reported constant right knee pain, especially through the medial joint. Claimant also reported a popping sensation and a limp. Claimant reported to Dr. Shoemaker that prior to the work injury he was not experiencing right knee symptoms. Dr. Shoemaker diagnosed tricompartmental knee osteoarthritis, that was moderate to severe in the medial and lateral compartments. Dr. Shoemaker recommended that Claimant not undergo PRP injections because of a prior diagnosis of rheumatologic disease. Dr. Shoemaker recommended viscosupplementation injections as an alternative. Dr. Shoemaker further opined that Claimant would likely need to undergo a total knee replacement.

13. On May 30, 2024, Claimant returned to Dr. Motz and reported "a little bit of relief' from the recent injection. Dr. Motz noted his understanding that Claimant was scheduled for a PRP injection with Dr. Shoemaker. As a result, Dr. Motz released Claimant from his care.

14. On July 24, July 31, and August 7, 2024, Dr. Shoemaker administered a series of three right knee injections of Gel-syn.

15. On August 21, 2024, Claimant returned to Dr. Shoemaker and reported no relief from the Gel-syn injections. Claimant also reported severe and debilitating pain. Dr. Shoemaker recommended Claimant return to an orthopedic surgeon for consideration of a total knee replacement. In support of this recommendation, Dr. Shoemaker noted that Claimant did not benefit from steroid or Gel-syn injections, and he was not a candidate for PRP injections.

16. Throughout 2024, Claimant continued to treat with MBI and was seen by Dr. Feldman and Paula Hornberger, PA-C. In a medical record dated August 24, 2024, PA Hornberger opined that surgical intervention was reasonable, necessary, and related to Claimant's March 4, 2024 work injury. On September 7, 2024, PA Hornberger made a referral to orthopedic surgeon Dr. Nathan Faulkner.

17. On September 23, 2024, Claimant was seen by orthopedic surgeon Dr. Nathan Faulkner. After examination and review of imaging, Dr. Faulkner opined that the underlying arthritis in Claimant's right knee was exacerbated by the work injury. In support of this opinion, Dr. Faulkner noted that Claimant had no knee symptoms immediately prior to the work injury. Dr. Faulker noted that Claimant had exhausted extensive conservative treatment (including physical therapy, medications, and injections). Dr. Faulkner recommended a right total knee arthroplasty {TKA).

18. At the request of Respondents, Dr. Qing-Min Chen performed a records review. In a report dated October 7, 2024, Dr. Chen opined that Claimant's right knee symptoms are not related to the March 5, 2024 work injury. In support of this opinion, Dr. Chen noted that there was no evidence of a bony or soft tissue contusion on MRI. Dr. Chen further noted that given the lack of any soft tissue damage, it is his opinion that the March 5, 2024 event at work did not aggravate the pre-existing arthritis in Claimant's

right knee. With regard to the recommended right TKA, Dr. Chen opined that the surgery is reasonable and necessary to treat Claimant's condition. However, Claimant's need for a total knee replacement is not related to his work injury.

19. Relying upon Dr. Chen's report, Respondents denied authorization for the requested knee replacement surgery.

20. Dr. Chen's testimony at the hearing was consistent with his written report. It continues to be Dr. Chen's opinion that although Claimant is a candidate for right total knee replacement, the need for replacement is not related to Claimant's March 5, 2024 work injury. Dr. Chen explained that the March 5, 2024 incident did not cause the advanced arthritis in Claimant's right knee. Dr. Chen also testified that the strike to Claimant's right knee on March 4, 2024 did not worsen the pre-existing arthritis.

21. The ALJ credits the medical records and Claimant's testimony. The ALJ specifically credits Claimant's testimony that prior to the March 5, 2024 work injury he was very active and had no issues with his right knee. The ALJ also credits the opinions of Claimant's treating providers, (Ors. Faulkner, Baran, Feldman, and Shackelford; and PA Hornberger), over the contrary opinions of Dr. Chen. The ALJ finds that Claimant has successfully demonstrated that it is more likely than not that the March 5, 2024 work injury aggravated, accelerated, or combined with the pre-existing condition of Claimant's right knee, resulting in the need for a right TKA. The ALJ further finds that Claimant has successfully demonstrated that it is more likely than not that the recommended TKA is reasonable medical treatment necessary to cure and relieve him from the effects of the March 5, 2024 work injury.

CONCLUSIONS OF LAW

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

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

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

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

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

6. As found, Claimant has demonstrated, a preponderance of the evidence, that the right TKA, as recommended by Dr. Faulkner, is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted March 5, 2024 work injury. As found, the March 5, 2024 work injury aggravated, accelerated, or combined with the pre-existing condition of Claimant's right knee, resulting in the need for a total knee replacement. As found, the medical records, Claimant's testimony, and the opinions of Drs. Faulkner, Baran, Feldman, and Shackelford, and PA Hornberger are credible and persuasive on this issue.

ORDER

It is therefore ordered Respondents' shall pay for the recommended right total knee arthroplasty (TKA}, pursuant to the Colorado Medical Fee Schedule.

Dated March 13, 2025.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

ALJ's order will be final. Section 8-43-301 (2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-288-627

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury during the course and scope of employment with Employer on October 24, 2024.

2. If Claimant suffered a compensable injury, whether she entitled to receive medical/healthcare benefits.

FINDINGS OF FACT

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

1. Claimant was employed by Southern Glazer's Wine and Spirits. (hereinafter referred to "SGW&S").

2. On October 24, 2024 Claimant and several co-workers were on a voluntary, educational trip ("excursion"), which included visiting an agave field and the Codigo distillery in Mexico.

3. On October 24, 2024 Claimant was at facilities owned and operated by Codigo a tequila manufacturer.
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4. Codigo tequila is supplied to SGW&S by Pernod Ricard as the supplier/importer.

5. Claimant and her co-workers received the opportunity to engage in several different recreational activities, one of which included getting on horses and being led to the agave plants for a closer view and to learn more about the process.

6. The horses were provided by Codigo, not by SGW&S.

7. Claimant was not required by SGW&S to attend the excursion, nor was Claimant required to "ride" a horse through the agave fields.

8. SGW&S took no part in initiating the horse walking activity.

9. Claimant's decision to "ride" the horse and the activity of getting on the horse and being led through the agave fields was voluntary.

10. The activity of getting on the horse and being led through agave fields was not a requirement of Claimant's job duties.

11. Claimant was not performing any duties of employment when she got on the horse and was led through the agave fields.

12. The activity of getting on the horse and being led through the agave fields was a recreational activity or program.

13. Claimant was injured when the horse she was riding reared up and fell backwards.

14. Immediately following the accident, Claimant received medical treatment in Mexico.

15. The medical treatment she received in Mexico was covered and paid for by Codigo/Pernod Ricard.

CONCLUSIONS OF LAW

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

1. 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. §8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 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. §8-43-201, C.R.S.

2. 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).

3. 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 to be assigned 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. §8-43-201, C.R.S.

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). An injury occurs "in the course of" employment where 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 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to 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*. An activity arises out of and in the course of employment when the activity is sufficiently related to the conditions and circumstances under which the employee generally performs her job functions such that the activity may reasonably be characterized as an incident of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996).

5. The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." §8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

6. Compensable injuries involve an “injury” which requires medical treatment or causes disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). 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). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009).

7. Section 8-40-201(8), C.R.S. excludes from the term employment any participation in a voluntary recreational activity or program. *See McLachlan v. Center for Spinal Disorders*, W.C. No.: 4-789-747 (July 2, 2010) and *Kendrick v. United Airlines*, W.C. No.: 4-991-007 (November 15, 2016) and §8-40-301(1), C.R.S.

8. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. §8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. §8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

9. The record reveals that the October 24, 2024 incident did not arise out of or occur in the course of Claimant’s employment with SGW&S. Claimant was not performing any duties of employment when she got on the horse and was led through the agave fields. The event constituted a voluntary recreational activity or program that was outside the scope of Claimant’s employment for SGW&S. Accordingly, the October 24, 2024 accident was not a compensable workers’ compensation event.

10. Any healthcare Claimant received as a direct and proximate result of the incident is not the legal liability of Respondents.

ORDER

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

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

2. Respondents are not liable for any medical or healthcare treatment.

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 14, 2025

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on April 17, 2024.

2. Whether Claimant established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits to cure or relieve the effects of a work-related injury.

3. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits for the period of April 19, 2024 to August 23, 2024.

4. Determination of Claimant's average weekly wage (AWW).

5. Whether Respondents established by a preponderance of the evidence that Claimant was responsible for termination of his employment and the resulting wage loss.

FINDINGS OF FACT

1. Beginning in August 2023, Claimant worked as a safety and security officer at a homeless shelter operated by Employer.

2. On April 17, 2024, Claimant was involved in an altercation with a female shelter resident related to the use of a microwave. Claimant testified that during the altercation, the resident pinned his right arm against a refrigerator, that he picked up the resident with his left arm to free himself, and felt pain down his right shoulder and neck. The altercation was captured on video from two angles, both of which are partially obstructed. (Ex. O). In one video the upper portion of the video is obstructed such that the top half of the individuals bodies are not visible. In the second video, the lower half of the bodies are not visible. Taken together, the videos show the resident, who is of medium build, at a microwave on a cart next to a refrigerator. The Claimant approached the resident, who then appeared to push the Claimant. Claimant appeared to reach past the resident and push her to the left. The microwave later fell to the floor, and Claimant picked it up and pulled it toward himself. At no point in the video does it appear that Claimant's arm was pinned against the refrigerator, as he testified; nor does the video show Claimant picking the resident up, or placing her in a bear hug, as he reported to health care provides.

3. Claimant testified that he reported the incident to his supervisor the following morning and that he was experiencing pain in his in his neck and shoulder. He testified that he indicated he may need a couple of days off, and that he was instructed to go

home. Employer's human resources director later called Claimant and informed him he was being terminated.

4. On April 19, 2024, Employer sent Claimant a letter indicating that he was being terminated "due to violation of [Employer's] code of conduct," as a result of the incident involving the resident. (Ex. F).

5. Approximately four weeks later, on May 14, 2024, Claimant sought medical attention at Concentra, and saw Ruth Vanderkooi, M.D. Claimant reported that the resident had pinned his arm against a refrigerator and that he hurt his neck and both shoulders when he picked her up and tossed her to his left. He reported that the following day he began experiencing pain in his neck, upper arms, back, and both shoulders, and mild numbness in his arms. Claimant reported a history of cervical spine fusion surgery in 2005 and 2022, and a left shoulder surgery in 2013. On examination, Dr. Vanderkooi noted thoracic spine and trapezius tenderness, and moderately limited range of motion in the cervical spine. Examination of Claimant's shoulders was positive for tenderness in the deltoid, "coarse twitching of muscles" in both upper arms, and mild pain at the extremes of range of motion. She diagnosed Claimant with neck and rotator cuff strains, and ordered a cervical CT scan. She further assigned claimant a maximum lifting restriction of twenty pounds. (Ex. 6).

6. On May 20, 2024, Respondents filed a First Report of Injury with the Division. The report does not indicate that date Claimant reported his claimed injuries to Employer. (Ex. A).

7. A cervical CT scan was performed on May 31, 2024, and showed multiple findings, including preexisting degenerative arthritis, and congenital stenosis. The CT did not show any acute findings. (Ex. N).

8. Claimant continued to seek treatment through Concentra through October 22, 2024, which included physical therapy and evaluations by various providers. (Ex. 6 and K).

9. In August 2024, Claimant came under the care of Blake Kandah, M.D, a physiatrist with Concentra. Claimant reported to Dr. Kandah that prior to the work incident, he experienced neck pain at a 4/10 level, without radiation, numbness or tingling into his limbs. He reported that his pain level increased to 8/10 after the altercation, and now with radiating numbness, tingling, and burning into both arms. On examination Dr. Kandah noted a positive Spurling's test resulting in cervical spasms, and cervical tenderness to palpation and with motion. He diagnosed Claimant with cervical radiculitis in both arms, and recommended an EMG of both arms to evaluate for radiculopathy. (Ex. K).

10. The EMG, performed on September 10, 2024, showed no evidence of acute left or right cervical radiculopathy, and no acute denervation. Dr. Kandah indicated that although the study was "abnormal," it suggested remote/chronic cervical radiculopathy without active denervation, and that this was consistent with Claimant's history of cervical spine fusion surgery predating his work injury. The EMG also showed evidence of right median

neuropathy at the wrist, which Dr. Kandah indicated was unrelated to Claimant's workers' compensation claim. (Ex. 6).

11. On October 22, 2024, Dr. Kandah authored a report in which he recommended epidural steroid injections in Claimant's thoracic spine, below the level of his prior fusion, and physical therapy. (Ex. K).

12. Claimant has a history of multiple medical issues, including chronic cervical spine pain and shoulder pain, lower back pain and radicular symptoms. He has had two prior cervical spine surgeries, one in 2005 and second in July 2022, when he underwent an anterior cervical disc and spur removal with fusion at C5-6 and C7-T1. (Ex. M). Since the 2022 surgery, Claimant was treated through the Veteran's Administration Hospital's Chronic Pain & Wellness Center for chronic neck, shoulder, and lower back pain. Claimant's reported symptoms during this time included neck pain radiating into his arms and fingers, shoulder, and trapezius pain. Claimant's records also demonstrate that he reported that his neck and shoulder pain was aggravated by activities of daily living, such as carrying groceries. Claimant's treatment included pain medications, muscle relaxants, and physical therapy. Other treatments, such as trigger point injections, and acupuncture were recommended, although the record is not clear that Claimant received these treatment modalities. (Ex. I).

13. As recently as August 2023, Claimant reported that his neck and shoulder pain was worse than before his surgery. By November 2023, Claimant reported that his neck and shoulder pain had improved with his job for Employer, but that he continued to experience lower back pain. Claimant's last documented visit at the VA prior to April 12, 2024, was on January 10, 2024, when he reported a temporary flare up in neck pain that had resolved, and lower back pain. (Ex. I).

14. On October 28, 2024, Claimant saw Carlos Cebrian, M.D., for an independent medical examination at Respondents' request. Dr. Cebrian reviewed Claimant's medical records, conducted an examination, and issued a report. Claimant reported he was injured when the shelter resident pinned his right arm between herself and a refrigerator for five to ten seconds, and then he grabbed her in a bear hug and picked her up. He reported that the woman weighed 210 to 220 pounds. Dr. Cebrian opined that Claimant's complaints of cervical pain are unrelated to the work incident of April 16, 2024, and are instead related to his pre-existing conditions, including cervical spine degenerative disc disease, chronic cervical spine radiculopathy, shoulder issues, and chronic pain complaints. He noted that the incident did not involve a mechanism likely to result in an injury to Claimant's cervical spine, and that Claimant has an extensive history of similar complaints. (Ex. H).

15. Claimant testified that before the April 2024 work incident, he had pain in his upper back, but no prior issues with his neck or shoulders, and that he had not previously had numbness and tingling in his hands, and that he was not previously diagnosed with chronic neck pain, and that the medications he was taking at the time of the incident, including pain medications and muscle relaxants were only for lower back pain. He testified that his current symptoms are different than those he previously experienced and

that he now experiences spasms and has a “grinding” pain in his neck. Claimant testified that following the incident, he did not seek treatment because he takes blood thinners, and believes he takes longer to heal from injuries. He testified that he waited because he believed his condition would improve without treatment.

16. Claimant testified that he had no training when he started working for Employer, and that he was not provided with any protocols or policies on dealing with residents. He testified that after his termination, he was unable to work until he started a job with a new employer on August 23, 2024. In his job with Employer, Claimant earned $20.00 per hour, and $30.00 or $34.50 per hour for overtime. During the seven pay periods before April 17, 2024, Claimant earned a total of $12,650.60 in wages, equating to an average weekly wage of $903.61.

17. Natalie Link, Employer’s chief human resource officer testified at hearing that Claimant was provided with a copy of Employer’s “Codes of Conduct” as part of his orientation within the first thirty-days of employment, and that new hires always receive that training. She testified that Employer’s policies include written policies related to interactions with residents, de-escalation, and violence, and that under these policies employees are not permitted to “physically interact” with residents. Ms. Link testified that Claimant was terminated for violation of these policies. Beyond Ms. Link’s testimony that such policies exist, no credible evidence was admitted as to the content or substance of employer’s policies, the specific conduct permitted or prohibited, or how Claimant’s altercation with the shelter resident violated any specific policy. Moreover, neither the written policies, nor any documents establishing that Claimant received the policies were admitted into evidence.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the

fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

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

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.,* W.C. No.4-894-311-03, (ICAO Apr. 9, 2014). All results

flowing proximately and naturally from an industrial injury are compensable. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer. Although an altercation occurred between Claimant and a resident, the Claimant has failed to credibly establish that the altercation resulted in an injury. Claimant's documented complaints of shoulder and neck pain are similar to those he reported to the VA in the year before April 2024. Moreover, there is no objective evidence of an injury. The CT scan performed on May 31, 2024 did not demonstrate evidence of an acute injury. While Dr. Kandah documented objective EMG evidence of radicular symptoms, he also opined that these were pre-existing and unrelated to the April 2024 work incident. None of Claimant's treating providers offered a credible causation explanation.

More significantly, Claimant's first medical treatment and first documented report of symptoms following the incident was on May 14, 2024, approximately four weeks after it occurred. Before the incident, he frequently sought treatment at the VA when he experienced increased symptoms or flareups of his pre-existing neck and shoulder condition. The symptoms Claimant reported to the VA before the incident were similar in many respects to symptoms he reported after, including neck pain, trapezius pain, shoulder pain, and numbness and tingling into his hands. During the calendar year 2023, Claimant was seen at the VA sixteen times for complaints of neck, shoulder, or lower back pain. Claimant's testimony that he waited four weeks after the incident to seek treatment because he thought he would heal appears inconsistent with his prior pattern of regularly seeking treatment for his symptoms. The ALJ does not find it credible that Claimant began to experience significant symptoms the day after the incident, yet waited nearly one month before seeking medical care in this instance. Claimant has failed to meet his burden of proving by a preponderance of the evidence that the April 17, 2024 altercation resulted in a compensable injury.

Medical Treatment

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

Because Claimant has failed to establish that he sustained a compensable injury, he has failed to establish an entitlement to medical benefits.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, a 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. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Temporary disability benefits continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.; See also § 8-42-106 (1)(b), C.R.S. (for temporary partial disability benefits) The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) *citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

Because Claimant has failed to establish that he sustained a compensable injury, he has failed to establish an entitlement to temporary disability benefits.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate a claimant's average weekly wage (AWW) based on a claimant's monthly, weekly, daily, hourly, or other earnings. The overall objective in calculating the AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., *supra*; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007).

Determination of Claimant's average weekly wage is moot.

Responsibility for Termination

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. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). "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 (November 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAO April 12, 2011).

Because Claimant has failed to establish that he sustained a compensable injury and is not entitled to temporary disability benefits, the ALJ makes no determination as to whether he was responsible for his termination.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits related to the April 17, 2024 work incident is denied and dismissed.
2. Because Claimant has failed to establish a compensable injury, the remaining issues are moot.

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

DATED: March 17, 2025

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-253-751-001

ISSUES

Whether Claimant has proven by a preponderance of the evidence that her workers' compensation claim should be reopened based on a change of condition pursuant to Section 8-43-303, C.R.S.?

FINDINGS OF FACT

1. Claimant was employed with employer as a housekeeper. On October 18, 2023, Claimant filed a Worker's Claim for Compensation alleging an injury on May 13, 2023 to her thoracic and lumbar spine and including psychological, anxiety and depression. Respondents filed a Notice of Contest on January 17, 2024 indicating that further investigation was necessary.

2. Respondents filed an Amended Petition to Close on July 18, 2024 requesting that the claim be closed for failure to prosecute the claim pursuant to W.C.R.P. 7-1(C) and Section 8-43-207(1)(n), C.R.S. The Amended Petition to Close was served on the parties to the email addresses provided by Claimant in the Worker's Claim for Compensation.

3. The Director of the Division of Workers' Compensation issued an Order to Show Cause on August 2, 2024 that stated in pertinent part:

> (1) You must tell the Division of Workers' Compensation what recent effort you have made or are making to pursue your claim for workers' compensation benefits and why you think your claim should remain open. You must show good cause as to why your claim should not be closed. This must be done in writing and you must sent a copy to the employer **and** insurance carrier.
>
> (2) If you did not already send a response to the request to close your claim, or if you do not mail or deliver a response within thirty (30) days of the date of the Certificate of Mailing attached to this Order, your claim will be automatically closed. Your written response must be filed with the Director, at the Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, CO 80202.
>
> (3) The closure of your claim will not affect ongoing benefits which have been admitted by the employer, the insurer (such as medical benefits after maximum medical improvement), or which have been ordered by an Administrative Law Judge.

(4) If your case is closed after 30 days, you have the right to petition to reopen your claim, subject to the provisions of § 8-43-303 C.R.S.

4. The Order to Show Cause was served by the Director to the parties in this case through the email addresses provided by the parties. Claimant did not respond to the Order to Show Cause and the claim was closed on or about September 2, 2024.

5. Claimant filed an Application for Hearing on November 7, 2024 endorsing issues including Compensability, Medical Benefits, Temporary Disability Benefits and the Petition to Reopen. The parties proceed to a prehearing conference on January 17, 2025 following which Claimant was compelled to provide discovery responses and the parties agreed to bifurcate the hearing to address on the issue of the reopening of the case at hearing.

6. Claimant testified at hearing that she was employed with Employer and sustained an injury on May 19, 2023 when she was pushing a care and felt pain in her lower back. Claimant testified she reported the injury to her supervisor the following day. Claimant testified she filed a workers' compensation claim in October 2023. Claimant testified she has not returned to a doctor because the insurance company has not authorized her to receive medical treatment. Claimant testified she is taking over the counter medication for her back pain and her back pain has worsened. Claimant testified she does not know what caused her back pain to worsen.

7. According to the medical records entered into evidence at hearing, Claimant sought treatment on May 24, 2023 at the Urgent Care with Physician's Assistant ("PA") Winkelhorst. Claimant reported to PA Winkelhorst that she developed pain in her back after moving a cart at work the previous Friday. Claimant reported the pain radiated down her lower back. Claimant reported her pain was worse Saturday and had to leave work early on Sunday. PA Winkelhorst ordered an x-ray of the lumbar spine and provided a prescription for cyclobenzaprine. The x-ray showed moderate disc space narrowing at the L4-5 level with small anterior osteophytes on the vertebral endplates. Mild disc space thinning was also noted at the L5-S1 level. Claimant was provided with lifting restrictions of 25 pounds.

8. Claimant was examined at Vail Health on June 7, 2023 by nurse practitioner ("NP") London. Claimant reported that she was pulling a housekeeping cart over a carpeted floor when she felt a pull in her lower central back. NP London noted that in the 2 ½ weeks since the injury Claimant had seen significant improvement in her pain and rated her current pain as only 1 out of 10. Claimant reported she was working with restrictions and had not tried to lift her four year old daughter yet for fear of reinjuring her back. Claimant reported she would be on vacation for the next two weeks. Claimant was released by NP London without restrictions and instructed to follow up in one month.

9. Claimant returned to Vail Health on July 12, 2023 for a telehealth appointment with NP Harris. Claimant noted she retuned to work after her two week vacation and noticed central low back tightness and mild discomfort, but no severe

pain or radiation to her legs. Claimant was again released to return to work without restrictions and referred for physical therapy. Claimant was instructed to follow up with Vail Health in one month.

10. Claimant had another telehealth appointment on August 24, 2023 with NP London. Claimant reported slight right sided lumbar pain that was present off and on, even when resting. Claimant also reported a mild tingling sensation to the post lateral thigh intermittently. Claimant reported she was unable to return to physical therapy because her script had run out. NP London recommended ongoing physical therapy once a week for 4 weeks and instructed Claimant to return in one month. NP London noted Claimant would likely be at MMI in one months.

11. Claimant started a course of physical therapy on September 12, 2023.

12. Claimant returned to Vail Health on September 20, 2023 and noted she had been laid off by Employer, but started a new job cleaning public areas at the airport. Claimant reported that after she was laid off by Employer, she did not work for a few weeks and her condition improved. However, after starting her new job, she had an increase in back pain and right leg symptoms with sharp pain and numbness to the posterior thigh. Claimant reported working full duty, but has pain when bending forward to clean. Claimant also noted she has a coworker perform the mopping for her. NP London recommended a magnetic resonance image ("MRI") of the lumbar spine.

13. The MRI of the lumbar spine was performed on September 26,2023. The MRI demonstrated a central disc protrusion at the L4-5 level that was superimposed on a small circumferential disc bulge, moderate disc height loss, disc desiccation, and osteophytic ridging. Mild bilateral facet arthropathy was also noted along with mild bilateral foraminal stenosis and mild bilateral lateral recess stenosis.

14. Claimant underwent a follow up telehealth appointment with NP London on September 28, 2023. NP London noted Claimant continued to complain of back pain and right leg symptoms with sharp pain and numbness to the posterior thigh. NP London provided Claimant with temporary work restrictions that included a 10 pound lifting restriction and limited stopping, bending and twisting with frequent position changes. Claimant was instructed to continue with physical therapy and a follow up appointment was made for October 26, 2023 or sooner if needed. NP London also referred Claimant for an orthopedic evaluation.

15. Respondents argue at hearing that Claimant is prohibited from reopening her claim for compensation based on a worsened condition by virtue of the Show Cause Order dated August 2, 2024 that closed Claimant's case 30 days after the Order where an injured worker fails to demonstrate good cause as to why the claim should not be closed for failing to prosecute their claim.

16. Respondents cite to the unpublished Court of Appeals case of *Amir v. Industrial Claim Appeals Office,* 17 CA 2165 October 25, 2018 (not selected for

publication). In *Amir,* the Court of Appeals affirmed a decision from the Industrial Claim Appeals Office that affirmed an Order from an ALJ that granted summary judgment to Respondents based on an argument that the Claimant could not proceed on an application for hearing endorsing a reopening for a worsening of condition on a claim where liability was not admitted because, based on *City and County of Denver v. Industrial Claim Appeals Office.* 58 P.3d 1162 (Colo. App. 2002), in order for an ALJ to assess whether a claimant's condition has *changed,* one must start with a compensable condition. The ALJ finds the facts in *Amin* to be distinguishable from the present case, and finds that Claimant may proceed on a reopening under the present fact scenario.

17. In that regard, the ALJ credits Claimant's testimony at hearing and the medical records entered into evidence at hearing and finds that her condition has worsened from the time of the closing and finds that Claimant may reopen her case in order to attempt to prove she sustained a compensable injury arising out of and in the course and scope of her employment with Employer. The ALJ specifically credits Claimant's testimony at hearing that her back pain has worsened and finds that Claimant has established that it is more likely true than not that Claimant's condition has worsened.

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 probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016.

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

3. Section 8-43-207(1), C.R.S. states in pertinent part:

> Hearings shall be held to determine any controversy, concerning any issue rising under articles Oto 47 of this title. In connection with hearings, the director and administrative law judges are empowered to:
>
> (n) Dismiss all issues in the case except as to resolved issues and except as to benefits already received, upon thirty days notice to all parties, for failure to prosecute the case unless good cause is shown why such issues should not be dismissed. For purposes of this paragraph (n), it shall be deemed a failure to prosecute if there has been no activity by the parties in the case for a period of at least six months.

4. Respondents, relying on the unpublished decision in *Amin, supra.,* argue that by obtaining a Show Cause order from the director involving a Petition to Close on a case that has not been admitted, effectively prohibits Claimant from ever litigating the issue of compensability. The ALJ disagrees with this conclusion.

5. Notably, *Amin* is an unpublished opinion from the Colorado Court of Appeals and therefore, does not represent precedent that shall be followed by trial judges. See C.A.R. 35(f).

6. The ALJ determines that the purpose of Section 8-43-207(1)(n), C.R.S. is to allow Respondents an avenue for closing cases in situations where benefits have been admitted, but no action has been taken by the injured worker to pursue said benefits. In those cases, Respondents may pursue closure pursuant to Section 8-43-207(1)(n) with the caveat that the claim may be reopened pursuant to Section 8-43-303, C.R.S., if reopening is appropriate. This is evidenced by the specific paragraph in the Show Cause Order in which the Director advised the Claimant that if the claim was closed for failure to prosecute, the claim could still be reopened pursuant to Section 8-43-303, C.R.S. in the future. If the intent of the show cause order was to permanently close the case without any possibility of obtaining further benefits, there would be no reason for the Director to include that language in the Order.

7. Moreover, Respondents theory that a case that has not been admitted could be closed permanently by virtue of the holding in *Amin* would effectively allow Respondents to accelerate the statute of limitations set forth at Section 8-43-103(2), C.R.S. and close a claim months or even years before the statute of limitations has run on a case.

8. As may be the case in many of these workers' compensation cases, the injured worker may sustain an injury and received a short course of medical treatment before deciding that additional medical treatment is unnecessary. It is not uncommon, much like the present case, for the condition to then worsen and additional medical treatment is reasonable and necessary to cure and relieve the injured worker from the effects of the work injury. In Respondents' legal theory of the interpretation of Section 8-43-207(1)(n), C.R.S., the injured worker would be permanently prohibited from pursuing these benefits in the event that the claim is closed. The ALJ would note that the reopening provisions set forth at Section 8-43-303, C.R.S., are in conflict with this

theory, as they allow for reopening of a closed case within 2 years of when disability benefits would be due and owing or within 2 years of when medical benefits become due and owing.

9. Additionally, in the event that Respondents seek to permanently close a case that has not been admitted, Respondents have an avenue for pursing such a remedy. Respondents are permitted to file an Application for Hearing seeking a determination on the issue of Compensability and proceeding to hearing on that issue. In the event Claimant is unable to establish his or her burden of proof on that issue, the Claimant's case is closed and not subject to reopening.

10. Lastly, the facts in this case are clearly distinguishable from the facts in *Amin, supra.* In *Amin,* Claimant did not initially pursue benefits until 2 years and 11 months had elapsed from the alleged injury. Moreover, there were multiple applications for hearing that had been filed in that case, only to have the hearings abandoned by Claimant.

11. With regard to the application for hearing in *Amin,* the only issue endorsed by Claimant ion that application for hearing was the issue involving the "Petition to Reopen".

12. In the present case, Claimant's application for hearing endorsed a number of issues, including compensability, medical benefits, and temporary disability benefits among other issues. The parties agreed at a prehearing conference to limit the scope of the hearing only to the issue involving Claimant's Petition to Reopen, but other issues were specifically listed on the application for hearing.

13. As found, the ALJ credits the testimony of Claimant at hearing and determines that Claimant has established by a preponderance of the evidence that her condition has worsened pursuant to Section 8-43-303, C.R.S. for purposes of reopening her claim. Claimant may therefore seek a hearing on the issue of compensability.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen her claim for benefits is granted. No decision is made regarding the compensability of Claimant's claim.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificat 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, S809-070). 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, 2025

Keith E. Mottram

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

ISSUE

The issue to be determined by this decision is the following issue:

1. Whether claimant's average weekly wage should be increased.

FINDINGS OF FACT

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

1. Claimant was hired by Employer as a pet groomer and began working on November 27, 2022.

2. Claimant sustained an admitted injury on January 2, 2023 Respondents filed a general admission of liability on January 18, 2023. The admission admitted for an average weekly wage of $520.87.

3. Attached to the general admission were wage records relied upon to calculate claimant's average weekly wage. The wages covered the pay periods from November 27, 2022 through December 24, 2022 which included all pay periods for which claimant had been paid prior to the date of injury.

4. Claimant testified that at the time of hire she expected be to work 40 hours per week but admitted that she only worked 40 hours during one week of her employment prior to the injury.

5. Claimant testified that she experienced a personal medical issue unrelated to work during the week of December 18, 2022 through December 24, 2022, which resulted in her being hospitalized. Claimant had no earnings in the period between December 25, 2022 and the January 2, 2023 date of injury.

6. Respondents paid claimant temporary total disability benefits from January 3, 2023, through February 12, 2023, and again from July 29, 2023, through November 29, 2023. Claimant returned to work for the employer on November 30, 2023, through June 12, 2024, and respondents paid her a total of $1,249.01 in temporary partial disability benefits by respondents for these dates.

CONCLUSIONS OF LAW

General Legal Principles

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40101, 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. 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). Moreover, 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 all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

Average Weekly Wage

The overall purpose of the average weekly wage statute is to arrive at a fair approximation of an injured workers wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P. 2d 77 (Colo. App. 1993); *National Fruit Prod. V. Crespin,* 952 P.2d 1027 (Colo. App. 1997).

Section 8-40-201(19) states "wages shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury either express or implied." Section 8-42-102(2) adds that the AWW

"shall be calculated based upon monthly, weekly, daily, hourly, or other remuneration which the injured ore deceased employee was receiving at the time of the injury." In the five weeks claimant was employed prior to the injury claimant worked a total of 101.38 hours at the hourly rate of $16.25 per hour plus tips. Respondents calculated the average weekly wage in the January 18, 2023 general admission by dividing the total earnings by the number pay periods for which claimant had earned wages to calculate the AWW of $520.87. This method excluded the week claimant missed due to her personal medical issue and the week including the date of injury. Respondents believe this AWW fairly represents claimant's average weekly wage "at the time of injury" and should be the basis for calculation of any temporary partial or temporary total disability benefits.

While respondents maintain that the AWW of $520.87 is a fair and just approximation of claimant's earnings at the time of the injury and would not result in a "manifest injustice", respondents acknowledge that §8-42-102(3) and (5)(b) give the ALJ discretion to determine the AWW. Claimant has alleged that her AWW should be increased based upon a single pay period three weeks prior to her date of injury. Claimant contends this single pay period most accurately reflects her earnings as it is the only pay period during which claimant worked fully as a groomer. It is also the only pay period that encompassed a 40-hour work week. There is no evidence that claimant was guaranteed 40 hours per week. Nor is there evidence that claimant ever averaged 40 hours per week before (or after) the injury.

Respondents voluntarily excluded a period during which claimant lost earnings for reasons unrelated to the work injury to avoid artificially lowering claimant's AWW. Claimant's proposal would exclude two additional weeks of actual earnings prior to her injury and would artificial increase the AWW based on claimant's "expectations" as opposed to what actually happened. Respondents contend this would result in a

"manifest injustice" as it would not accurately reflect claimant's actual work hours and earnings at the time of the injury. Instead, it would exclude three of the five weeks claimant had been employed on the date of injury and base claimant's earnings not on her "average" but rather on the single pay period during which she happened to earn the highest wage. The wage records accurately reflect claimant's actual earnings at the time of injury and support the admitted AWW of $520.87.

ORDER

1. Claimant's request to increase the AWW is denied.

2. Any issue not decided herein is reserved for future determination.

DATED: March 18, 2025

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-214-906-001

ISSUES

- Did Claimant prove she suffered a compensable occupational disease?

STIPULATIONS

If the claim is compensable, the parties stipulated that Claimant is entitled to TTD for 10 days of missed work for out-of-town medical appointments, based on an average weekly wage of $850.00 per week.

FINDINGS OF FACT

1. Claimant worked for Employer as a records clerk. In February 2021, Claimant and a co-worker were tasked with digitizing old paper files so the files could be destroyed. The files were stored in bankers boxes in a "Conex" shipping container on Employer's premises. The files had been previously stored in the basement and had suffered water damage when the basement flooded several years before. Other employees had moved the files to the Conex shortly before Claimant started the digitization project.

2. Claimant and her co-worker retrieved file boxes from the Conex several times per week and brought them to their office for review and data entry. After completing work on a batch of files, they would put the documents back in the boxes and return them to the Conex, where they would retrieve other boxes and repeat the process.

3. Claimant described the files as mildewed, moldy, and generally "nasty." Claimant and her coworker wore face masks covering their nose and mouth during the project. Because of the COVID pandemic, the supply of N95 masks was unreliable, and Claimant estimated they had N95 masks approximately 10% of the time. The rest of the time, they used fabric or paper masks. They worked in a small office with limited ventilation. Claimant was provided a small air purifier, which she perceived as ineffective. Claimant testified that the masks typically appeared soiled and blackened at the end of her workday.

4. Claimant processed files in this manner daily from February 2021 until November 2022.

5. Claimant testified that she and her coworker started experiencing symptoms such as itchy skin, watery eyes, and headaches in approximately May 2021. Approximately six months into the project, Claimant testified she developed a progressive cough.

6. Claimant first sought treatment for her symptoms in September 2022, when she saw Dr. Joseph Browne, a general practitioner at the Rio Grande Hospital Clinic. Dr. Brown's initial report noted Claimant had been working daily for 18 months cleaning files and had developed a chronic cough despite wearing a mask every day. Her pulmonary examination was unremarkable, and chest x-rays showed no evidence of acute pulmonary disease. Dr. Browne diagnosed chronic cough, chest congestion, and environmental exposure. He referred Claimant to National Jewish Health in Denver.

7. Claimant saw Dr. Karin Pacheco at National Jewish on November 9, 2022. Claimant reported she developed a cough, runny nose, nasal drainage, headache, myalgias and fatigue after starting work on water damaged and moldy files in February 2021. Lung exam was unremarkable. PFT testing showed improvement in FEV1 after bronchodilator use, but the results did not meet reliability criteria because of coughing fits. A high-resolution chest CT scan was interpreted as showing diffuse bronchial wall thickening suggesting asthma, mild ground glass opacities consistent with hypersensitivity pneumonitis, and air in the thoracic esophagus suggesting reflux. Dr. Pacheco diagnosed "hypersensitivity pneumonitis (HP) caused by exposure to moldy papers, files, and boxes in the workplace," and aggravation of pre-existing asthma. Dr. Pacheco recommended treating the asthma and chronic sinusitis, while restricting Claimant from additional exposure to the contaminated files at work. She wrote a letter to Employer requesting that a different coworker move the boxes from the Conex, that the work be performed in a different room with better ventilation, and that Claimant be given PPE including an N95 mask and Tyvek suit. Dr. Pacheco recommended allergy testing with an expanded mold panel, a sinus CT, and to start using Advair daily.

8. Allergy testing completed on December 14, 2022 showed no reaction to any of 24 tested mold species.[1] The sinus CT showed no evidence of sinus inflammation.

9. Dr. Pacheco reevaluated Claimant on December 14, 2022. Claimant had been moved to a different office and was no longer working with the water damaged files.[2] Nevertheless, she reported no change in her cough, nasal drainage, headaches, myalgias, shortness of breath, or fatigue. Dr. Pacheco noted the allergy testing was negative, but did not comment on how that would impact her assessment. She recommended Claimant continue using Advair, neti pot, and Flonase nasal spray, and avoid further exposure to moldy files.

10. John Klein performed environmental air quality and mold testing for Employer on February 5, 2023. Mr. Klein took air samples of various locations where the files were stored and processed, including the Conex. He also performed a surface test on a document he found in the Conex that appeared stained with mold. The results of the air testing in showed "slightly elevated" levels of mold spores compared to the background control level. The surface test confirmed the presence of settled mold spores on the document that was tested.

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[1] The testing included molds later identified by testing at Claimant's workplace.
[2] Employer had halted all work with the files after receiving Dr. Pacheco's November 2022 letter.

11. After receiving Mr. Klein's report, Employer retained a contractor to remediate the water damaged files. The remediation was performed from March or April 2023 to November 2023, and then again from approximately April 2024 until June 2024. The process was done outdoors on tables or in a large tent when the weather was bad. The procedure entailed wiping all documents with a cleaning solution and placing them in new files and boxes. The Claimant supervised the process to ensure the documents were secure, but did not physically work with the files. She wore N95 masks, gloves, and safety glasses.

12. Claimant followed up with Dr. Pacheco on July 17, 2023. She was frustrated by her persistent symptoms and lack of improvement. Dr. Pacheco reiterated her opinion that exposure to mold aggravated Claimant's pre-existing asthma and likely caused hypersensitivity pneumonitis. However, because Claimant had not been exposed to the Conex or moldy files since December 2022, Dr. Pacheco was less concerned that Claimant would develop a permanent lung disability. Dr. Pacheco opined Claimant had developed chronic gastroesophageal reflux triggered by bronchodilator use, and obstructive sleep apnea, which she believed should be "covered by her workers' compensation insurance." Dr. Pacheco recommended that Claimant continue her existing medications, start Prilosec and Pepcid and undergo a sleep study.

13. A repeat high-resolution chest CT scan was completed on July 17, 2023. The radiologist noted mild patchy and centrilobular ground glass opacities in the mid and upper lungs, similar to the previous scan, which raised a "possibility" of hypersensitivity pneumonitis.

14. Claimant did not return to Dr. Pacheco after July 2023. Claimant testified that she lacked confidence in Dr. Pacheco and did not feel the treatment was beneficial or worth the long drive from Alamosa to Denver.

15. Claimant started seeing Elizabeth Nugent, PA-C at the UCHealth Pulmonology Clinic on November 28, 2023. Claimant reported her symptoms failed to improve after December 2022 even though she had stopped working with the moldy files. Claimant described chronic, severe coughing, which caused her to vomit several times per week. She also described difficulty climbing stairs due to fatigue and shortness of breath. The remediation process had recently been paused but was expected to resume in approximately March 2024. The PFTs had worsened compared to the November 2022 testing. Ms. Nugent ordered a repeat chest CT.

16. The repeat high-resolution chest CT was completed on April 9, 2024. It showed mild peribronchial thickening but no evidence of hypersensitivity pneumonitis.

17. Claimant followed up with Ms. Nugent on April 26, 2024. The remediation procedure had not restarted as of the date of the evaluation. PFTs from that visit showed mild obstruction but no bronchodilator response. Ms. Nugent indicated the test results had improved compared to November 2023. Ms. Nugent diagnosed severe persistent reactive airway disease, hypersensitivity pneumonitis, chronic cough, dyspnea on exertion, and hypoxia. Ms. Nugent opined that Claimant's "symptoms and testing [are]

consistent with hypersensitivity pneumonitis triggered by exposure to moldy storage area and files of starting in February 2021. Exposure also triggered reactive airway disease, which caused significant chronic daily cough to the point of emesis and significant dyspnea on exertion." Ms. Nugent noted that successive CT scans since 2022 showed findings consistent with HP while Claimant was being exposed to moldy files, and absence of those findings after the mold exposure stopped. As a result, she opined, "This supports a diagnosis of hypersensitivity pneumonitis and reactive airway disease caused by exposure to moldy documents."

18. Claimant has been using supplemental oxygen 24/7 since May 2024.

19. Dr. Jeffrey Schwartz performed an IME for Respondents on June 4, 2024, and testified via deposition on February 24, 2025. Dr. Schwartz agreed that hypersensitivity pneumonitis is "an unusual allergic respiratory disorder" that can be caused by repeated exposure to excessive airborne fungal spores. However, he did not believe HP was a correct diagnosis for Claimant's condition, or that she has a work-related pulmonary condition. Dr. Schwartz cited multiple factors in support of his conclusions, including:

- Dr. Schwartz personally reviewed the initial November 9, 2022 chest CT and observed "negligible findings of centrilobular ground glass nodularity," which suggested, but was not diagnostic of HP. Dr. Schwartz's interpretation of the CT scan was confirmed by a board-certified thoracic radiologist who also reviewed the films. As a result, the initial diagnosis of HP was unsupported. Furthermore, Dr. Schwartz those minimal changes were no longer shown on the April 9, 2024 chest CT, which means HP cannot account for Claimant's report of ongoing and progressive respiratory symptoms.

- Based on the environmental testing data, he saw no persuasive evidence that Claimant was ever exposed to levels of mold spores sufficient to cause HP.

- HP involves an allergic response, but testing in December 2022 showed Claimant is not to any species of mold, including those detected by the workplace environmental testing. Claimant could not have developed an allergic response to a substance to which she is not allergic.

- Claimant reported ongoing and worsening symptoms even after she stopped working with the files or entering the Conex in December 2022. This was confirmed by 2024 PTFs that showed a significant reduction in lung function compared to the November 2022 study. In Dr. Schwartz's view, "this would not make any sense" if the respiratory issues were caused by working with the moldy files. Even if Claimant had been exposed to a high level of mold spores and had somehow developed an allergic reaction despite not being allergic to the mold, her symptoms should have improved after the exposure ceased. This confirms that Claimant's respiratory issues are unrelated to any workplace exposure.

- Claimant had multiple documented instances of oxygen desaturation before she started working with the water-damaged files, including a level of 87% on room air in 2017 and 90% in December 2020.

- Occult GERD is the most medically probable cause of Claimant's chronic cough is occult GERD. Claimant has reported worsening reflux since she started receiving treatment for her chronic cough. Although she has not undergone testing to objectively verify GERD, other differential diagnoses (such as HP, sinusitis, and asthma) have been ruled out.

20. Claimant testified she was active 50-year-old individual before she started working with the old files. She said she regularly walked with friends, played with her grandchildren, and had no ongoing breathing problems before being exposed to the water-damaged boxes. She testified she had no issues with shortness of breath, watery eyes, a runny nose or any respiratory problems whatsoever nor had she ever been diagnosed with sleep apnea. She was never diagnosed with GERD and had no issues with any type of chest pain or acid reflux issues.

21. The evidence presented by Claimant in support of a causal nexus is no more persuasive than the contrary evidence presented by Respondents.

22. Claimant failed to prove by a preponderance of the evidence that she developed a compensable occupational disease.

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 mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease 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.

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

The claimant must prove entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is evidence that leads the ALJ to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). Put another way, the standard is met when the existence of a contested fact is "more probable than its nonexistence." *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

As found, Claimant failed to prove she suffered an occupational disease proximately caused by her work. To be sure, Claimant has presented evidence from which a causal nexus could be inferred. Claimant and her co-worker developed persistent respiratory symptoms after working with water-damaged and moldy files for a prolonged period. And several treating providers have opined that the symptoms were caused by excessive exposure to mold at work. But Dr. Schwartz explained in detail why he believes the condition is not work-related, despite the apparent connection suggested at first blush by the temporal association. Critically, Dr. Schwartz explained that an allergic condition (HP) is not probable because Claimant was objectively shown to have no allergy to the species of mold present in the Conex and on the files. Claimant's providers did not persuasively address or refute this point. Nor did Claimant's providers offer a persuasive explanation for why she continued to worsen long after exposure to the moldy files stopped. The evidence presented by Claimant in support of a causal nexus is no more persuasive than the contrary evidence presented by Respondents. Claimant has the burden of proof in this matter, and this relative evidentiary equipoise prevents her from crossing the threshold of "more likely than not."

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 18, 2025

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 5-273-032-002

PRELIMINARY MATTERS

This matter was set on Respondents application for hearing. The issues were apportionment of death benefits, compensability, and average weekly wage (AWW). Prior to any testimony, Respondents acknowledged that the death of [redacted] (Decedent) occurred within the course and scope of his employment with Employer. Respondents further admitted that there were supplementary wages earned by Decedent in a business of which he was partial owner (Miller Soils). Respondents thus stipulated to an AWW of $1,725.82, and all parties agreed that the issue was reserved for a future hearing.

ISSUE

The proper allocation of death benefits between Decedent's wife ([redacted] and minor child ([redacted]

FINDINGS OF FACT

1. Decedent suffered a work-related injury resulting in his death on May 16, 2024 while in the course and scope of his employment with Employer. No General Admission of Liability (GAL) has been filed because Respondents are awaiting the outcome of this hearing.

2. At the time of Decedent's death, he was married to Claimant [redacted] They were married on July 17, 2018.

3. Decedent was previously married to [redacted] Decedent and [redacted] adopted a daughter, Claimant [redacted] (fka [redacted] in 2011. They divorced in 2016.

4. When the marriage ended, Decedent and [redacted] entered into a Memorandum of Understanding. The Memorandum delineated parenting time, maintenance, child support payments and other payment obligations for matters including extracurricular activities, uncovered medical expenses, and the terms of child-rearing. The agreement required child support to continue until Claimant [redacted] reached the age of 19 or remained enrolled in high school or an equivalent program. The document also anticipated that Decedent and [redacted] would consult and attempt to agree upon the payment for postsecondary education costs for Claimant [redacted] including tuition, books, fees, and room and board, that were not paid for by third parties, scholarships, or financial aid. The Memorandum imposed no payment obligation on either party.

5. Decedent and [redacted] entered into a modification of the 2016 agreement in 2018. The modification increased child support payments based on the relative incomes of the parties. It also increased Decedent's share of extracurricular activities and

uncovered medical expenses from 60% to 67%. There were also minor changes to parenting time. All other provisions of the prior agreement remained in effect.

6. In 2021 the Decedent and [redacted] executed a court stipulation that temporarily suspended Decedent's parenting time. Claimant [redacted] began residing full-time with [redacted] The stipulation specified counselling aimed at the reunification of Decedent and Claimant [redacted] No other modifications were made to the terms of the prior agreements. Child support payments also were not increased.

7. After the 2021 stipulation, Claimant [redacted] and Decedent continued their relationship by texting, facetime calls, and in-person time together.

8. Decedent paid $530 per month in child support, plus health insurance and 67% of extracurricular activities and doctor's visits. He would continue his payment obligations until Claimant [redacted] turned 19 per the 2018 agreement. Prior to Decedent's death he remained current on all child support payments, extracurricular fees and medical expenses.

9. Claimant [redacted] was 16 years old at the time of Decedent's death. She is currently 17 years old and in her sophomore year in high school. She is on track to graduate from high school in May 2027, when she will be approximately 19 years and 6 months old.

10. Claimant [redacted] began receiving Social Security Survivor Benefits of $1,607 per month on Decedent's date of death. At the time of his death, Decedent owed about 30 more months of child support for a total of $15,900.

11. Pursuant to the terms of the initial Memorandum of Understanding, Decedent maintained a life insurance policy to ensure the ongoing obligation of maintenance for [redacted] and support payments for Claimant [redacted] The policy would cover his child support and alimony obligations if he died. After death, the policy paid $78,000 to [redacted]

12. Decedent would Venmo [redacted] for Claimant [redacted] expenses. Their Venmo history shows about $5,500 in transactions over 17 months for an average of $320 per month.

13. From the time of her marriage to Decedent, Claimant [redacted] lived in his home. She had no ownership interest in the property.

14. Claimant [redacted] was 35 years of age at the time of Decedent's death and is currently 36 years old. She testified she was entirely dependent on Decedent at the time of his death.

15. Claimant [redacted] has held a pilot's license since 2016 and began flying commercially in 2021. In 2023 Claimant [redacted] earned $47,958 as an airline pilot for

Skywest Airline and Mesa Airline combined over a six-month period. She earned $54,454 in total wages for 2023.

16. Claimant [redacted] is currently unable to fly commercially because of a kidney stone that prevents her from receiving medical clearance. She would also be required to pay for significant flight hours prior to applying for jobs. Claimant [redacted] also testified she is currently not mentally prepared to fly because of Decedent's death. She is currently working for the Department of Motor Vehicles and earning approximately $2,800 per month.

17. Decedent died intestate and Claimant [redacted] has been appointed the personal representative of his estate.

18. Claimant [redacted] testified that the inventory of the intestate estate has an estimated net value of $344,852. The home owned by Decedent in which Claimant [redacted] resides constitutes the vast majority of the estate. The home is being sold in the probate process and is currently under contract for approximately $15,000 more than the value that was listed on the estate inventory. Claimant [redacted] is moving to an apartment where her rent will be about $1,500 per month.

19. Claimant [redacted] and Claimant [redacted] are the only two beneficiaries of the Decedent's estate.

20. The ALJ takes judicial notice of the intestate succession statute. Because Claimant [redacted] is the spouse and Claimant [redacted] is the only descendant of Decedent but not of Claimant [redacted] subsection (4) of §15-11-102 C.R.S. applies. The subsection provides that the surviving spouse will take the first $209,000 (adjusted per department of revenue order for deaths occurring in 2024) in value from the intestate estate, plus 50% of the remainder. Using the net value of the estate as testified to by Claimant [redacted] she would receive a total of $276,926 from the estate, while Claimant [redacted] will receive $67,926 from the estate.

21. Based on Claimant [redacted] age at the time of Decedent's death, her eligibility for benefits would end on her graduation from high school in May of 2027. She will be 19 years and 6 months old and receive a total of 37 months of benefits. If Claimant [redacted] enrolls in college, her benefits may continue until she reaches the age of 21 in November of 2028. After that date Claimant [redacted] would be entitled to the entire benefit unless otherwise terminated pursuant to statute.

22. While Decedent was alive, Claimant [redacted] was reliant on him for a majority of her bills. Now, she is solely responsible for the payment of everyday expenses. She had to sell the house she was living in and rent an apartment for $1,500 per month, which is over 50% of her monthly income of $2,800. However, the record also reflects that Claimant [redacted] will receive, as the surviving spouse, approximately $276,000 from Decedent's intestate estate.

23. Prior to Deceased's death, Claimant [redacted] was receiving $530 in monthly child support, and he was paying 67% of extracurricular activities and medical bills. Decedent had about 30 more months to pay child support, for a total of $15,900. Claimant [redacted] now receives Social Security Death benefits, until she turns 19, in the amount of $1,607 per month. In total, she will receive approximately $48,210 in Social Security benefits. Furthermore, [redacted] received a $78,000 life insurance policy. This life insurance policy was executed in 2016 specifically if Decedent died before his child support and alimony obligations were complete. Combining the total benefits from Social Security and the life insurance policy total about $126,210.

24. Based on the totality of the evidence, Claimant [redacted] and Claimant [redacted] were each wholly dependent upon Decedent pursuant to §8-41-501(1)(a) and (b), C.R.S. However, both Claimants have obtained significant financial resources subsequent to Decedent's death. Claimant [redacted] will receive, as the surviving spouse, approximately $276,000 from Decedent's intestate estate. Similarly, Claimant [redacted] will receive total benefits from Social Security and a life insurance policy totaling about $126,210.

25. Importantly, the length of time that Claimant [redacted] may be eligible for death benefits would be at most 4 years and 6 months. After that date Claimant [redacted] would be entitled to the entire benefit unless otherwise terminated pursuant to statute. Moreover, Claimant [redacted] has no earnings of her own and must look to the Social Security benefits, together with the earnings of her mother, for support. Conversely, Claimant [redacted] will receive the entire benefit most likely for decades given her young age. Moreover, Claimant [redacted] earned significant wages in 2023. She continues to work and earn $2,800 per month. It is also likely that her medical condition will resolve and allow her to return to her career as a pilot.

26. Claimant [redacted] will not have any significant earning capacity before her eligibility for death benefits ends pursuant to statute. Moreover, the divorce decree between [redacted] and Decedent specifically contemplated that the parties would hopefully contribute to Claimant [redacted] post-secondary education costs. However, there are no funds set aside by either for that expense. Considering the "actual dependence" of the Claimants as well as their relative incomes and circumstances, apportioning Decedent's death benefits 75% for Claimant [redacted] and 25% for Claimant [redacted] represents a just and equitable allocation under the facts and circumstances of this case.

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. Under §8-42-115, C.R.S, where death proximately results from an industrial injury, the decedent's dependents are entitled to receive the decedent's workers' compensation benefits. Where one or more dependents is entitled to receive a decedent's benefits, the benefits are to be apportioned in a "just and equitable" manner. §8-42-121, C.R.S. According to §8-41-503, C.R.S., dependency shall be determined as of the date of the industrial injury. Under §8-42-114, C.R.S., where periodic death benefits granted by the federal old age, survivors, and disability insurance act (i.e., Social Security) are payable to a dependent, Colorado Workers' Compensation death benefits to that dependent shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.

5. Pursuant to §8-42-121, C.R.S., "[d]eath benefits shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable." This statutory provision does not require that all persons deemed to be wholly dependent be treated on an equal basis. *Spoo v. Spoo*, 142 Colo. 268, 358 P.2d 870 (Colo. 1961). Rather, it is well-settled that the ALJ may consider the relative incomes and the unique financial circumstances of the claimants when determining a "just and equitable" apportionment of death benefits in any particular case. *See Spoo,* 358 P.2d at 872; *Ward v. Apex Heating and Air Conditioning*, W.C. 4-129-484 (ICAO, Feb. 8, 2001). The ALJ may consider the "actual dependence" of the claimants as well as their relative incomes and foreseeable economic circumstances. *Ward v. Ward,* 928 P.2d 739 (Colo. App. 1996).

6. As found, while Decedent was alive, Claimant [redacted] was reliant on him for a majority of her bills. Now, she is solely responsible for the payment of everyday expenses. She had to sell the house she was living in and rent an apartment for $1,500 per month, which is over 50% of her monthly income of $2,800. However, the record also

reflects that Claimant [redacted] will receive, as the surviving spouse, approximately $276,000 from Decedent's intestate estate.

7. As found, prior to Deceased's death, Claimant [redacted] was receiving $530 in monthly child support, and he was paying 67% of extracurricular activities and medical bills. Decedent had about 30 more months to pay child support, for a total of $15,900. Claimant [redacted] now receives Social Security Death benefits, until she turns 19, in the amount of $1,607 per month. In total, she will receive approximately $48,210 in Social Security benefits. Furthermore, [redacted] received a $78,000 life insurance policy. This life insurance policy was executed in 2016 specifically if Decedent died before his child support and alimony obligations were complete. Combining the total benefits from Social Security and the life insurance policy total about $126,210.

8. As found, based on the totality of the evidence, Claimant [redacted] and Claimant [redacted] were each wholly dependent upon Decedent pursuant to §8-41-501(1)(a) and (b), C.R.S. However, both Claimants have obtained significant financial resources subsequent to Decedent's death. Claimant [redacted] will receive, as the surviving spouse, approximately $276,000 from Decedent's intestate estate. Similarly, Claimant [redacted] will receive total benefits from Social Security and a life insurance policy totaling about $126,210.

9. As found, importantly, the length of time that Claimant [redacted] may be eligible for death benefits would be at most 4 years and 6 months. After that date Claimant [redacted] would be entitled to the entire benefit unless otherwise terminated pursuant to statute. Moreover, Claimant [redacted] has no earnings of her own and must look to the Social Security benefits, together with the earnings of her mother, for support. Conversely, Claimant [redacted] will receive the entire benefit most likely for decades given her young age. Moreover, Claimant [redacted] earned significant wages in 2023. She continues to work and earn $2,800 per month. It is also likely that her medical condition will resolve and allow her to return to her career as a pilot.

10. As found, Claimant [redacted] will not have any significant earning capacity before her eligibility for death benefits ends pursuant to statute. Moreover, the divorce decree between [redacted] and Decedent specifically contemplated that the parties would hopefully contribute to Claimant [redacted] post-secondary education costs. However, there are no funds set aside by either for that expense. Considering the "actual dependence" of the Claimants as well as their relative incomes and circumstances, apportioning Decedent's death benefits 75% for Claimant [redacted] and 25% for Claimant [redacted] represents a just and equitable allocation under the facts and circumstances of this case.

ORDER

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

1. Claimant [redacted] shall receive 75% of the death benefit until she is no longer eligible. Claimant [redacted] shall receive 25% of the benefit until Claimant [redacted] is no longer eligible.

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

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

DATED: March 18, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-279-801-001

STIPULATIONS

- Claimant sustained a compensable injury on June 11, 2024. Respondent filed a General Admission of Liability on August 21, 2024.

- As a result of the injury claimant obtained reasonable, related and necessary medical care with Orthopedic Centers of Colorado and Focus Hand and Arm Surgery Center, and their referrals as contained in Exhibits 1 and 2.

- Claimant is entitled to Temporary Disability benefits from June 12, 2024 to July 15, 2024.

- Claimant's ATP placed claimant at MMI on December 6, 2024.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence that he sustained a compensable injury.[1]

II. If Claimant established that he sustained a compensable injury, whether he also established that he is entitled to all reasonable, necessary, and related care for his injury.

III. What is Claimant's AWW?

IV. Whether Claimant established that he is entitled to Temporary Total Disability (TTD) benefits.

V. Whether the Respondent has proven by a preponderance of the evidence that Claimant is responsible for termination.

FINDINGS OF FACT

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

1. Dave DeMayola testified that Respondent-Employer did not have workers' compensation insurance at the time of the injury because when he purchased the package of insurance recommended by his insurance agent, there was no recommendation for workers' compensation insurance.

[1] Although the parties have stipulated as to compensability, prior to approving the stipulation, the ALJ has considered the evidence to verify that the Claimant did sustain a compensable injury and that there is a factual basis for the stipulation.

2. Claimant sustained a right forearm laceration. Claimant sought treatment with Orthopedic Centers of Colorado and Focus Hand and Arm Surgery Center. The treatment with the providers is reasonable, necessary and related to his work injury.

3. Respondent filed a General Admission of Liability on August 21, 2024, which admitted to an Average Weekly Wage of $759.20. The employers pay stubs for Claimant's employment with Respondent were admitted into evidence. The pay stubs establish that Claimant earned a total of $13,838.00 from February 1, 2024, through June 8, 2024, at total of 18 3/7 weeks. $13,838.00 ÷ 18 3/7 = $750.90 per week.

4. Claimant provided a different calculation of AWW based on wage records from March 10, 2024 to June 10, 2024. Utilizing the wages from that period of time the AWW would be $908.94.

5. The Administrative Law Judge finds that Claimant's Average Weekly Wage is $759.20, as that figure, for which Respondent admitted liability in the General Admission of Liability dated August 21, 2024, is higher than the wages Claimant earned while working before the injury and represents the wages per week Claimant would have earned had he not been injured.

6. Respondent's General Admission of Liability admitted liability for Temporary Total Disability benefits from June 12, 2024, through July 15, 2024. However, the wage records establish that Claimant actually was paid wages for that time, with taxes withheld, rather than Temporary Total Disability benefits. [Exhibit B, pp. 18-21]. Therefore, Claimant would be entitled to Temporary Partial Disability benefits for the period from June 12, 2024, through July 15, 2024, rather than Temporary Total Disability benefits.

7. Claimant's pay stub detail for the pay period from June 2, 2024, through June 15, 2024, establishes that Respondent paid Claimant 76.92 hours at $20.00 per hour for the pay period, for a total of $1,538.40. [Exhibit B, p. 18]. Claimant's time card for the pay period shows that Claimant worked 50 hours from June 2, 2024, through June 10, 2024.

8. Therefore, for the dates of June 11, 2024, through June 15, 2024, Respondent paid Claimant 26.92 hours at $20.00 per hour, for a total of $538.40. The wage records establish that Claimant is entitled to Temporary Partial Disability benefits from June 11, 2024, through July 29, 2024, in the amount of $279.47.

9. Claimant's timecard establishes that Claimant returned to work on July 15, 2024. [Exhibit D, p. 41]. On that date, Claimant sent a text message to Dave DeMayola setting forth the job duties Claimant performed on that date and the duties he would perform the following day.

10. Claimant testified that the employer did not provide him with work within his restrictions for the period from July 15, 2024, through July 29, 2024. However, on cross examination Claimant admitted that there were only two instances where the jobs he was

asked to perform were outside of his restrictions. The first instance was when he was asked to take his own truck to a warehouse to pick up an appliance. Claimant testified that he was not required to lift anything upon accepting the appliance from the warehouse, but he was forced to unload the appliance when he returned to Respondent's yard, which was beyond his restrictions. The second instance was when he was asked to assist Marcus Sanchez in unloading a truck full of debris at a junkyard, which he alleged required him to lift a heavy piece of metal with both hands.

11. As to the first instance, Marcus Sanchez and Dave DeMayola both testified that they specifically requested that Claimant drive the company truck to the warehouse because it was their intention that Claimant leave the appliance in the company truck so that they could take the truck with the appliance to a job site the following morning, but that Claimant chose to drive his own truck instead. If Claimant had complied with Employer's instructions and taken the company truck, Claimant would not have been required to unload the appliance from his truck so Claimant could take his truck home.

12. Claimant testified that he did not want to drive the company truck because it did not have registration and insurance. Claimant did not indicate how he came upon the knowledge that the truck was not registered or insured. In addition, Dave DeMayola specifically testified that he purchased a package of insurance upon the recommendation of his insurance broker. The Administrative Law Judge finds Claimant's testimony that the truck was not registered or insured is not credible.

13. As to the instance of unloading the truck at the junkyard, Marcus Sanchez testified that they were unloading small pieces of wire directly into a dumpster, which required them to reach into the bed of the truck and lift the pieces into the dumpster, which Claimant performed with his one good hand. Mr. Sanchez denied that Claimant was required to lift anything heavy or to use two hands to unload items at the dumpster.

14. Between July 15, 2024, and July 29, 2024, Claimant did not send any texts to Dave DeMayola indicating that he needed assistance with any job duties or that he was being asked to perform any job duties which required him to use his injured arm. [Exhibit D, pp. 43-44].

15. Claimant testified that he requested to speak with Dave DeMayola on July 29, 2029, but Mr. DeMayola was not present so he actually spoke to Mr. DeMayola on July 30, 2024. Mr. DeMayola and Mr. Sanchez both testified that Claimant spoke to Mr. DeMayola on July 29, 2024. However, the actual date of the conversation is irrelevant to the issue of why Claimant did not return to work after July 29, 2024.

16. Claimant testified that he expressed his concerns about being asked to perform job duties outside of his work restrictions and that Mr. DeMayola become angry and told Claimant to leave the jobsite. However, Claimant acknowledged that in his discovery responses he indicated that Mr. DeMayola "fired" him.

17. Mr. Sanchez and Mr. DeMayola both testified that Claimant asked for a raise and that Mr. DeMayola informed Claimant that could not afford to give Claimant a

raise because he was working modified duty, that Claimant then became irate because it was the injury that was causing him to work modified duty, and that Claimant banged on the window of Mr. Sanchez's truck and asked to be taken back to his own truck and left the jobsite.

18. On Tuesday, July 30, 2024, at 8:46 AM, Dave DeMayola sent a text message to Claimant stating "Please come back to work." [Exhibit D, p. 44].

19. Regardless of whether Claimant was "fired" or "quit" his job on July 29 or July 30, the question remains whether Claimant's wage loss after July 29, 2024, was caused by the injury. Claimant argues that he either was fired or could not continue working because he was being asked to perform jobs outside of his work restrictions. However, Employer did not ask Claimant to perform duties outside of his restrictions. Instead, through what can be characterized as a miscommunication, Claimant ended up taking his own truck and then had to unload the appliance from his truck on his own rather than leave it in the company truck as intended by Employer.

20. From June 14, 2024, through June 29, 2024, Claimant also did not send any text messages supporting his claim that the employer was asking him to perform job duties outside of his restrictions. Under the totality of the circumstances, the Administrative Law Judge finds that the Employer was meeting the Claimant's restrictions and that Claimant left work because he became upset that he did not receive a raise on July 29, 2024.

21. Claimant's timecards from July 15, 2024, through July 29, 2024, established that Claimant worked Monday through Friday. On Thursday, July 18, 2024, and Thursday, July 25, 2024, Claimant did not work any hours. However, Claimant testified that he asked for and received those days off because he did not want to return to work after his therapy appointments so he could take care of other issues. Exhibit 3 establishes that Claimant paid for his therapy appointment at 3:19. It is a reasonable inference that Claimant's appointment, therefore, was from 2:00 PM to 3:00 PM. The therapy appointment was in Parker, and Claimant worked in Castle Rock. Therefore, Claimant could have worked from 8:00 AM to noon on Thursday, July 18, 2024, and then traveled to his therapy appointment, leaving him 2 hours to travel to the appointment, if Claimant had not requested the entire day off. Therefore, the 4 hours Claimant missed on July 18, 2024, were not caused by the industrial injury.

22. It is a reasonable inference that the same analysis applies to the time missed from work on July 25, 2024. Therefore, the 4 hours Claimant missed on July 25, 2024, were not caused by the industrial injury.

23. Giving the employer credit for the 4 hours Claimant chose to miss from work on July 18 and July 25, 2024, the Claimant averaged 6.9 hours per day after his return to work on July 15, 2024 through July 29, 2024.

24. Dave DeMayola and Marcus Sanchez both testified that Employer would have continued to offer work to Claimant through October 20, 2024, if Claimant had not refused to return to work. This testimony is supported by the job offer made by Employer to Claimant on November 8, 2204, indicating that Employer did have work available for Claimant. [Exhibit E, p. 52]. Therefore, if Claimant had not refused to return to work after July 29, 2024, it is a reasonable inference that Claimant would have earned $691.00 per week through October 20, 2024 (6.91 hours per day x $20.00 per hour = $138.20 per day x 5 days per week = $691.00 per week).

25. Claimant found other employment on October 21, 2024 for wages that exceed his AWW.

26. Based on a totality of the evidence, Claimant is entitled to $868.30 in Temporary Partial Disability benefits from June 15, 2024, through October 20, 2024.

CONCLUSIONS OF LAW

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

Generally

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

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

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

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

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case there is no dispute that the Claimant was within the course and scope of employment when he suffered a traumatic laceration of his forearm.

Average Weekly Wage

E. C.R.S. §8-42-102(d), provides "Where the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from said daily wage in the manner set forth in paragraph (c) of this subsection (2)".

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

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

determine AWW. *Campbell v. IBM Corp*., supra. The ALJ concludes that $759.20 represents a fair calculation for Claimant's AWW.

Responsible for termination

F. 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, Respondent failed to sustain its burden of proof that Claimant was responsible for his termination of employment. There appears to be a miscommunication that led to Claimant's termination of employment.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that he sustained a work related injury.

2. Claimant is entitled to medical benefits incurred due to his work related injury with the medical providers identified in finding of fact #3.

3. Claimant's AWW is $759.20. This is based on considering both the Claimant's calculation and Respondent's calculation to arrive at a fair calculation of Claimant's wages.

4. Claimant is entitled to temporary disability benefits from June 12, 2024 through October 20, 2024.

5. Respondent failed to sustain its burden that Claimant was responsible for his termination.

6. Any issue not addressed herein is reserved for future determination.

DATED: March 20, 2025

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

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

ISSUES

1. What is Claimant's correct average weekly wage.

2. Whether Claimant has proved by a preponderance of the evidence that TTD and PPD benefits should be recalculated based on a different average weekly wage than that which was admitted in the Final Admission of Liability.

FINDINGS OF FACT

1. Claimant was employed by Inland Technologies International as a deicer.

2. Claimant began employment with Respondent-Employer on August 23, 2023, starting with classroom and computer-based training. On September 16, 2023, Claimant began on-the-job training, during which he would work between four and six hours daily. Claimant became single operator certified on October 31, 2023, allowing him to operate his own deicing truck as a one-man crew. Claimant's hourly wage was $24 per hour, with $36 per hour for overtime both during and after training. Claimant was paid biweekly.

3. Claimant suffered an admitted industrial injury on December 8, 2023, one hour into an eight-hour shift. Leading up to his date of injury, Claimant's employment spanned a total of eight two-week pay periods. Claimant never returned to work following his work injury.

4. Respondents filed a Final Admission of Liability admitting for an average weekly wage (AWW) of $652.50. Respondents admitted to $73,358.40 in permanent partial disability (PPD) benefits for a 34% whole person impairment rating paid out at a weekly rate of $435 over 400 weeks. Respondents also admitted for $18,145.71 in temporary total disability (TTD) benefits, also at a weekly rate of $435 and over 41 and 5/7 weeks.

5. In calculating Claimant's AWW, Respondents excluded the first two pay periods, noting that the pay during the first two pay periods was markedly low and, consequently, not representative of Claimant's earnings overall. They also excluded the last pay period, as it included lost wages resulting from Claimant's work-related disability. Consequently, of the eight two-week pay periods for which Claimant was paid by Respondents leading up to the injury, Claimant's gross

earnings for pay periods three through seven amounted to $6,525, which Respondents used to calculate the AWW of $652.50.

6. Claimant credibly testified at hearing consistent with the above. Claimant also testified that he could bid on five or six shifts per week, and that "it was pretty much going to be 40 hours a week every shift." Beginning around November 1, 2023, Claimant was bidding for jobs on a consistent basis.

7. Respondents called Adam Gamache to testify at hearing as well. Mr. Gamache credibly testified that he was responsible for new-hire on-boarding at Respondent-Employer, for training with existing employees, and for handling reports of on-the-job injuries. Mr. Gamache testified that it was typical for employees in the deicer role to have hours that would fluctuate from week to week. He testified that there is a bidding period each week when employees bid their own schedules. The more an employee is available, the more likely it would be that they would be able to pick up shifts on a weekly basis, depending on the weather. Mr. Gamache testified that when the weather was below forty-six degrees Fahrenheit or there were weather conditions conducive to frost, employees would be called in to work.

8. The Court finds the testimonies of both Claimant and Mr. Gamache to be credible.

9. During the pay period from November 26 to December 9, 2023, Claimant was unavailable to work for the last day and seven hours of the second to last day due to his injury. Therefore, Claimant's pre-injury availability for that pay period was twelve days and one hour (of an eight-hour shift). He earned $1,638 during that pay period.

10. During the four pay periods preceding that pay period, Claimant earned a total of $5,559. That same time frame included 56 days. The first day of that pay period was October 1, 2023, the first day that Claimant could work a single operation.

11. From October 1 to Claimant's injury on December 8, 2023, Claimant was available for work for 68 and 1/8 shifts. During that time, Claimant earned a total of $7,197. This corresponds with weekly earnings of $739.51.

12. The Court finds that calculating Claimant's average weekly wage based on the time period beginning October 1, 2023, and ending on December 8, 2023, one hour into Claimant's shift, most fairly represents Claimant's wage-earning capacity as of the date of Claimant's injury.

13. The Court finds that this time period best reflects Claimant's wage-earning capacity as of his date of injury because it captures the period when Claimant was fully trained, single-operator certified, and actively bidding on shifts. Unlike the initial pay periods, which included classroom and on-the-job training with reduced hours, this timeframe represents Claimant's actual earning potential under normal working conditions. Additionally, the exclusion of the final pay period prevents

distortion of the AWW due to the lost hours from Claimant's injury. By using this period, the calculation reflects the most consistent and representative pattern of Claimant's work schedule and earnings, ensuring a fair and equitable assessment of his AWW.

14. Therefore, the fairest calculation of Claimant's AWW as of his date of injury is $739.51.

15. The appropriate TTD rate based on the correct AWW is $493.00.

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 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).

AWW

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM*, 867 P.2d 77, 82 (Colo. App. 1993). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury. *See* § 8-42-102(2), C.R.S. (2021).

Where the prescribed methods will not result in a fair calculation of a claimant's AWW in the particular circumstances, section C.R.S. § 8-42-102(3) grants an ALJ discretion to determine AWW "in such other manner and by such other method as will, in the opinion of the director *based upon the facts presented*, fairly determine such employee's average weekly wage." Section 8-42-102(3), C.R.S. (emphasis added).

Claimant argues that his AWW should be calculated at $960.00 per week based on his hourly wage of $24.00 and his anticipated full-time schedule of forty hours per week. Claimant contends that after completing his training and becoming single operator certified on October 31, 2023, he had the ability to work full-time and was, in fact, working a consistent schedule leading up to his injury on December 8, 2023. Claimant argues that his pay history from the weeks following certification reflect earnings consistent with a full-time schedule.

Respondents, in turn, argue that Claimant's AWW should remain as admitted in the FAL at $652.50. They base this figure on Claimant's actual gross wages earned over the 10 weeks preceding his injury, excluding the initial two-pay periods containing the training period and the eighth pay period which contained the date of injury. Respondents contend that Claimant's work hours varied significantly due to the nature of his job, which depended on weather conditions and his self-selected availability under the employer's "when-to-work" scheduling model. They argue that Claimant's assertion of a 40-hour workweek is speculative and not supported by his historical work patterns, as he only worked an average of 26.65 hours per week over the relevant period.

As found, calculating Claimant's average weekly wage based on the time period beginning October 1, 2023, and ending on December 8, 2023, one hour into Claimant's shift, most fairly represents Claimant's wage-earning capacity as of the date of Claimant's injury. It excludes the initial training period and begins only once Claimant began working as a single operator. Furthermore, it does not exclude the wages earned by Claimant during the roughly week and a half preceding his injury, an exclusion which would artificially and negatively misrepresent Claimant's earning capacity on his date of injury. Therefore, as found, the fairest calculation of Claimant's AWW as of his date of injury is $739.51.

TTD and PPD

The Act provides that TTD benefits are to be paid out at a rate of two thirds the AWW. Section 8-42-105, C.R.S.

Section 8-42-107(d), C.R.S. sets forth the formula for calculating PPD awards for non-scheduled impairments. One of the four factors in the formula is the TTD rate specified in § 8-42-105.

As found, the appropriate TTD rate based on the correct AWW is $493.00. Therefore, Respondents shall pay Claimant TTD and PPD benefits based on the correct TTD rate of $493.00.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $739.51.

2. The correct TTD rate in this matter is $493.00.

3. Respondents shall pay Claimant TTD and PPD benefits based on the correct AWW of $739.51 and TTD rate of $493.00.

4. All benefits not paid when due are subject to interest at 8% per annum.

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

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

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

DATED: March 20, 2025.

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable work injury on December 12, 2023.

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to medical benefits to cure and relieve her of the effects of a December 12, 2023 work injury.

3. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits from December 12, 2023, through February 26, 2024.

FINDINGS OF FACT

1. Claimant is a dental hygienist who alleges she was injured on December 12, 2023, when either a coworker closed a supply closet door on her or the door closed automatically on her, striking her in the back and causing her to hit her head on the door jamb.

2. That same day, Claimant sought medical treatment at Denver Health's emergency department. Claimant arrived in a wheelchair and reported that she had been holding a door with her back when a coworker pushed the door causing her to lunge forward and catch herself on a dresser before hitting the ground. Claimant complained of low back pain with radiation down the right leg. Claimant exhibited a positive right straight leg raise, but was able to bear weight and walk. Claimant also reported being bullied at work. The attending provider noted that no imaging was warranted at that time. The provider discharged Claimant with instructions to follow up in the morning.

3. Claimant had her initial visit with Denver Health Center for Occupational Safety and Health (COSH) on December 14, 2023. Claimant was attended by Dr. Douglas Scott. Claimant reported that she sustained an injury when she was working in the supply room at work and was holding the door open with her body when a coworker closed the door on her back, pushing her forward into a wall and causing her to strike her face. Claimant reported developing pain in the low back as well. On physical examination, Claimant reported tenderness from her thoracic spine down to her lumbar area with point tenderness at her sacroiliac joint. Dr. Scott noted no muscle spasm. Dr. Scott was unsure of the diagnosis, but

suspected a lumbar sprain or sacroiliac joint sprain. He recommended Claimant take Tylenol and ibuprofen and referred Claimant for physical therapy. He took Claimant off work through December 18.

4. Claimant returned to COSH on December 18, 2023, where she was attended by Dr. Erin Bammann. Claimant reported ten-out-of-ten low back pain when not using medications, worse on the right than the left and worse than it had been before, and radiating down the right leg through the foot with numbness and paresthesias. Claimant also complained of pain radiating down her left thigh and pain in her right shoulder with some numbness in her right hand. Claimant told Dr. Bammann that the last time she was able to use her right arm without difficulty was on December 14. Dr. Bammann also noted that Claimant was ambulating with a cane that she had bought on her own several days earlier due to worsening pain. On physical examination, Claimant was unable to extend her back at all due to pain and was able to flex her back only to about forty-five degrees at her waist. Claimant was able to actively abduct her right shoulder only to about forty-five degrees and passive abduction was limited to ninety degrees due to pain. Claimant's right shoulder forward flexion was limited to forty-five degrees. Dr. Bammann referred Claimant for a right shoulder X-ray to evaluate for fracture or malalignment and an MRI of the right shoulder. She recommended continued use of ibuprofen and acetaminophen and to follow up in a few days. Claimant was kept off work given the severity of Claimant's reported symptoms.

5. On December 22, 2023, Claimant returned to COSH where she was attended by Dr. Ana de Oliveira Pereira. Claimant reported that all her symptoms had gotten worse, including right-sided neck pain associated with headaches and which would radiate down her posterior right shoulder through her upper extremity to her first and second digits. Claimant's complaints also included pain in her thoracic and lumbar spine, worse on the left side, and which would radiate from her low back to her right calf. Additionally, Claimant complained of abdominal wall tenderness. Claimant also expressed distress arising from being bullied in the workplace. Dr. de Oliveira Pereira noted that Claimant had "multiple symptoms of gradual onset that may not be fully explained by her mechanism of injury." She kept Claimant off work and anticipated the results of lumbar and shoulder MRIs.

6. Claimant underwent a right shoulder MRI on December 29, 2023. The MRI showed: mild supraspinatus tendinosis with subtle articular surface fraying and no high-grade rotator cuff tear; moderate acromioclavicular joint osteoarthritis with trace subacromial-subdeltoid bursitis; and possible degeneration and fraying of the posterior superior glenoid labrum. Claimant also underwent a lumbar spine MRI that same day that showed mild multi-level degenerative changes not significantly changed from prior imaging and with no evidence of an acute traumatic lumbar spine injury.

7. Claimant saw Dr. Pula on January 29, 2024. Dr. Pula noted that Claimant's tenderness to palpitation along her cervical spine was "distractable," which Dr.

Sadie Sanchez would later credibly explain at hearing to mean that the tenderness was not present when Claimant was distracted.

8. Claimant returned to Dr. Pula on January 31, 2024, for a follow-up appointment. Dr. Pula noted on physical examination that Claimant's neck range of motion was limited to sixty degrees with right and left lateral movement, but that Claimant would turn her head to eighty degrees when reacting to muscle tenderness in her arm. Dr. Pula also noted that Claimant exhibited thirty degrees of abduction of her right shoulder during physical examination but that Claimant would voluntarily move her right shoulder to ninety degrees during history-taking. Dr. Pula ultimately observed that Claimant's pain was diffuse throughout the whole body and was not likely related to the work injury.

9. Claimant attended a massage therapy appointment on the morning of February 14, 2024. Claimant reported being in significant pain that day with no improvements. Claimant was concerned that she was not healing and that her pain would get worse at times. During range-of-motion testing, Claimant exhibited no range of motion in her right shoulder and elbow. Surveillance obtained later that day showed Claimant outside her home hanging up clothes to dry. In order to hang the clothes up, Claimant would climb up onto a stool or chair and reach overhead to hang the clothes on a line, exhibiting significant shoulder flexion in both shoulders. In the video, Claimant did not use her cane while standing on the stool or chair, but she did appear to use it when walking back inside her home. The Court finds Claimant's level of function as exhibited in the surveillance footage inconsistent with her documented presentation at her massage therapy appointment earlier that day.

10. At a February 26, 2024 follow up visit with Dr. Pula, Claimant demonstrated "breakaway strength in shoulder abduction, elbow extension and flexion, wrist extension and flexion and finger abduction." Dr. Pula noted that the exam was nonspecific for any radiculopathy or single muscle group that would cause discomfort. Her pain patterns were nonspecific. They discussed that her pain is not directly related to her injury and Dr. Pula recommended that Claimant pursue treatment through her primary care provider. Dr. Pula found Claimant at MMI as of this visit with no permanent impairment, no permanent restrictions, and she noted that any overhead issues were not likely to be related to the injury now that it was unlikely that her right arm pain was due to radiculopathy.

11. In video surveillance taken on this same day, Claimant was seen casually walking with her cane in her left hand at around the 12:17 P.M. mark and without using the cane to bear weight. At times, she would swing the cane at her side while continuing to walk. As she neared a door, she switched carrying the cane from her left hand to her right hand without missing a step. Later, at approximately 1:48 P.M., Claimant is again seen swinging the cane and picking it up with her left hand, apparently not using it for bearing weight. At the 2:13 P.M. mark, Claimant is seen exiting her SUV and casually using the cane with her left hand while talking on a

phone with her right hand—again, not using the cane for bearing weight. Claimant's gait appeared normal and, at one point, she even let the cane drag behind her.

12. At a March 26, 2024 physical therapy appointment, the therapist noted that Claimant's progress over the course of therapy had been "mixed and non-linear." She opined that some, if not all, of the progress Claimant had made may have been the result of the natural healing and adaptation process rather than a response to skilled therapy. She further noted that Claimant's ongoing pain at that time extended beyond typical tissue healing timeframes and that Claimant's initial reported pain and level of disability was not commensurate to a mechanism of injury indicating a potential role of central sensitization and catastrophization, particularly in light of Claimant's reporting of a hostile work environment.

13. On June 6, 2024, Claimant attended an independent medical examination (IME) with Dr. Sadie Sanchez. At the appointment, Claimant complained of back pain that would radiate up and down the middle of her back with a sensation of swelling as well as low back pain radiating to her right buttock and down the posterior aspect of her right leg, ending at the knee. Claimant also described neck pain that would reach ten out of ten with movement of the neck and arm and which would radiate down her back, right shoulder, and throughout the right arm, and which would also radiate to the right lateral side of Claimant' head. Ultimately, Dr. Sanchez opined that Claimant did not suffer any significant trauma as a result of the mechanism of injury. She reasoned in part based on the video of the door that the automated door would not have pushed Claimant forward while it was closing. She noted that the automated door could not be forcefully shut. Dr. Sanchez also opined that there was no substantiation of head, neck, shoulder, or upper extremity pain, as no provider note documented Claimant's complaints or any abnormalities regarding her head or upper extremity shortly after the injury. Regarding Claimant's cane use, Dr. Sanchez opined that it was suspect and inconsistent at best. That is, Dr. Sanchez noted that the surveillance video showed her using the cane minimally, which Dr. Sanchez noted to conflict with Claimant's presentation in her office that day in which she displayed a significant need for use of the cane and abnormal placement of her right foot. Dr. Sanchez also pointed out the inconsistency between Claimant's diagnostic imaging and her complaints of symptoms. That is, the imaging suggested that any radiculopathy related to the pathology on the imaging would be left-sided, but Claimant's complaints were right-sided. Ultimately, Dr. Sanchez concluded that Claimant was not credible and she suspected that Claimant "may have unknown psychosocial factors contributing to possible psychosomatic pain with pain exaggeration and magnification."

14. One week later, on June 13, 2024, Claimant underwent an IME with Dr. Mark Winslow. Claimant reported that she was struck in the back by a door that a coworker opened, causing her to grab the door and hit her head on the door jamb, breaking her safety glasses and twisting her foot. Claimant reported that she initially felt an intense pain in her back with a sensation of heat as well as

numbness in the toes of her right foot. Claimant also told Dr. Winslow that her symptoms worsened over the following week, despite being off work, and that she began to have neck pain and difficulty moving he right arm. Dr. Winslow examined Claimant and reviewed her medical records. Ultimately, he concluded that Claimant did in fact sustain an injury on December 12, 2023, and that it was directly responsible for Claimant's ongoing symptoms. He reasoned that, although Claimant's mechanism of injury was minor, it would have been sufficient to aggravate previously asymptomatic degenerative changes. He further acknowledged that there had been inconsistencies noted during therapy and that Claimant had exaggerated regarding her history, those did not negate the fact that, in his opinion, Claimant sustained an injury on December 12, 2023.

15. Dr. Winslow did not make any reference to the surveillance footage in his report, and the Court infers that he was not aware of the surveillance footage at the time he prepared his report. Given that Dr. Winslow rendered his opinion without the benefit of review of the surveillance footage, the Court finds Dr. Winslow's opinions less compelling than those of Dr. Sanchez.

16. Claimant testified at hearing on her own behalf. She testified that at the time of her injury she had been working as a dental assistant. Her job included preparing the exam room, preparing the patient file, taking the patient's blood pressure, taking X-rays, cleaning the exam room, and assisting the patient. Claimant testified that on the date of injury she went to the supply closet to obtain gauzes to assist with a tooth extraction. When she arrived at the supply room, a coworker, Alejandra Arteaga, was already in the supply closet. Ms. Arteaga left the supply room, and Claimant then entered behind her. As Claimant stood in the supply closet, the heavy door struck her roughly in the middle of the back. Claimant denied that the door struck any other part of her back. Claimant testified that she initially felt pain in her back and then began to feel her toes and right foot go numb. Claimant also testified that she hit her forehead where her glasses were on the door frame. Claimant testified that she then went to the emergency room.

17. Claimant testified that prior to her date of injury she was not limited in her mobility, did not have to use a cane, was not taking any medications, and was able to complete her job duties with Respondent-Employer. Claimant testified that she stopped working because she could no longer lift her arm and did not want to injure a patient or injure herself further. She testified that her pain has been improving.

18. Regarding her cane, Claimant testified that there are days when she cannot walk at all without the cane, but there are others where she can walk without the cane but will carry the cane in case she needs it for support. Claimant acknowledged that no doctor had prescribed her the cane, but she testified that the doctors approved of it when they learned she had it.

19. Claimant testified that she was working in a very toxic environment with Respondent-Employer in which there was a lot of bullying. She testified that she felt depressed.

20. The Court does not find Claimant's testimony or subjective complaints to her doctors to be credible due to significant inconsistencies between her reported symptoms, objective medical findings, and her observed physical abilities as captured in surveillance footage. Claimant's complaints of severe pain and functional limitations were not supported by corresponding clinical findings. Multiple treating providers, including Dr. de Oliveira Pereira and Dr. Pula, noted that Claimant exhibited pain behaviors inconsistent with her injury mechanism and that her reported symptoms did not align with the expected clinical course. Further, Dr. Pula observed distractible tenderness and inconsistent range-of-motion limitations, suggesting symptom exaggeration.

21. Additionally, surveillance footage undermines Claimant's credibility. On February 14, 2024, she presented at a massage therapy appointment with reports of severe pain and an inability to move her right shoulder. However, footage from later that same day showed her freely reaching overhead and climbing onto a stool without apparent discomfort. Similarly, on February 26, 2024, she was seen casually walking with her cane, switching it between hands, and at times not using it to bear weight—despite presenting to providers with a pronounced need for assistive support. These discrepancies call into question the authenticity of Claimant's presentation to medical providers.

22. Further, Claimant's evolving and expanding symptomatology over time—progressing to include diffuse pain, numbness, and paresthesias well beyond the initial injury area—suggests non-physiologic complaints rather than an organic injury process. Dr. Sanchez credibly testified that Claimant's pain patterns were more indicative of psychosomatic factors than of an acute work-related injury. Given these inconsistencies, the Court finds that Claimant is not a reliable historian and that her testimony regarding the severity and persistence of her symptoms is not credible.

23. While it is possible that some of Claimant's complaints may have been genuine, the extent to which Claimant's subjective complaints and testimony are riddled with exaggerations and falsehoods renders it impossible for the Court to parse truth from fiction among Claimant's utterances. Therefore, the Court declines to afford any credibility whatsoever to Claimant's testimony or any medical opinion that relied on Claimant's presentation.

24. Alejandra Arteaga testified that she was present in the supply room when the alleged injury occurred. She stated she walked out past Claimant but did not see the door hit her. She did not recall Claimant reacting immediately in pain or distress. Ms. Arteaga described the door as heavy but not one that would close

forcefully. She also testified that Claimant continued working without apparent difficulty after the incident.

25. The Court finds Ms. Arteaga's testimony credible insofar as she testified that she did not recall Claimant reacting immediately in pain or distress after the alleged injury and that Claimant continued working without apparent difficulty after the incident.

26. Corrina Jaramillo, another employee of Respondent-Employer, testified that she observed Claimant after the alleged injury and did not notice any visible signs of distress. Ms. Jaramillo described workplace interactions and indicated that Claimant had prior complaints about back pain. She testified that she did not believe the door incident could have caused the extent of injuries Claimant claimed.

27. The Court finds Ms. Jaramillo's testimony credible insofar as she testified that she did not notice any visible signs of distress from Claimant following the alleged injury.

28. Renee Elliott, a supervisor, testified that she received Claimant's report of injury and promptly filed the necessary paperwork. She stated that Claimant had previous performance issues and had conflicts with coworkers. Ms. Elliott described the supply closet door as standard and suggested that it was unlikely to cause severe injury. She also testified about Claimant's work attendance issues before her termination.

29. The Court finds Ms. Elliott's testimony credible.

30. Dr. Sanchez testified at hearing as well that Claimant's pain complaints were disproportionate to clinical findings and aligned more with chronic conditions than an acute work-related injury. She also testified that Claimant had pre-existing spinal degeneration and that medical records showed similar complaints before the alleged workplace incident. Dr. Sanchez testified regarding the surveillance footage from February 14, 2024. Dr. Sanchez testified that Claimant's presentation in that footage differed from Claimant's presentation at the IME appointment. She noted that when Claimant was lifting clothes to the clothes line, she flexed her shoulder approximately 150 degrees, exhibiting fluid motion with no pain behaviors. She also noted that Claimant stood up on the stool. Nevertheless, Dr. Sanchez noted that at the IME, Claimant reported that she was feeling somewhat better than she had been feeling since last time she was seen at COSH on February 26, 2024. Dr. Sanchez testified that she felt Claimant sustained at most a contusion on the date of injury.

31. The Court finds Dr. Sanchez's testimony and opinions highly credible, as they are well-supported by the medical evidence, Claimant's history, and the surveillance footage. Dr. Sanchez provided a thorough and well-reasoned analysis of

Claimant's condition, noting that her complaints were disproportionate to objective findings and were inconsistent with an acute work-related injury. Her opinion that Claimant sustained, at most, a contusion is supported by the fact that early medical records contained no documentation of significant head, neck, or shoulder trauma immediately following the incident.

32. Dr. Sanchez's credibility is further strengthened by her detailed analysis of the surveillance footage. She noted that Claimant displayed fluid and pain-free movement when engaging in activities outside of a clinical setting, such as hanging clothes on a line and stepping onto a stool. This contrasted starkly with Claimant's presentation at medical appointments, where she exhibited significantly limited mobility and heightened pain behaviors. Dr. Sanchez correctly identified these discrepancies, which further supported her conclusion that Claimant's reported limitations were exaggerated.

33. Additionally, Dr. Sanchez's findings are consistent with Claimant's diagnostic imaging, which revealed only mild degenerative changes and no acute traumatic injury. Her interpretation of the imaging was persuasive, as she explained that any radiculopathy associated with Claimant's findings would be left-sided, whereas Claimant's complaints were predominantly right-sided. This inconsistency further undermines the legitimacy of Claimant's symptom reports.

34. Finally, the Court assigns greater weight to Dr. Sanchez's opinion than to that of Dr. Winslow, as the latter did not review the surveillance footage before rendering his conclusions. Dr. Sanchez's comprehensive evaluation, including her consideration of the footage and objective medical findings, makes her assessment more compelling and reliable. Accordingly, the Court finds Dr. Sanchez's testimony credible and persuasive.

35. Ultimately, because Claimant's evidence rests on her testimony—which the Court finds not credible—and on medical records that are in turn reliant on Claimant's unreliable subjective complaints, the Court is left with little if anything at all to find that Claimant has met her burden. Therefore, the Court finds that Claimant has not met her burden of proving that it is more likely than not that she sustained an injury at work on December 12, 2023.

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

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41 301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App.2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

The existence of a preexisting condition will not prevent an injury from "arising out of" the employment. *Peter Kiewit Sons' Co. v. Indus. Comm'n of Colo.*, 124 Colo. 217, 220, 236 P.2d 296, 298 (1951); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). Generally, an injury will be found compensable if the employment aggravated, activated, caused, or accelerated a medical disability or need for medical treatment. *Id*.

An incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Barba v. RE 1J School District*,

W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company*, W.C. No. 3-850-024 (December 14, 1989). Rather, a claimant must establish to a reasonable degree of probability that the need for additional medical treatment is proximately caused by the aggravation, and is not simply a direct and natural consequence of the pre-existing condition. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo.1949); *Rockwell Intl. v. Turnbull*, 802 P.2d 1182 (Colo.App.1990).

As found, the Court concludes that Claimant has not met her burden of proving by a preponderance of the evidence that she in fact sustained a compensable injury on December 12, 2023, as the evidence on which her case relies is found to be unreliable.

ORDER

It is therefore ordered that:

1. Claimant did not sustain a compensable work injury on December 12, 2023.

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 20, 2025.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-150-587-002

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Permanent Total Disability (PTD) benefits as a result of her October 2, 2020 admitted industrial injuries.

2. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Stanley H. Ginsburg, M.D. that Claimant suffered a 35% whole person permanent impairment rating as a result of her October 2, 2020 admitted industrial injuries.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to a disfigurement award pursuant to §8-42-108(1), C.R.S.

STIPULATION

The parties agreed that Respondents are entitled to an offset for Claimant's receipt of Social Security Disability benefits.

FINDINGS OF FACT

1. Claimant was born on July 2l, 1961 and is currently 63 years old. She worked for Employer as a certified medical assistant (MA). On October 2, 2020 Claimant sustained an admitted work injury when she tripped and fell. A right knee MRI on October 19, 2020 showed mild degeneration, trace fluid, and fraying along the undersurface of the posterior horn medial meniscus.

2. After physicians expressed early concerns about the development of a sympathetic disorder, testing for Chronic Regional Pain Syndrome (CRPS) was negative. Claimant underwent conservative treatment with her initial primary Authorized Treating Physician (ATP) F. Mark Paz. M.D. On July 6, 2021, he assigned modified work restrictions. By November 16, 2021 Dr. Paz noted she was working eight hours per day, five days per week, while predominantly sitting. The record reflects that during the time Claimant continued to experience high levels of pain.

3. Giancarlo Barolat, M.D. recommended a spinal cord stimulator ("SCS") trial for pain relief. Kathy McCranie, M.D. reviewed the request and recommended denial due to lack of a definitive diagnosis of CRPS.

4. Claimant switched her primary ATP to Nazia Javed, M.D. Dr. Javed placed Claimant at Maximum Medical Improvement (MMI) on July 28, 2022. She assigned a 12% impairment rating for Claimant's right knee. She also assigned 15-20 pound lifting, carrying, pushing/pulling restrictions with the need for sit down breaks every thirty minutes or as needed.

5. During the following month Dr. Kawasaki noted Claimant did "not clearly fit into the diagnosis categories for CRPS." On October 3, 2022 J. Tashof Bernton, M.D. performed thermogram and QSART testing that was positive for CRPS. Dr. Bernton noted her pain complaints were 4-8/10, and she was working with restrictions of no standing more than 1 hour, walking, or bending. Dr. Barolat again sought authorization for the SCS and it was approved.

6. On January 5, 2023 Claimant underwent an initial DIME evaluation with Linda Mitchell, M.D. She determined Claimant had not reached MMI based upon the need for the SCS trial. Dr. Mitchell assigned a provisional 20% whole person impairment for CRPS based upon Claimant's ability to ambulate with difficulty, but not being limited to ground level only. Claimant's had reported that she can "climb stairs but slowly."

7. After Dr. Barolat performed the SCS trial implant, Claimant reported 50% relief of pain and dramatic functional improvement in her right foot, toes, and knee. On February 28, 2023 Dr. Barolat proceeded with permanent implantation. By March 8, 2023 Claimant reported postoperative pain, but she still felt that the stimulator was "dramatically beneficial." However, on May 3, 2023 Dr. Barolat noted Claimant's CRPS had spread to the areas of implantation. Dr. Barolat subsequently remarked that she had developed CRPS in her right buttock battery site.

8. Claimant has three separate surgical scars on her back associated with the placement of the neuromodulator as seen in Exhibit 42. The scars were measured during a medical examination as follows: a 7 cm linear scar, a 7 cm horizontal scar and a 3 cm horizontal scar.

9. Claimant explained that her CRPS began in her right knee but has spread to her entire leg and into her hip area. She has also experienced CRPS symptoms into her back following the placement of the neuromodulator and battery pack.

10. Claimant commented that she has received some relief of her right leg pain from the SCS. She can change programs of her SCS to address different locations of her symptoms. Claimant charges the battery approximately twice per week, depending upon what programs she uses. After she removes the battery charger, it will hurt the rest of the night and into the next day. Her pain levels range from 4/10 per day and rise to 8-9/10 at some point every day. Claimant has an average pain level of 5-7/10. She takes one Nucynta per day, but two on days where activity increases her pain.

11. Claimant testified her days consist of making the bed, going downstairs, making coffee, and then sitting in her recliner with her leg elevated all day. She also

performs occasional housework like laundry and dishes. Driving hurts her right leg after 10 minutes. She can sit for 5-10 minutes before needing a cushion behind her back. Claimant takes Nortriptyline to help with sleep, but wakes 4-5 times a night because of pain. She feels loopy and foggy with Nortriptyline and Nucynta.

12. On May 8-9, 2024 Claimant underwent a Functional Capacity Evaluation (FCE) with Sherry Young, OTR. Ms. Young determined Claimant fell in a "Less than Sedentary" work category due to her inability to safely lift 10 pounds and an inability to reach the floor and lift any weight. She also noted positional tolerances were "fair" throughout the FCE, with occasional sitting tolerances of 20-30 minute increments, occasional standing in 10-15 minute increments, and walking on an occasional basis in 10 minute increments. Ms. Young administered cognitive testing and concluded Claimant had deficits in various aspects, including working memory and verbal reasoning. On cross-examination, she acknowledged the tasks Claimant performed were "definitely" more strenuous than what is required of some sedentary jobs.

13. On May 16, 2024 Claimant underwent a second DIME with Stanley H. Ginsburg, M.D. Dr. Ginsburg determined Claimant had reached MMI as of May 16, 2024. He assigned a 30% whole person rating using Table 1, page 109 of the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*) for Claimant's CRPS. He detailed that "I believe that the appropriate designation is can stand but walks only on the level. I believe the patient would have difficulty with stairs." Dr. Ginsburg also assigned a 12% extremity or 5% whole person range of motion (ROM) impairment because "I note that there is functional difficulty and I will rate this as well." He further assigned a 1% psychiatric impairment. Combining the ratings yields a 35% whole person impairment as a result of Claimant's October 2, 2020 industrial injuries. Dr. Ginsburg remarked that Claimant required a sedentary position with no ladders, working at heights, climbing steps infrequently, and potentially a cane or other apparatus to assist ambulation.

14. Albert Hattem, M.D. disagreed with the 30% CRPS rating, noting Dr. Ginsburg "assigned the higher rating based on [c]laimant's revised history to him of not being able to climb stairs." He also disagreed with the ROM rating, noting page 89 of the Level II curriculum forbids such a rating in addition to the neurologic portion of the rating from the *AMA Guides* Table 1, page 109.

15. Michael Tracy, D.O. has treated Claimant since November 2023 following a referral from Dr. Barolat, He confirmed that Claimant suffers from CRPS. Dr. Tracy determined that Claimant warranted a 34% whole person impairment rating because she has great difficulty with any uneven surface and is relegated to level surfaces. Dr. Tracy remarked that it was "entirely up to the clinician" to use their judgment, and "it's a bit arbitrary" regarding what level of impairment to assign per Table 1. *Id.* He believed the "stand but walks only on the level" category applies, because he interpreted "level" to not mean steps but even surfaces. Dr. Tracy equated "on the level" to cannot walk on uneven surfaces, which he admitted was "my interpretation." He agreed the category 1 description contained on p. 107, noting difficulty with "elevations, grades, steps, and distances,"

described Claimant. He also noted that Dr. Ginsburg erroneously assigned a ROM impairment in addition to the *AMA Guides* CRPS Table 1, page 109 rating.

16. Dr. Tracy reviewed the FCE report prepared by Ms. Young and agreed with her limitations and recommendations. He emphasized that Claimant has great difficulty performing the basics of everyday living and her pain is severe enough that she is not reliably employable. Dr. Tracy agreed with Ms. Young's statement that Claimant's energy must be conserved for self-preservation, including getting up, bathing, feeding herself, and interacting with her family. He confirmed on cross-examination that the FCE was the primary component in his consideration of applicable working restrictions. Nevertheless, Dr. Tracy acknowledged the FCE did not test for tolerances related to more sedentary positions that primarily require sitting and standing at a desk.

17. Brian Mathwich, M.D. performed an Independent Medical Examination (IME) on August 28, 2024. He recommended a 20% whole person impairment for Claimant's CRPS based on Table 1, p. 109 of the AMA Guides, He reviewed surveillance video showing Claimant was able to navigate steps. Dr. Mathwich testified Dr. Ginsburg's assignment of a 30% rating was incorrect because Claimant fell within the "Can stand but walks with difficulty" category of the station and gait section of Table 1, p. 109 of the *AMA Guides*. She can navigate steps, and is not limited to walking on level ground by her own report and surveillance. Dr. Mathwich recommended sedentary work restrictions including lifting up to five pounds with 15 pounds pushing/pulling, occasional lifting and/or carrying of paper files and small tools, and generally work that primarily involved sitting.

18. Dr. Mathwich also testified Dr. Ginsburg erroneously assigned ROM impairment in addition to the *AMA Guides* table rating. A ROM rating is simply not proper to assign in addition to a CRPS rating as per Level II curriculum and Tip 8 of Desk Aid 11 / DOWC Impairment Rating Tips guidance. Notably, the Rating Tips expressly forbid a ROM rating when it is accounted for in the neurologic rating.

19. Dr. Mathwich testified FCEs are a single piece of the puzzle to determine work restrictions, not a singular or primary tool. He does not believe FCE's are an accurate indicator of a patient's ability to return to work, because they do not test actual functional capacity. Dr. Mathwich continued to believe Claimant could work sedentary duty, with lifting up to five pounds and pushing/pulling up to 15 pounds. He remarked that the FCE data did not invalidate his opinion that she could perform work within those restrictions. Dr. Mathwich further testified that, regardless of Claimant's comments that she spends most of her day in a recliner, it was still his opinion she could safely work a sedentary job with sitting and standing as needed. Dr. Mathwich testified the jobs identified by Ms. Nowotny fell within the sedentary category of work within his recommended restrictions. He noted sedentary work does not involve any cardio/respiratory or muscular exertions that would exhaust her and limit her ability to perform activities of daily living or engage in family activities. Dr. Mathwich remarked that her battery charging and increased pain therefrom should not be an impediment to her returning to work.

20. Suzanne Kenneally, Psy.D., performed a neuropsychological assessment of Claimant on September 19, 2024. Dr. Kenneally explained that Claimant admitted to lifelong learning disabilities. She testified there were no deficits with concentration, memory, word finding, or ability to multi-task during the testing. However, Claimant's psychological testing revealed she had a very elevated symptom validity scale. The results suggested that, due to psychological distress, she was reporting an unusually high amount of pain levels and symptoms.

21. Dr. Kenneally testified the cognitive tests administered by Ms. Young were not developed or normed for determining brain function, lack validity testing and are not equal to neuropsychology. She also explained that Ms. Young made incorrect conclusions from the administered testing. Dr. Kenneally concluded Claimant could return to work in a job that required a level of cognition similar to her prior job as a MA. She also did not think Claimant's work performance would suffer as a result of her current levels of depression.

22. Cynthia Bartmann performed an employability evaluation and issued a report dated October 16, 2024. Ms. Bartmann relied upon the work restrictions assigned by Dr. Tracy because he is the most familiar with Claimant. Moreover, Dr. Tracy's restrictions were based upon Claimant's demonstrated abilities during a two-day multi-hour long FCE performed by Ms. Young. Ms. Bartmann concluded Claimant cannot return to work due to her sedentary to sub-sedentary work status and pain. However, she did not conduct any labor market research.

23. Ms. Bartmann detailed Claimant was not employable because she would miss work 1-2 days per week. She attributed the likely absences to increased pain from an unpredictable charging schedule for her SCS battery, or for other reasons causing increased pain such as increased activity the prior day. Ms. Bartman remarked that employers will only allow 1-2 missed days per month. She also noted that someone who is off task for more than six minutes per hour, as reflected in the FCE, cannot sustain employment. Ms. Bartman commented that people who need to change positions frequently cannot maintain productivity, compared to typical workers who change positions every 45 minutes.

24. Sara Nowotny performed a vocational evaluation and issued a final report on November 11, 2024. She concluded Claimant was capable of employment. Ms. Nowotny does not believe that FCEs have predictive value of a patient's ability to return to work. Here, the FCE did not test Claimant's ability to perform sedentary work, rather it tested her maximum physical capacity. Moreover, the tasks performed did not mirror tasks that Claimant would perform in jobs she identified. She disagreed with Ms. Young's assessment that Claimant could not work more than a few hours per day, noting the FCE tasks were in excess of sedentary work. Ms. Nowotny also disagreed with Ms. Bartmann's conclusion that Claimant would be off task too often to maintain employment in light of the FCE data.

25. Ms. Nowotny testified Claimant's background included a range of experience, including interacting with patients, taking vital signs, receptionist work, scheduling, and billing. Her skills were acquired in the medical field, but prior experience with tasks such as receptionist work and scheduling were transferrable across fields. Ms. Nowotny performed labor market research. She contacted six employers offering home sedentary jobs in the patient/service/scheduling fields that Claimant could perform. Ms. Nowotny also contacted five employers with in-office patient access positions for which Claimant was qualified and capable. Finally, she contacted five employers with receptionist/scheduler positions available for which Claimant was qualified.

26. Ms. Nowotny explained jobs she listed in her report as offering "flex scheduling" meant patients can often choose hours they can work. The patient access jobs she identified were office jobs that involve communicating with patients as they arrived and checking them in. The scheduling jobs she identified involved scheduling patients over the phone while either in an office or working from home. The office jobs required periodic walking to deliver paperwork or to talk to a co-worker, in addition to sedentary desk work. Ms. Nowotny remarked that the 15 separate jobs she identified as viable options for Claimant were just examples. Her research was a sample of vocational options and not meant to be an exhaustive list of opportunities.

27. Respondents submitted surveillance video and reports. The reports are Exhibits 35, 37, 39 and 41. The reports reflect that surveillance was attempted on a total of 16 days, typically for about 8 hours. The surveillance spanned the period from late December 2023 through August 2024. On December 31, 2023 Claimant is seen walking without her cane for a little over one minute, and stepping up onto her front porch and into her home. On April 3, 2024 she is seen walking to her car without a cane, carrying items in her arms with a backpack over her shoulder, and driving away from her home. On July 3, 2024 Claimant departs her home as a passenger in a vehicle at 9:22 a.m., she is seen walking in a parking lot with her cane at 10:14 a.m., going into an office building and then departing at 11:15 a.m. She is then seen at 11:45 a.m. walking a dog on a leash in the parking lot of a restaurant. After exiting a restaurant, Claimant arrives home at 12:58 p.m., walks inside, and then up a couple steps without her cane. On August 28, 2024 Claimant returns home and walks up the couple steps into her home using her cane.

28. Claimant has failed to demonstrate it is more probably true than not that she is entitled to receive PTD benefits as a result of her October 2, 2020 admitted right knee injury. Initially, on October 2, 2020 Claimant suffered admitted injuries when she tripped and fell at work. Claimant developed CRPS in her right knee area and Dr. Barolat implanted a SCS for pain control. Claimant later developed CRPS in her right buttock battery site and testified that it has spread to encompass her entire leg, hip area and back. She seeks PTD benefits based on her worsening CRPS symptoms and inability to earn any wages.

29. Despite Claimant's contention, Ms. Nowotny persuasively testified as to numerous positions she identified in medical fields for which Claimant was vocationally qualified. The positions also fit within the sedentary category of employment and her

lifting, standing, and sitting tolerances measured by the FCE. Ms. Nowotny testified Claimant's background included a range of experience, including interacting with patients, taking vital signs, receptionist work, scheduling, and billing. Her skills were acquired in the medical field, but prior experience with tasks such as receptionist work and scheduling were transferrable across fields. Ms. Nowotny performed labor market research. She determined there were both work from home and in office positions that Claimant could work part or full time. Ms. Nowotny contacted six employers offering home sedentary jobs in the patient/service/scheduling fields that Claimant could perform. She also contacted five employers with in office patient access positions for which Claimant was qualified and capable. Finally, she contacted five employers with receptionist/scheduler positions available for which Claimant was qualified.

30. Ms. Nowotny remarked that the jobs she identified as viable options for Claimant were just examples. Her research was a sample of vocational options and not meant to be an exhaustive list of opportunities. Furthermore, Dr. Kenneally concluded Claimant could return to work in a job which required a level of cognition which was required of her prior job as a MA. She also did not think Claimant's work performance would suffer as a result of her current levels of depression. Finally, Dr. Mathwich testified the jobs identified by Ms. Nowotny fell within the sedentary category of work within his recommended restrictions. He noted sedentary work does not involve any cardio/respiratory or muscular exertions that would exhaust Claimant or limit her ability to perform activities of daily living. Dr. Mathwich also remarked that her battery charging and any associated increased pain would not be an impediment to returning to work.

31. Ms. Nowotny's opinion regarding employability is more persuasive than Ms. Bartmann's opinion regarding Claimant's employability. Ms. Nowotny credibly testified as to numerous specific positions she identified in medical fields for which Claimant was vocationally qualified. The positions also fit within the sedentary category of employment and Claimant's lifting, standing, and sitting tolerances measured by the FCE. Conversely, Ms. Bartmann did not perform any labor market research within any set of working restrictions. For example, Ms. Bartmann testified Claimant was not employable because she would miss work 1-2 days per week because she had to charge her SCS battery. However, her reasoning that Claimant could not work on days she had to charge her battery was based on Claimant's subjective report of 8-9/10 pain on and after days of battery-charging. Importantly, those are similar to pain levels Claimant reported at the IME's with Dr. Mathwich and Dr. Kenneally while still being functional in terms of processing and relaying information in a sedentary manner. Ms. Bartmann's conclusion that Claimant could not perform "activities" on certain days when her pain was worse from charging was a vague prediction that assumed the sedentary jobs identified by Ms. Nowotny could not be performed based on pain levels.

32. Contrary testimony from Dr. Tracy regarding Claimant's functional abilities is also not persuasive. Dr. Tracy testified Claimant cannot work but never articulated any specific work restrictions. His opinion that Claimant could not work was based primarily upon the FCE. However, by accepting Ms. Young's findings, he also adopted the raw data of Claimant's lifting, sitting, and standing tolerances that fit within sedentary work.

Dr. Tracy admitted the FCE did not test Claimant's tolerance for working in a position with fewer physical requirements than her prior job, and he agreed she could work at a non-strenuous desk job with some "difficulty." Dr. Tracy's opinion that Claimant could not work was therefore based on Ms. Young's unqualified conclusions regarding employability from FCE tasks that were more strenuous than sedentary duty. He also did not testify that an attempt at return to work was not safe for Claimant, but rather merely echoed Ms. Young's opinion that she would need to preserve energy for self-care and leisure activities.

33. The differing opinions concerning Claimant's functional tolerances are demarcated by reliance upon her subjective reports of pain and tolerances versus capabilities shown through participation in testing, surveillance videos, and medical opinions. The bulk of the evidence reflects that the determination of Claimant's physical tolerances should not be based upon her subjective reports. Moreover, the evidence reflects Claimant is capable of a higher degree of functional tolerances while dealing with pain than has been projected by her retained experts. Notably, Dr. Kenneally credibly testified that Claimant's testing reflected a high degree of somatization. Furthermore, Dr. Mathwich expressed concern for the presence of somatization based upon the disparity in her pain complaints and presentation. For example, Dr. Mathwich noted Claimant was able to sit in a chair without her pillow and pleasantly converse and joke with him, while reporting an 8/10 pain score. Similarly, Dr. Kenneally documented Claimant reported an 80/100 pain score at the start of her evaluation, but the testing lasted seven hours. Finally, surveillance video reflects Claimant's ability to perform activities outside the home while reporting severe pain to providers.

34. The medical records and persuasive opinions of Dr. Mathwich, Dr. Keneally and Ms. Nowotny demonstrate that employment exists that is reasonably available to Claimant under her particular circumstances. Considering various human factors, including Claimant's physical condition, mental ability, age, employment history, education, and availability of work, reveals that there are a variety of jobs available in Claimant's local labor market within her permanent work restrictions. The jobs Ms. Nowotny identified included 15 separate positions suitable for Claimant and within her restrictions. Her research was a sample of vocational options and not meant to be exhaustive of opportunities. Claimant has thus failed to prove by a preponderance of the evidence that she is incapable of earning any wages and is entitled to receive PTD benefits as a result of her October 2, 2020 admitted industrial injury. Claimant's claim for PTD benefits is thus denied and dismissed.

35. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Ginsburg that Claimant suffered a 35% whole person permanent impairment rating as a result of her October 2, 2020 admitted industrial injuries. Initially, Dr. Ginsberg assigned a 35% whole person rating. The rating consisted of 30% for a neurologic impairment based on Claimant's CRPS, 5% for ROM impairment and a 1% psychiatric impairment. The 30% CRPS rating was based on a spinal cord injury as contemplated by Table 1(A), page 109 of the *AMA Guides*. Dr. Ginsberg determined that Claimant qualified for the rating because she "can stand but walks only on the level."

36. The record reflects that Dr. Ginsburg erred by assigning more than a 20% whole person impairment rating for CRPS based on Table 1, p. 109 of the *AMA Guides*. Notably, Dr. Ginsburg's rating was based upon his assessment that Claimant "would have difficulty with stairs." Importantly, assigning greater than a 20% impairment rating because of "difficulty with stairs" is not the appropriate standard based on the express definitions in the *AMA Guides*. As noted on p. 107 of the *AMA Guides*, up to a 20% rating is appropriate for patients who can walk but have difficulty with steps. The 25-35% rating category is reserved for persons who are "limited to level surfaces." By her own report and surveillance Claimant is not limited to level surfaces and can navigate steps.

37. Importantly, Drs. Mathwich, Hattem, and first DIME physician Dr. Mitchell, agreed that a 20% impairment for CRPS was appropriate. Notably, Dr. Mathwich explained that Claimant had related she navigates the stairs in her home at least twice each day. Moreover, video surveillance reflected that she went up steps from her front landing to her door. Dr. Mathwich commented that, although Claimant moves slowly, she is able to accommodate stairs. Therefore, he placed Claimant in the first category of impairment "can stand but walks with difficulty" and assigned a 20% whole person rating rather than the 30% assigned by Dr. Ginsburg. Notably, Dr. Mitchell also assigned a provisional 20% whole person impairment for CRPS based upon Claimant's ability to ambulate with difficulty. Claimant was not limited to ground level only, based on her report that she can "climb stairs but slowly."

38. Dr. Ginsburg also erred by assigning a 5% ROM impairment in addition to the CRPS rating. As noted by Drs. Mathwich, Hattem, and Tracy, the Level II Curriculum and DOWC Impairment Rating Tips Desk Aid 11 for CRPS expressly forbids a ROM rating when it is accounted for in the neurologic rating. Respondents have thus produced unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's impairment ratings for Claimant's industrial injuries were clearly erroneous. Therefore, the appropriate ratings are 20% for CRPS plus the 1% assigned by Dr. Ginsburg for mental impairment. Based on the *AMA Guides* Combined Values Chart, a 21% whole person impairment rating is appropriate.

39. The ALJ finds and concludes that as a result of her October 2, 2020, work injury, Claimant has a visible disfigurement to the body consisting of three scars to her back including: a 7 cm linear scar, a 7 cm horizontal scar and a 3 cm horizontal scar. All the scars are discolored and have a different appearance than the surrounding skin. Claimant also has a limp. Claimant has a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles her to additional compensation. Section 8-42-108(1), C.R.S. The ALJ orders that Respondents shall pay Claimant $2,800.00 for such disfigurement.

CONCLUSIONS OF LAW

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

C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

Permanent Total Disability

4. Under §8-40-201(16.5)(a), C.R.S., permanent total disability means "the employee is unable to earn any wages in the same or other employment." This definition was intended to tighten and restrict eligibility for permanent total disability benefits. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). A claimant thus cannot obtain permanent total disability benefits if he is capable of earning wages in any amount. *Id*. at 556. Therefore, to establish a claim for PTD the claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. *See* §8-43-201, C.R.S. The phrase, "to earn any wages in the same or other employment," "provides a real and non-illusory bright line rule for the determination whether a Claimant has been rendered permanently totally disabled." *Lobb v. Indus. Claim Appeals Off.*, 948 P.2d 115, 119 (Colo. App. 1997).

5. The Workers' Compensation Act defines "employment" as "[a]ny trade, occupation, job, position, or process of manufacture or any method of carrying on any trade, occupation, job, position or process of manufacture in which any person may be engaged." §8-40-201(8), C.R.S. "Wages" is the rate for which the employee is to be compensated for services. §8-40-201(19), C.R.S. For purposes of PTD "any wages" means more than zero. *See McKinney v. Indus. Claim Appeals Off.*, 894 P.2d 42 (Colo. App. 1995). In ascertaining whether a claimant is able to earn any wages, the test that must be conducted on a case-by-case basis is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer*, 955 P.2d at 557; *Holly Nursing v. ICAO*, 992 P.2d 701, 703 (Colo. App. 1999). In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors,

including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Bymer*, 955 P.2d at 558.

6. The claimant must demonstrate that his industrial injuries constituted a "significant causative factor" in order to establish a claim for PTD. *In Re Olinger*, W.C. No. 4-002-881 (ICAO, Mar. 31, 2005). A "significant causative factor" requires a "direct causal relationship" between the industrial injuries and inability to earn wages. *In Re of Dickerson*, W.C. No. 4-323-980 (ICAO, July 24, 2006); *see Seifried v. Indus. Comm'n*, 736 P.2d 1262, 1263 (Colo. App. 1986). The preceding test requires ascertaining the "residual impairment caused by the industrial injury" and whether the impairment was sufficient to result in PTD without regard to subsequent intervening events. *In Re of Dickerson*, W.C. No. 4-323-980 (ICAO, July 24, 2006). Resolution of the causation issue is a factual determination for the ALJ. *Id.*

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to receive PTD benefits as a result of her October 2, 2020 admitted right knee injury. Initially, on October 2, 2020 Claimant suffered admitted injuries when she tripped and fell at work. Claimant developed CRPS in her right knee area and Dr. Barolat implanted a SCS for pain control. Claimant later developed CRPS in her right buttock battery site and testified that it has spread to encompass her entire leg, hip area and back. She seeks PTD benefits based on her worsening CRPS symptoms and inability to earn any wages.

8. As found, despite Claimant's contention, Ms. Nowotny persuasively testified as to numerous positions she identified in medical fields for which Claimant was vocationally qualified. The positions also fit within the sedentary category of employment and her lifting, standing, and sitting tolerances measured by the FCE. Ms. Nowotny testified Claimant's background included a range of experience, including interacting with patients, taking vital signs, receptionist work, scheduling, and billing. Her skills were acquired in the medical field, but prior experience with tasks such as receptionist work and scheduling were transferrable across fields. Ms. Nowotny performed labor market research. She determined there were both work from home and in office positions that Claimant could work part or full time. Ms. Nowotny contacted six employers offering home sedentary jobs in the patient/service/scheduling fields that Claimant could perform. She also contacted five employers with in office patient access positions for which Claimant was qualified and capable. Finally, she contacted five employers with receptionist/scheduler positions available for which Claimant was qualified.

9. As found, Ms. Nowotny remarked that the jobs she identified as viable options for Claimant were just examples. Her research was a sample of vocational options and not meant to be an exhaustive list of opportunities. Furthermore, Dr. Kenneally concluded Claimant could return to work in a job which required a level of cognition which was required of her prior job as a MA. She also did not think Claimant's work performance would suffer as a result of her current levels of depression. Finally, Dr. Mathwich testified the jobs identified by Ms. Nowotny fell within the sedentary category of work within his

recommended restrictions. He noted sedentary work does not involve any cardio/respiratory or muscular exertions that would exhaust Claimant or limit her ability to perform activities of daily living. Dr. Mathwich also remarked that her battery charging and any associated increased pain would not be an impediment to returning to work.

10. As found, Ms. Nowotny's opinion regarding employability is more persuasive than Ms. Bartmann's opinion regarding Claimant's employability. Ms. Nowotny credibly testified as to numerous specific positions she identified in medical fields for which Claimant was vocationally qualified. The positions also fit within the sedentary category of employment and Claimant's lifting, standing, and sitting tolerances measured by the FCE. Conversely, Ms. Bartmann did not perform any labor market research within any set of working restrictions. For example, Ms. Bartmann testified Claimant was not employable because she would miss work 1-2 days per week because she had to charge her SCS battery. However, her reasoning that Claimant could not work on days she had to charge her battery was based on Claimant's subjective report of 8-9/10 pain on and after days of battery-charging. Importantly, those are similar to pain levels Claimant reported at the IME's with Dr. Mathwich and Dr. Kenneally while still being functional in terms of processing and relaying information in a sedentary manner. Ms. Bartmann's conclusion that Claimant could not perform "activities" on certain days when her pain was worse from charging was a vague prediction that assumed the sedentary jobs identified by Ms. Nowotny could not be performed based on pain levels.

11. As found, contrary testimony from Dr. Tracy regarding Claimant's functional abilities is also not persuasive. Dr. Tracy testified Claimant cannot work but never articulated any specific work restrictions. His opinion that Claimant could not work was based primarily upon the FCE. However, by accepting Ms. Young's findings, he also adopted the raw data of Claimant's lifting, sitting, and standing tolerances that fit within sedentary work. Dr. Tracy admitted the FCE did not test Claimant's tolerance for working in a position with fewer physical requirements than her prior job, and he agreed she could work at a non-strenuous desk job with some "difficulty." Dr. Tracy's opinion that Claimant could not work was therefore based on Ms. Young's unqualified conclusions regarding employability from FCE tasks that were more strenuous than sedentary duty. He also did not testify that an attempt at return to work was not safe for Claimant, but rather merely echoed Ms. Young's opinion that she would need to preserve energy for self-care and leisure activities.

12. As found, the differing opinions concerning Claimant's functional tolerances are demarcated by reliance upon her subjective reports of pain and tolerances versus capabilities shown through participation in testing, surveillance videos, and medical opinions. The bulk of the evidence reflects that the determination of Claimant's physical tolerances should not be based upon her subjective reports. Moreover, the evidence reflects Claimant is capable of a higher degree of functional tolerances while dealing with pain than has been projected by her retained experts. Notably, Dr. Kenneally credibly testified that Claimant's testing reflected a high degree of somatization. Furthermore, Dr. Mathwich expressed concern for the presence of somatization based upon the disparity in her pain complaints and presentation. For example, Dr. Mathwich noted Claimant was

able to sit in a chair without her pillow and pleasantly converse and joke with him, while reporting an 8/10 pain score. Similarly, Dr. Kenneally documented Claimant reported an 80/100 pain score at the start of her evaluation, but the testing lasted seven hours. Finally, surveillance video reflects Claimant's ability to perform activities outside the home while reporting severe pain to providers.

13. As found, the medical records and persuasive opinions of Dr. Mathwich, Dr. Keneally and Ms. Nowotny demonstrate that employment exists that is reasonably available to Claimant under her particular circumstances. Considering various human factors, including Claimant's physical condition, mental ability, age, employment history, education, and availability of work, reveals that there are a variety of jobs available in Claimant's local labor market within her permanent work restrictions. The jobs Ms. Nowotny identified included 15 separate positions suitable for Claimant and within her restrictions. Her research was a sample of vocational options and not meant to be exhaustive of opportunities. Claimant has thus failed to prove by a preponderance of the evidence that she is incapable of earning any wages and is entitled to receive PTD benefits as a result of her October 2, 2020 admitted industrial injury. Claimant's claim for PTD benefits is thus denied and dismissed.

Overcoming the DIME on Impairment

14. 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).

15. 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).

16. 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).

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

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

19. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Ginsburg that Claimant suffered a 35% whole person permanent impairment rating as a result of her October 2, 2020 admitted industrial injuries. Initially, Dr. Ginsberg assigned a 35% whole person rating. The rating consisted of 30% for a neurologic impairment based on Claimant's CRPS, 5% for ROM impairment and a 1% psychiatric impairment. The 30% CRPS rating was based on a spinal cord injury as contemplated by Table 1(A), page 109 of the *AMA Guides*. Dr. Ginsberg determined that Claimant qualified for the rating because she "can stand but walks only on the level."

20. As found, the record reflects that Dr. Ginsburg erred by assigning more than a 20% whole person impairment rating for CRPS based on Table 1, p. 109 of the *AMA Guides*. Notably, Dr. Ginsburg's rating was based upon his assessment that Claimant "would have difficulty with stairs." Importantly, assigning greater than a 20% impairment rating because of "difficulty with stairs" is not the appropriate standard based on the express definitions in the *AMA Guides*. As noted on p. 107 of the *AMA Guides*, up to a 20% rating is appropriate for patients who can walk but have difficulty with steps. The 25-35% rating category is reserved for persons who are "limited to level surfaces." By her own report and surveillance Claimant is not limited to level surfaces and can navigate steps.

21. As found, importantly, Drs. Mathwich, Hattem, and first DIME physician Dr. Mitchell, agreed that a 20% impairment for CRPS was appropriate. Notably, Dr. Mathwich explained that Claimant had related she navigates the stairs in her home at least twice each day. Moreover, video surveillance reflected that she went up steps from her front landing to her door. Dr. Mathwich commented that, although Claimant moves slowly, she is able to accommodate stairs. Therefore, he placed Claimant in the first category of impairment "can stand but walks with difficulty" and assigned a 20% whole person rating rather than the 30% assigned by Dr. Ginsburg. Notably, Dr. Mitchell also assigned a provisional 20% whole person impairment for CRPS based upon Claimant's ability to ambulate with difficulty. Claimant was not limited to ground level only, based on her report that she can "climb stairs but slowly."

22. As found, Dr. Ginsburg also erred by assigning a 5% ROM impairment in addition to the CRPS rating. As noted by Drs. Mathwich, Hattem, and Tracy, the Level II Curriculum and DOWC Impairment Rating Tips Desk Aid 11 for CRPS expressly forbids a ROM rating when it is accounted for in the neurologic rating. Respondents have thus produced unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's impairment ratings for Claimant's industrial injuries were clearly erroneous. Therefore, the appropriate ratings are 20% for CRPS plus the 1% assigned by Dr. Ginsburg for mental impairment. Based on the *AMA Guides* Combined Values Chart, a 21% whole person impairment rating is appropriate.

Disfigurement

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

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

25. As found, the ALJ finds and concludes that as a result of her October 2, 2020, work injury, Claimant has a visible disfigurement to the body consisting of three scars to her back including: a 7 cm linear scar, a 7 cm horizontal scar and a 3 cm horizontal scar. All the scars are discolored and have a different appearance than the surrounding skin. Claimant also has a limp. Claimant has a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles her to additional compensation. Section 8-42-108(1), C.R.S. The ALJ orders that Respondents shall pay Claimant $2,800.00 for such disfigurement.

ORDER

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

1. Claimant's request for PTD benefits is denied and dismissed.

2. Respondents have overcome Dr. Ginsburg's DIME rating by clear and convincing evidence. Claimant suffered a 21% whole person impairment rating as a result of her October 2, 2020 work injuries.

3. Claimant shall receive a disfigurement award in the amount of $2,800.00.

4. All matters not resolved in this matter 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 24, 2025.

_____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-261-669-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on January 11, 2024.

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

3. Whether Claimant established an entitlement to temporary total disability (TTD) and/or temporary partial disability (TPD) benefits.

4. Whether Respondents established by a preponderance of the evidence that Claimant was responsible for his termination.

5. Determination of Claimant's authorized treating physician (ATP).

STIPULATIONS

1. If compensable, Claimant's average weekly wage (AWW) was $1,806.37.

FINDINGS OF FACT

1. Claimant was employed by Employer as a light-duty tow truck driver. His job duties included towing abandoned, broken down, or vehicles involved in accidents, primarily in and around Summit County, Colorado. Claimant has approximately five and one-half years experience as a tow truck driver.

2. On January 11, 2024, Employer dispatched Claimant to an accident scene to tow a vehicle that had left the highway. Claimant testified he had already worked approximately ten hours that day, and received the dispatch call at approximately 8:00 p.m. When he arrived at the scene, law enforcement and emergency medical personnel were already at the location. The subject vehicle was upside down and located approximately forty feet off the road down an embankment. Recovery of the vehicle required Claimant to manually pull the towing cable from the tow truck winch, descend the embankment approximately forty feet though a path in snow, attach the towing cable, and then return to his truck to activate the winch. After Claimant attached the cable and began climbing back up the embankment, he collapsed. Law enforcement attended to Claimant, determined that he had no pulse, and administered CPR for approximately three minutes, ultimately reviving Claimant.

3. At the time of the incident, the outside temperature was approximately four degrees. Claimant testified that the tow truck winch cable had iced over after being washed earlier in the day, and that it required extra effort to unspool the cable from the

winch. The path Claimant used to access the vehicle was a path law enforcement and EMS had created by walking through the snow off the side of the road, and not an established trail. Claimant estimated the snow between the road and the vehicle was three to four feet deep. He testified that he was outside for 30 to 45 minutes working on the towing job when he collapsed.

4. After Claimant collapsed, he was transported to St. Anthony Hospital – Summit County by ambulance. At the hospital, Claimant was evaluated, and diagnosed with cardiac arrest. Serum troponin testing showed an abnormal level of 81 ng/l at approximately 8:30 p.m., and 118 ng/L one hour later. The normal reference range for troponin is less than 41 ng/l. (Ex. C, p. 49). Claimant was then transferred to St. Anthony Hospital – Lakewood.

5. At St. Anthony Lakewood, Claimant was evaluated and diagnosed with acute right heart failure, non-ST elevated myocardial infarction (NSTEMI), cardiac arrest (cause unspecified), acute and chronic respiratory failure with hypoxia, and polycythemia. Claimant's troponin levels increased to 357 ng/L by approximately 2:00 a.m. (Ex. C). An echocardiogram showed a severely dilated right heart ventricle with reduced function and normal left ventricle function. Laboratory testing showed Claimant's hematocrit was markedly elevated at 58.2%. A cardiologist recommended Claimant undergo cardiac catheterization, but Claimant declined, and left against medical advice on January 12, 2024. Claimant was advised not to drive (commercially or privately) until his condition was further evaluated. (Ex. C).

6. Claimant's next documented medical treatment was on February 1, 2024, when he saw Katherine Schuetze, M.D., at Vail Health. Further testing confirmed a moderate to severe enlargement of Claimant's right ventricle with severe dysfunction. Dr. Schuetze indicated that Claimant's cardiac arrest was "likely a hypoxic driven event" and likely pulseless electrical activity (PEA) event. Dr. Schuetze noted her strong suspicion that Claimant had underlying right ventricle dysfunction and pulmonary hypertension that led to the event, and her fairly low suspicion of an ischemic event. Based on her evaluation, Dr. Schuetze recommended Claimant undergo a right heart catheterization. (Ex. 16).

7. On February 16, 2024, Dr. Schuetze performed that right heart catheterization procedure. The post-procedure diagnosis was right ventricle failure and pulmonary hypertension. Dr. Schuetze recommended referring Claimant to the pulmonary clinic for evaluation of hypoxia and pulmonary hypertension. (Ex. 16).

8. At a return visit on March 7, 2024, Dr. Schuetze noted that Claimant had not returned to work due to lifting restrictions that she had imposed. She further noted that Claimant had an appointment with a pulmonary specialist in two weeks. (Ex. 16).

9. At a visit on March 22, 2024, Claimant underwent an oxygen assessment at Vail Health with Chakradhar Kotaru, M.D., which showed his oxygen levels dropped with mild exertion. Based on his evaluation, Dr. Kotaru indicated that Claimant most likely had secondary polycythemia with chronic untreated hypoxemia. He was placed on supplemental oxygen to maintain an appropriate level of oxygen saturation, and it was

recommended that he consider moving to a lower elevation. Dr. Kotaru counseled Claimant that he should not overexert himself due to a persistent risk of repeat cardiac arrest with any exertion that my compromise his heart, and that exposure to low oxygen levels could exacerbate his condition. He also indicated that Claimant's medical issues precluded him from returning to work. (Ex. 16).

10.

11. In April 2024, Claimant called Vail Health indicating that the tow truck he had been driving was found to have a leak in the exhaust system causing carbon monoxide to leak into the cab. Claimant indicated he believed that this caused his cardiac and pulmonary problems. (Ex. 16). At hearing, Claimant testified that in the winter months, he would also "inhale a lot of [magnesium] chloride vapor" from de-icing treatments placed the highway. Implicit in Claimant's testimony is his belief that magnesium chloride vapor may have also contributed to his health issues. No credible evidence was admitted demonstrating that Claimant was exposed to carbon monoxide as he contends, or that his pulmonary or cardiac issues are attributable to either magnesium chloride or carbon monoxide inhalation.

12. On September 19, 2024, Sander Orent, M.D., conducted a medical record review and later met with Claimant, issuing two reports. (Ex. 20 & 21). Dr. Orent testified that he believed Claimant suffered a "pulseless electrical event" (i.e., PEA) as a result of overexertion while performing his job, causing cardiac arrest. (Orent Testimony, p. 13-14). He opined that the medical care Claimant received is directly related to the collapse. Dr. Orent did not offer any cogent explanation as to how a PEA is different than a heart attack or whether one could experience both a PEA and myocardial infarction. (Ex. 20 & 21). While Dr. Orent offered his opinion concerning whether Claimant's work activities on January 11, 2024 were an "extraordinary exertional event," his opinion on that issue is not within his expertise, and is of little evidentiary value.

13. On October 13, 2024, Claimant saw Jeffrey Schwartz, M.D., for an IME at Respondents' request. Dr. Schwartz testified that Claimant's elevated serum troponin levels represented "death of some myocardial or heart muscle cells, which is our definition for a heart attack." He indicated that Claimant suffered a "type 2 heart attack" which results from stress such as low oxygen levels, rather than a type 1 heart attack which is related to an occlusion of circulation. (Schwartz Testimony, p. 6). The ALJ finds Dr. Schwartz' testimony that Claimant suffered a "heart attack" credible. Dr. Schwartz testified that he believes Claimant had pre-existing pulmonary issues related to sleep apnea and Claimant's weight. He characterized Claimant's condition as a "low oxygen disorder" which caused his cardiac disease. Dr. Schwarz opined that Claimant's chronic hypoxemia, polycythemia, pulmonary hypertension, and right heart failure were not work-related. Dr. Schwartz also testified that Claimant's work, and particularly exertion at high altitude, caused the event on January 11, 2024, and necessitated the medical treatment Claimant received. The ALJ finds credible that Claimant had pre-existing chronic pulmonary issues, including hypoxemia, enlarged right ventricle, and pulmonary hypertension. While these pre-existing conditions likely pre-disposed Claimant to

suffering a cardiac event, but for the work-related events of January 11, 2024, Claimant would not have collapsed and suffered cardiac arrest on January 11, 2024.

14. Claimant testified that 90% of the towing jobs he performs involve vehicles that are stopped on the road side, and that a lesser percentage involve vehicles that are off the road. According to Employer's records, between February 4, 2023 and January 5, 2024, Claimant was the primary tow truck driver involved in towing vehicles that had left the road and were in a ditch or down an embankment at least seventeen times[2]. (Ex. I). The fact that Claimant was required to occasionally descend embankments to perform his job does not credibly establish that the level of exertion required on January 11, 2024 was a typical of Claimant's job duties. The ALJ finds that the events of January 11, 2024 constituted an unusual exertion, compared to Claimant's normal job duties.

15. Daniel Kalland, Employer's towing department operations manager testified at hearing. Mr. Kalland is familiar with the operation of a tow truck, including operating one in the winter. He testified that 35 to 38% of Claimant's work involved recovering vehicles that were off the road, down embankments, and that it was not unusual for drivers to work in cold temperatures and at elevations between 8,000 and 11,000 feet. He indicated that it is typical for towing cables to be frozen with ice, although he indicated that pulling the cable out will typically break off the ice, freeing the cable. He also testified that it was possible that a tow truck driver could struggle to unspool a towing cable from a winch.

16. Claimant testified that Employer did not provide him with a designated list of physicians, and advised him that workers' compensation was difficult to deal with, and that he should use his health insurance to pay for treatment related to the January 11, 2024 incident. Respondents filed a First Report of Injury with the Division on January 12, 2024. (Ex. 1). Respondents Ex. P2 is a letter from Insurer to Claimant dated January 15, 2024, and addressed to Claimant's home mailing address. The letter includes Claimant's claim number and a list of designated workers compensation providers. The ALJ does not find credible Claimant's testimony that he was not provided with the list of designated providers credible, or that Employer directed him to use his private insurance. The fact that Employer filed a First Report of Injury on January 12, 2024, makes clear that Employer reported the incident to Insurer, which is inconsistent with Claimant's testimony that he was advised to go through his private insurance. Moreover, Insurer assigned a claim number and sent a designated list of providers to Claimant's home address within four days of January 11, 2024, which is inconsistent with Claimant's testimony. The ALJ finds it more likely than not that Employer did provide Claimant with a designated list of providers.

17. Claimant testified that after January 11, 2024, Employer did not pay him wages, and that he did not receive pay for "a few weeks" and that he applied for paid leave under the Family and Medical Leave Act (FMLA) on May 15, 2024. Claimant testified that he received $1,100 per week for a period of eleven months after the date of his injury. He testified that his benefits were "back dated" to the date of the accident.. Claimant did not

[2] Four additional vehicles were towed from off the road by a heavy-duty tow truck, which Claimant does not operate. Although Claimant was apparently initially dispatched to perform the tow.

receive unemployment or social security benefits, and his only additional source of funds was his savings and 401(k).

18. Claimant's last date of Employment with Employer was on March 25, 2024. On that date, Claimant signed an "Employee Separation Notice," indicating that he "Resigned without notice" for "personal reasons." (Ex. H, p. 379). The documents contains no other information regarding the reasons for separation. Claimant testified that Employer provided the document to him when he applied for FMLA benefits, and that Mr. Kalland completed the form. Claimant indicated he believed Employer was terminating his employment based on Mr. Kalland's "personal reasons." Claimant testified that he would not have voluntarily resigned from employment because he had 12 weeks of "job protection" under the FMLA, that had not yet expired. Claimant's testimony was confusing, inconsistent, and not credible.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

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

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.,* W.C. No.4-894-311-03, (ICAO Apr. 9, 2014). All results flowing proximately and naturally from an industrial injury are compensable. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970

Applicability § 8-41-302, C.R.S.

The so called "heart attack statute," § 8-41-302 (2), C.R.S., provides that disability caused by a heart attack is not compensable "unless is it shown by competent evidence that such heart attack was proximately caused by an unusual exertion arising out of an within the course of the employment." *Wackenhut Corp. v. Indus. Claim Appeals Office*, 975 P.2d 1131, 1133 (Colo. App. 1997). The statute does not apply unless it is established

that the injured worker suffered a heart attack. *See Eisenberg v. Colo. Indus. Comm'n*, 624 P.2d 361 (Colo. App. 1981) (applying predecessor statute § 8-41-10 (2.5), C.R.S. (1979).

The statute does not define the term "heart attack," but courts have applied the "heart attack" standard to different cardiac events, such as "myocardial infarction," "cardiac arrhythmia," and "cardiac arrest," *See e.g., Vigil v. Nationsway Transport Servs.*, *Inc.*, W.C. No 4-372-511 (ICAO Oct. 29, 1999) (myocardial infarction); *Elliott v. Washburn Mining Co.*, W.C. No. 4-342-550 (ICAO May 20, 2001) (myocardial infarction); *Trudeau v. UMETCO Minerals Corp.*, W.C. No. 4-537-010 (ICAO Aug. 21, 2003) (myocardial infarction); *Helvey v. Bison Propane Bottle Exchange*, W.C. No. 4-608-265 (ICAO Jul. 15, 2005) (myocardial infarction); *Cortez v. Colo. Springs Disposal*, W.C. No. 4-544-111 (ICAO Nov. 23, 2005) (cardiac arrhythmia); *Beaudoin Const. Co. v. Indus. Comm'n*, 626 P.2d 711 (Colo. App. 1980) (cardiac arrest). As found, Claimant likely sustained a type 2 heart attack, specifically a myocardial infarction that likely resulted from low oxygen levels and exertion on January 11, 2024. Although Dr. Orent and Dr. Schuetze opined that Claimant's cardiac arrest was likely the result of a PEA, no credible evidence was offered differentiating a PEA event from a "heart attack," or demonstrating that he did not sustain a myocardial infarction as well. Ultimately, Claimant sustained a cardiac event that resulted in his heart stopping (*i.e.*, cardiac arrest), the ALJ concludes that Claimant's injury constitutes a heart attack under the Act.

Determining whether Claimant's heart attack was caused by "unusual exertion" involves a two-pronged causation test. "First, it must be shown that the heart attack was proximately caused by unusual exertion. Secondly, that exertion must arise out of and in the course of the employment." *Wackenhut Corp. v. Indus. Claim Appeals*, 975 P.2d 1131 (Colo. App. 1997). "The existence of unusual exertion requires a comparison of the decedent's duties at the time of the heart attack compared to the decedent's job history. Unusual exertion may exist if the decedent's duties at the time of the attack were different in kind or quantity than was usually the case. Determination of this issue is one of fact for the ALJ." *Abel v. The Wackenhut Corp.*, W.C. No. 4-496-813 (ICAO Nov. 5, 2002) (Citations omitted).

While Claimant more likely than not has pre-existing pulmonary issues unrelated to his employment, he likely would not have suffered a heart attack on January 11, 2024 but for performing his job duties. Both Dr. Schwartz and Dr. Orent agree that Claimant's heart attack was caused by his exertion in the performance of his job duties on January 11, 2024, and that the event would not have occurred but for his work. The credible evidence demonstrates that Claimant's level of exertion was unusually high compared to his normal job duties. Claimant's work as a tow truck driver requires some physical labor, yet the vast majority of Claimant's job involved towing cars located on the roadside, which required Claimant to crawl under a vehicle to attach towing cables. Although Claimant's job did occasionally require him to move up and down embankments, work in cold temperatures, and work long shifts, there is no requirement that the level of exertion resulting in a heart attack be of a singular nature or a one-time event, only that it differs from the usual job duties. The evidence insufficient to demonstrate that towing jobs regularly required the same level of physical exertion or occurred in the same conditions

as January 11, 2024. The combined factors of moving up and down an embankment, in 2-3 feet of snow, at extremely cold temperatures, at the end of a long shift render the Claimant's duties on January 11, 2024 different in kind and quantity than was usually the case. Claimant has met his burden of establishing that his injury is compensable.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence and entitlement to authorized medical benefits that are reasonable and necessary to cure or relieve the effects of his heart attack on January 11, 2024. Specific medical benefits are not at issue in this matter, and the determination of whether any specific treatment is compensable is reserved for future determination.

Authorized Treating Physicians

Claimant seeks a determination that all of his treating providers are authorized treating providers, based on the assertion that Respondents did not provide Claimant with a list of designated providers.

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act and applicable Division Rules require that respondents must provide injured workers with a list of at least four designated treatment providers within seven business days following the date employer has notice of the injury §8-43-404(5)(a)(I)(A), C.R.S.; WCRP Rule 8-2 (A)(2).

However, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Indus. Claim Appeals Off.,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, WC 4-586-030 (ICAO Sep. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO Jun.

29, 2005). Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381, 384 (Colo. App. 2006).

As found, Respondents provided Claimant with the required list of designated providers by letter on January 15, 2024. (Ex. P1). The ALJ does not find credible Claimant's testimony Employer advised him to use his private insurance, or that that he did not receive Respondents' January 15, 2024 letter. The medical treatment Claimant received on January 11, 2024, until he left St. Anthony Littleton on January 12, 2024 constituted emergency medical care which did not require authorization, and is therefore compensable. Thereafter, Claimant elected to seek medical care from Vail Health, which was not included on Respondents' list of designated providers. Claimant has failed to establish that the providers from whom he sought treatment after January 12, 2024 were authorized providers.

Temporary Disability Benefits

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

Claimant has established an entitlement to temporary disability benefits. Following the injury, Claimant was under work restrictions which prevented him from driving, exerting himself, and performing the duties of his job. Claimant testified that he has not worked since his January 11, 2024 work injury. No credible evidence was admitted demonstrating that any of the events for termination of TTD under §8-42-105(3)(a)-(d), C.R.S., have occurred. Accordingly, Claimant is entitled to TTD benefits, until terminated by law.

Responsibility for Termination

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. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO Apr. 24, 2006). "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).

Respondents have established by a preponderance of the evidence that Claimant voluntarily terminated his employment with Employer on March 25, 2024. Although Claimant denied that he voluntarily resigned from his employment, and testified that he believed he was being terminated because of Mr. Kalland's "personal reasons," his testimony was not credible and was inconsistent. Claimant testified that he would not have resigned from his employment because he had 12 weeks of "job protections" under the FMLA. Claimant testified that he did not apply for FMLA until May 15, 2024, and that he received the separation document (Ex. H) at the same time he received the FMLA application (*i.e.*, March 25, 2024). Under either scenario, Claimant had not applied for FMLA benefits as of March 25, 2024, rendering his testimony inconsistent and not credible. The ALJ concludes that it is more likely than not that Claimant voluntarily resigned his employment on March 25, 2024, and was, therefore, responsible for his termination.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury, a heart attack, on January 11, 2024 arising out of the course of his employment with Employer.
2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his January 11, 2024 work injury.
3. The providers from whom Claimant received treatment on January 11, 2024 and January 12, 2024 are authorized

treating providers. Claimant's treating providers after January 12, 2024 are not authorized providers.

4. Claimant was responsible for his termination of employment on March 25, 2024.

5. Claimant has established an entitlement to temporary disability benefits beginning January 12, 2024, and ending March 25, 2024.

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 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 24, 2025

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury on July 17, 2024, and is entitled to medical treatment.

II. Whether Claimant established by a preponderance of the evidence that the surgery recommended by Dr. Jeffers is reasonable, necessary, and causally related to treat her July 17, 2024, injuries.

III. Whether Claimant established by a preponderance of the evidence that she is entitled to temporary total and temporary partial disability benefits from July 17, 2024, through November 18, 2024.

IV. Whether Claimant established by a preponderance of the evidence that she has the right to select Dr. Yamamoto as the authorized provider.

STIPULATIONS

- If the claim is compensable, Claimant's AWW is as follows:
  - July 17, 2024, to August 9, 2024 - $680.00
  - August 10, 2024, forward - $720.00
- Claimant's request for temporary disability benefits on and after her date of termination, November 18, 2024, and Respondents' termination for cause/responsibility for termination defense, are held in abeyance for future determination.
- If Claimant is awarded TPD benefits for the week ending August 3, 2024, there is an offset for Claimant's receipt of unemployment compensation benefits totaling $309.00.

FINDINGS OF FACT

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

1. Claimant began working for Employer in the online grocery department in July 2023.

2. On July 8, 2024, Claimant switched stores and was hired at the Lakewood location to also work in the online grocery department. She was hired as a full-time employee, scheduled to work 40 hours per week.

Prior knee injury in 2017

3. On July 3, 2017, Claimant sustained a traumatic injury to her left knee when she fell from a bike. Claimant underwent an MRI of her knee which revealed a lateral tibial plateau fracture with the ACL ligament attached to the fracture fragment, as well as a low-grade MCL injury and injuries to the lateral meniscus.

4. On July 26, 2017, Claimant underwent left knee surgery, which was performed by Dr. Jensen. The surgery included an arthroscopic tibial spine fixation and lateral meniscus repair.

5. On June 27, 2018, almost a year after her surgery, Claimant returned for additional medical treatment for her left knee and saw James Jeffrey, NP and complained of pain in the lateral anterior aspect of her knee. Claimant said that she had pain while going up and down stairs, kneeling, and rising after sitting. Claimant underwent an x-ray that confirmed the avulsion fracture was comminuted. Based on his assessment, NP Jeffrey ordered another MRI of her left knee.

6. On July 17, 2018, Claimant underwent the MRI. The MRI revealed internal fixation with hardware at the fracture, which had developed an irregular cortical surface, cartilage loss, and synovitis with a probable small loose body along the posterior central tibial plateau measuring 7 mm. The MRI also showed a tibial screw extending from the medial metaphysics to be along the anterior fibers of the MCL as well as an amorphous tear of the anterior horn of the lateral meniscus and a very small amount of effusion.

7. On July 20, 2018, Claimant was evaluated by NP Jeffrey to go over her MRI. NP Jeffrey stated that the MRI confirmed a medial meniscus tear with a loose body measuring 7 mm. Based on his assessment, Claimant was referred for a course of physical therapy. It was also noted that Claimant would follow up as needed or follow up within the next year if her pain became unbearable. Claimant did, however, indicate that if she needed surgery, it would have to be done next summer.

8. On November 18, 2019, Claimant returned to NP Jeffrey. At this appointment, she stated that she does have problems getting up from the ground to a sitting position. At the appointment, she rated her pain at 0 out of 10. Yet she said that she does have mechanical symptoms of catching, locking, and popping of her left knee and that when it catches, her pain is 10 out of 10. At that time, Claimant was taking ibuprofen, as needed for her pain. She also said that she would wear one of her knee braces when her pain was at its worst and that the brace helped her with stability. On physical examination, Claimant had a positive McMurray test. Based on his assessment, NP Jeffrey diagnosed Claimant with a partial medial meniscus tear and a loose body in her knee. He also ordered a new MRI for comparison to her prior MRIs due to her new onset of mechanical symptoms, i.e., catching, locking and popping.

9. On November 21, 2019, Claimant underwent another MRI – and it revealed similar findings to the last MRI.

10. On December 6, 2019, Claimant followed up with NP Jeffrey to go over the MRI. At this appointment, Claimant said that she continued to feel as though her left knee was giving out on her. She also described continued pain at a level of 3 out of 10. She also said she was continuing to use Tylenol for her knee pain. NP Jeffrey noted that Claimant's physical examination was consistent with a torn meniscus. However, he found Claimant had excellent range of motion in all planes, but limitations in strength with extension. He also noted that the MRI did not show significant derangement of her knee. Based on his assessment, he recommended Claimant undergo physical therapy 2 times a week for 6-8 weeks, and for her to continue taking Tylenol and icing her knee multiple times a day. He also stated that if the physical therapy did not work, then he may proceed with a steroid injection and if the injection does not help, he would refer her back to her surgeon, Dr. Jensen, for a diagnostic arthroscopy. But, based on his assessment, he did not recommend a follow up appointment, but recommended Claimant follow up as needed. It was also noted in the medical report from this visit that Claimant would be undergoing a hysterectomy in about a week.

11. After her December 2019 appointment with NP Jeffrey, there is no credible evidence that Claimant returned to him, or sought treatment from anyone else, for the possible follow-up care he mentioned might be needed if her knee symptoms persisted. As a result, the ALJ finds Claimant's knee symptoms did not require medical treatment between December 2019 and July 17, 2024. Moreover, there is also no credible evidence that she had any work restrictions due to her knee during that same period. Thus, the ALJ also finds that her knee condition was not disabling between December 19, 2019, and the work accident on July 17, 2024.

<u>July 17, 2024, work accident</u>

12. On July 17, 2024, at approximately 5:00 p.m., Claimant entered the walk-in cooler to retrieve items for a customer order. Upon stepping into the cooler, Claimant slipped on cherries that were on the floor. As a result, her left leg extended forward, her right leg bent behind her, and she fell into a splits position. During the fall, she also heard and felt a pop in her left knee.

13. After she fell, Claimant called out for help, but no one responded. She eventually stood up, completed the customer's order, and immediately reported the injury to her team lead, Y.O. Thereafter, Y.O. completed an Associate Witness Statement (Statement). Y.O. noted in the Statement that Claimant was in the breakroom when Claimant came and told her that she slipped on some fruit in the produce cooler. Y.O. also noted that there were signs of a physical injury, which included swelling of Claimant's knee. Y.O. then went and took a picture of the slip marks a few minutes after the incident. There is not, however, any indication that Claimant went back with Y.O. to show her where she slipped. Claimant also completed an Associate Incident Report (Report). In the Report, Claimant said that she walked into the produce cooler to get a customer's order and slipped on some fruit. She also stated she did hear a pop in her knee. She further noted the accident caused inflammation and swelling of her knee. Furthermore, the report had a section asking if she required medical treatment at that time – and Claimant said yes. Lastly, the Report had a section that

asked if she had ever been treated for similar injury. Claimant indicated that she had been treated for a similar injury in 2017 and had surgery.

14. Claimant contends that the photograph taken by her team lead Y.O. depicts the area where she slipped, including the fruit and the large curved slip marks from her feet. At first glance, the image appears to support her contention. However, E.F. testified that the marks visible in the photograph are from pallets regularly moved within the cooler. He also stated that subsequent photographs, taken after the floor was cleaned, still show the same marks, indicating they were more likely caused by pallets than by Claimant's fall. The photograph also includes a piece of yellow tape that was not present at the time of the incident. The ALJ infers that Y.O. placed the tape on the floor immediately before taking the photograph to document and mark the smashed fruit and the location where Claimant most likely slipped. Accordingly, the ALJ finds that the smashed fruit near the yellow tape is the fruit upon which Claimant slipped and supports Claimant's contention that she slipped on fruit - while the large curved marks on the floor were more likely caused by pallets.

15. After the accident, Claimant's team lead took her to Lutheran Hospital Emergency Room because Concentra was closed. The notes from that visit indicate Claimant said that she injured her knee due to slipping on a cherry and "did the splits." Claimant reported that she twisted her left knee and that she has been unable to ambulate since the injury and has had increasing knee pain. On physical examination they noted mild tenderness of her left knee, but no edema or erythema. They also noted she had full range of motion. In light of their assessment, they took x-rays, which showed no acute abnormality, but they did place her in a knee immobilizer and told her to follow up with a workers' compensation provider for further evaluation.

16. On July 18, 2024, the next day, Claimant returned to Employer. Once at work, another team lead drove her to Concentra and dropped her off. Claimant was never informed of the ability to choose between four doctors and was never given a designated provider list (DPL). Thus, Claimant had no understanding of her right to choose a doctor from a list, so she went to Concentra for acute care. At this appointment, Claimant was seen by Chelsea Rasis, PA-C. Claimant described the same mechanism of injury – that she slipped on a cherry and basically did the splits with one leg going in front of her and one leg going behind her. Her physical examination revealed tenderness diffusely over the anterior of the knee, but no ecchymosis or swelling. She also noted Claimant had an antalgic gait. During her evaluation, Claimant told PA Rasis about her prior knee injury and surgery and reported that she made a complete recovery. Based on her assessment, she recommended an MRI.[1] She also placed Claimant on restricted duty, which required Claimant to sit for 95% of the day, no repetitive stairs, and no ladders. She was also told to use a knee brace and use crutches with only partial weight bearing on her left leg/knee. Based on these restrictions, Claimant was not able to perform her regular job duties.

17. On July 19, 2024, Claimant underwent an MRI. The MRI revealed the following:

[1] The report was also signed off on by Theodore Villavicencio, M.D.

i. Abnormal anterior cruciate ligament which appears partially torn in the mid to distal fibers. There is abnormal signal intensity within the intercondylar notch which could be due to inflammation or recent injury versus arthrofibrosis from prior operative intervention. A small cyclops lesion is suggested. The presence of some displaced torn ACL fibers are difficult to entirely exclude on the basis of this examination.

ii. Chronic ununited comminuted avulsion fracture injury of the medial tibial spine.

iii. Degenerative tear at the posterior horn root attachment of the medial meniscus with an adjacent multilocular parameniscal cyst.

iv. Degenerative tearing with maceration and fraying throughout the anterior horn lateral meniscus extending to the root attachment.

v. High-grade possibly full-thickness cartilage fissuring of the trochlear trough.

18. On July 22, 2024, Claimant returned to Concentra and again saw PA Rasis for her to check Claimant's condition and go over the MRI. Based on her assessment, and the MRI findings, PA Rasis referred Claimant to an orthopedic surgeon, Dr. Jeffers.

Return to Work

19. Mr. E.F., the Asset Protection Manager for Employer, contacted Claimant by telephone around the end of July to get more information from Claimant about the accident and to obtain her work restrictions so he could determine whether Claimant could return to work. During the telephone call, Claimant told him that she was restricted to sitting 95% of the day.

20. On August 2, 2024, he prepared a Temporary Alternative Duty Assignment (TAD) for Claimant – a modified job offer. The TAD stated that the job tasks, which included answering the phone, could be done while sitting. The TAD also stated that Claimant was required to return to work the next day, August 3, 2024. There is, however, no indication when Claimant received the TAD. That said, Claimant did return to modified duty on August 7, 2024. After returning to work on April 7, 2024, the attendance records demonstrate Claimant's attendance, and starting work on time, were sporadic.

21. Claimant testified that she missed work due to the effects of her injury. This included pain, being tired from medication, being taken off for a day or two at a time and attending medical appointments. While the ALJ cannot substantiate from the medical records that she was taken off work for a day or two at a time, after August 7, 2024, or that the medication made her tired and unable to work-there is a lack of credible evidence that Claimant had attendance issues before her work accident. Thus, the ALJ credits Claimant's testimony that the pain and effects from the injury caused her

to miss work and have attendance issues from August 7, 2024, through November 18, 2024, and finds that her injury caused her to miss time from work during that period.

Ongoing Treatment for Knee Injury

22. On August 9, 2024, Claimant returned to Concentra and was seen by Darla Draper, M.D. At this appointment, it was noted that Claimant continued to have knee pain, was using a hinged knee brace, and was requesting additional pain medication since the Tylenol was not controlling her pain. It was also noted Claimant was scheduled to see Dr. Jeffers, the surgeon, on August 14, 2024. Dr. Draper continued Claimant's work restrictions that required her to sit 95% of the day and these restrictions continued to preclude Claimant from performing her regular job duties.

23. On August 14, 2024, Claimant was evaluated by Dr. Jeffers, an orthopedic surgeon. Dr. Jeffers obtained a medical history, performed a physical examination, reviewed Claimant's MRI films, and conducted a causation assessment. In describing the history of her injury, he noted that Claimant informed him of her prior knee injury and surgery, as well as the symptoms she experienced before the work-related accident. The medical record notes that Claimant stated she was not experiencing "significant pain or dysfunction" prior to the injury and was able to function normally. Accordingly, the ALJ finds that while Claimant probably had some preexisting left knee symptoms, those symptoms were manageable, did not require medical treatment, and did not restrict Claimant from performing her regular job duties.

24. Dr. Jeffers also reviewed the MRI and provided a detailed interpretation. Based on his examination and review of the MRI, he concluded Claimant's injuries were significant and resulted in an unstable knee, pain, and a sensation of blocked motion that prevented her from fully bending or straightening her knee. Dr. Jeffers ultimately determined that, based on Claimant's history, physical examination, and MRI findings, she had sustained an acute-on-chronic exacerbation of her preexisting knee condition. In order to treat the exacerbation of her preexisting knee condition, Dr. Jeffers recommended surgery. He recommended an ACL reconstruction, debridement of loose bodies, lateral meniscus anterior root repair, medial meniscus posterior root repair and evaluation of her cartilage.

25. The ALJ finds Dr. Jeffers' causation assessment and surgical recommendation to be credible and persuasive for several reasons.

    i. Although Claimant had a preexisting knee condition that was intermittently symptomatic, she had not sought or received medical treatment for her left knee since December 2019-approximately four and a half years before the work-related accident.

    ii. Right after the accident, a co-worker observed that Claimant's knee was swollen.

    iii. Contemporaneous with the workplace incident, Claimant developed knee pain that had not been present immediately before the accident as well as a sensation of blocked motion regarding the movement of her knee.

iv. Upon evaluation for her workplace injury, Claimant was restricted from performing her regular job duties and was ultimately unable to continue in her normal work capacity due to the condition of her knee immediately after the work accident.

v. Dr. Jeffers' opinion is consistent with, and supported by, the history presented by Claimant and her underlying medical records.

vi. No other treating physician has recommended an alternative treatment plan that is more likely to improve her condition.

26. On August 20, 2024, Dr. Jeffers requested authorization for the surgery. The request for authorization was denied.

Selection of-and Treatment-with Dr. Yamamoto

27. After her surgery was denied, Claimant sought legal counsel. She was then advised that because the Employer did not provide her with a designated provider list- allowing her to choose from four medical providers - the right to select a treating physician passed to her. As a result, Claimant chose Dr. Yamamoto as her treating physician. At no point before this selection did Claimant voluntarily choose to treat at Concentra. Moreover, her six weeks of treatment at Concentra, which included a number of physical therapy appointments, did not constitute or indicate a choice to treat at Concentra based on the facts of this case. Claimant only treated at Concentra for a short period because her Employer, rather than providing a designated provider list and allowing her to choose a provider, took her directly to Concentra the day after the accident, and until she selected Dr. Yamamoto as her treating physician.

28. On August 28, 2024, Claimant had her first appointment with Dr. Yamamoto, her chosen provider. He evaluated Claimant and planned to get her MRI to determine a treatment plan.

29. On September 10, 2024, Claimant returned to Dr. Yamamoto for ongoing treatment of her knee injury. During this appointment, Dr. Yamamoto reviewed her MRI and based on his assessment, recommended tramadol at night for symptom management. He also suggested a referral to orthopedics and, possibly, to a psychologist due to Claimant's recurrence of depression, which appeared to be related to her work injury.

30. Claimant continued treating with Dr. Yamamoto to treat her from the effects of her work injury.

31. Respondents had Claimant evaluated by Dr. William Ciccone. Dr. Ciccone issued a report and testified by deposition. Dr. Ciccone concluded that Claimant's knee condition was not caused or aggravated by the accident at work but is due to the natural progression of her preexisting knee condition that arose from her 2017 accident and surgery. He also concluded that the surgery recommended by Dr. Jeffers is not reasonable at this time.

32. After reviewing Dr. Ciccone's independent medical evaluation and deposition testimony, his opinion that Claimant's knee condition was neither caused nor aggravated by the work accident and that surgery is unnecessary at this time is found to be unpersuasive for several reasons. First, the temporal relationship between the accident and Claimant's symptoms. Claimant developed pain and disability immediately after the July 17, 2024, work accident. Plus, there is no credible evidence that any co-workers indicated Claimant complained of knee pain, or had to be accommodated, before the July 17, 2024, work accident. Thus, the onset of symptoms and disability aligns directly with the incident, supporting a causal connection. Second, Dr. Ciccone appears to have over-relied on the MRI imaging. Dr. Ciccone's conclusions hinge on the MRI findings while minimizing Claimant's subjective complaints and functional limitations that occurred after the accident and close in time to the accident. The medical providers who evaluated Claimant soon after the accident, and have treated Claimant, have not disputed causation. Third, although Claimant had a 2017 knee injury that required surgery, and the pre-accident MRI imaging does show degenerative changes, there is no credible evidence of documented treatment or significant complaints and disability between 2019 and the work accident. Claimant's cessation of treatment and ability to work without restrictions before the work incident suggests that her condition had stabilized. Thus, the sudden and exponential increase in symptoms and disability immediately after the accident supports a finding that the work accident caused a significant and permanent aggravation of her preexisting condition and that her symptoms, disability, and need for treatment is not due to merely the natural progression of her preexisting knee condition. Fourth, Dr. Ciccone did not offer a credible alternative explanation for Claimant's exponentially worsening condition after the accident.

33. Dr. Ciccone also suggests delaying surgery due to range of motion concerns. He does not, however, offer a viable alternative treatment plan. His position is at odds with Dr. Jeffers who recommends ACL reconstruction, meniscal repair, and debridement based on clinical findings in order to improve Claimant's symptoms that the accident caused. Overall, the ALJ finds Dr. Jeffers' opinion more persuasive than Dr. Ciccone's regarding the need for surgery.

34. The immediate post-accident symptoms, corroborating medical records, and lack of a viable alternative explanation all support the conclusion that Claimant's work injury significantly and permanently aggravated her preexisting knee condition and proximately caused the need for the knee surgery recommended at this time by Dr. Jeffers.

35. The ALJ finds Claimant's testimony, and statements to her medical providers about the accident and the onset of her symptoms and disability that occurred immediately after the accident to be credible for several reasons. First, Claimant immediately reported the injury to her team lead, which is consistent with someone suffering an unexpected work accident. Second, Claimant's account of the accident, her mechanism of injury, and her resulting symptoms have remained consistent throughout her medical treatment. Third, the photographs depicting fruit on the cooler floor, the incident report completed shortly after the accident, and the timing of her

medical treatment just after the accident at work all support her version of events. Fourth, Claimant's documented medical history indicates that she had not been actively seeking medical treatment for her knee for approximately four and a half years before the work accident-which further supports her version of events. Even if Claimant had some ongoing knee symptoms before the work accident, the ALJ finds that she did not have symptoms that warranted the need for medical treatment, or that her condition was disabling, until the work accident, upon which Claimant required medical treatment and was disabled and unable to perform her regular job duties.

Ultimate Findings of Fact

36. The work accident caused a substantial and permanent aggravation of Claimant's preexisting knee condition and proximately caused her disability and need for medical treatment-including the surgery recommended by Dr. Jeffers.

37. The work accident proximately caused Claimant's disability which prevented her from performing both her regular job duties and her modified job duties on a full-time-40 hours per week-basis. As a result, Claimant left work because of her disability and the disability resulted in an actual wage loss from July 17, 2024, through November 18, 2024.

38. Claimant was temporarily and totally disabled from July 17, 2024, the date of the accident, through August 6, 2024. Claimant's entitlement to temporary total disability benefits ended on August 7, 2024, when she returned to modified employment.

39. Claimant was offered and started modified employment on August 7, 2024. Although she was scheduled to work 40 hours per week, her injury prevented her from doing so. The resulting decrease in earnings is found to be causally related to her work injury. As a result, Claimant is entitled to temporary partial disability benefits for the reduction in earnings incurred after August 7, 2024, through November 18, 2024. However, this opinion does not address whether Claimant's attendance, and/or other issues ultimately led to her termination and whether she bears responsibility for her wage loss, which could impact her continued eligibility for temporary disability benefits after November 18, 2024. The question of Claimant's entitlement to temporary partial disability benefits after November 18, 2024, is expressly reserved.

40. The Employer did not provide Claimant with a designated provider list. As a result, the right to select a treating physician passed to Claimant. Although the Employer transported Claimant to Concentra for initial treatment, and she received care there for a brief period, this is not persuasive evidence under the totality of the circumstances to establish Claimant affirmatively chose Concentra as her provider. Thus, Claimant retained the right of selection and exercised her right of selection by choosing to treat with Dr. Yamamoto. As a result, Dr. Yamamoto is an authorized treating physician.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury on July 17, 2024, and is entitled to medical treatment.

Claimant is required to prove by a preponderance of the evidence that the conditions for which she 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 pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether 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). Moreover, 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).

Respondents raise doubts about whether Claimant fell on July 17, 2024, and whether the fall caused an increase in symptoms and aggravated her preexisting knee condition. Alternatively, they contend that, even if a fall did occur, any increase in symptoms and worsening of condition was unrelated to the fall, despite the close temporal proximity between the incident and the onset of those symptoms and need for medical treatment. They also contend that Claimant's current symptoms are simply the result of the natural progression of her preexisting knee condition, rather than any work-related aggravation. Respondents also give minimal attention to the well-established principle that an aggravation of a preexisting condition that causes the need for medical treatment is compensable. Likewise, they largely overlook the fact that Claimant did not require medical treatment for her knee before the accident, but did require treatment—including surgery—after the accident due to the worsening or her symptoms.

Respondents also contend that each of the three components of the surgery recommended by Dr. Jeffers directly relates back to post-surgical findings documented in the 2018 and 2019 left knee MRIs. Respondents further argue that Dr. Jeffers did not review these prior MRIs and that his 2024 surgical recommendation lacks a causation analysis incorporating that history. Plus, they indicate that Dr. Jeffers acknowledged the 2024 MRI documented chronic findings.

Nevertheless, the evidence supports a finding that the work accident aggravated Claimant's preexisting left knee condition. Although the underlying degenerative changes were present prior to the accident, they were asymptomatic and did not require medical treatment. It was only after the work accident that Claimant began experiencing symptoms necessitating care, including the recommended surgery. The accident is therefore found to have proximately caused the need for treatment and surgery.

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 between the accident and her pain and disability, combined with the lack of credible evidence of pain, disability, and need for medical treatment right before the accident leads this ALJ to find and conclude that the July 2024 accident is the proximate cause of Claimant's need for medical treatment and surgery at this time.

The ALJ finds and concludes that Claimant established by a preponderance of the evidence that she slipped and fell in the cooler on July 17, 2024, and the fall substantially and permanently aggravated her preexisting knee condition and proximately caused the need for medical treatment. Therefore, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that she suffered a compensable injury and that Respondents are responsible for the reasonable and necessary medical treatment to cure and relieve Claimant from the effects of her injury.

II. Whether Claimant established by a preponderance of the evidence that the surgery recommended by Dr. Jeffers is reasonable, necessary, and causally related to treat her July 17, 2024, 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).

As previously found and concluded, the work accident on July 17, 2024, substantially and permanently aggravated Claimant's preexisting left knee condition and proximately caused the need for the surgery recommended by Dr. Jeffers. In support of this finding, the ALJ credits the medical opinion of Dr. Jeffers over that of Dr. Ciccone on the issues of causation and necessity of treatment.

The ALJ further finds that the recommended surgery is reasonably necessary to cure and relieve Claimant from the effects of her work-related injury. Dr. Jeffers prescribed the procedure to address symptoms that arose following the work accident. And while not required, there is no credible evidence supporting the availability or appropriateness of any alternative treatment at this time to treat Claimant from the effects of her injury.

Respondents, among other things, contend that each of the three components of the recommended surgery relates back to post-surgical findings documented in the 2018 and 2019 MRIs, and that Dr. Jeffers failed to review those studies. They further argue that his recommendation lacks a comprehensive causation analysis and acknowledge that the 2024 MRI reflects chronic changes.

Nonetheless, the ALJ finds and concludes that the evidence supports a finding that the work accident substantially aggravated a previously asymptomatic condition,

transforming it into one that now requires surgical intervention. The presence of preexisting chronic findings on imaging does not negate the causal relationship between the work accident and the onset of pain and disabling symptoms. It was only after the accident that Claimant began to experience significant pain and functional limitations necessitating the need for treatment and the surgery has been prescribed to treat Claimant's pain and functional limitations.

Accordingly, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Jeffers was proximately caused by the work accident and is reasonably necessary to cure and relieve Claimant from the effects of her work injury.

III. Whether Claimant established by a preponderance of the evidence that she is entitled to temporary total and temporary partial disability benefits from July 17, 2024, through November 18, 2024.

To prove entitlement to TTD 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 Off.,* 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 Elec.*, 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).

a. <u>Whether Claimant is entitled to temporary total disability benefits.</u>

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); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 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 Elec.*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.; s*ee Chavez v. Costco Wholesale, Inc.*, WC 5-096-055-003 (ICAO, Feb. 4, 2022) (noting that, where TTD benefits had not commenced, they could not be terminated based on the ATP's MMI determination).

The ALJ finds and concludes that Claimant established by a preponderance of the evidence that her work-related injury on July 17, 2024, proximately caused her disability and inability to perform her regular job duties. Moreover, due to her injury and restrictions, Claimant also established that due to her injury, she did not work from the date of her accident through August 6, 2024. Thus, Claimant suffered an actual wage loss due to her injury and is entitled to temporary total disability benefits from July 17, 2024, through August 6, 2024.

b. Whether Claimant is entitled to temporary partial disability benefits.

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). When an employee is only partially disabled, TPD benefits are calculated by determining 66 2/3 of the difference between the employee's AWW at the time of the injury and the employee's AWW during the continuance of the temporary partial disability. *See* §8-42-106(1), C.R.S.

Moreover, temporary partial disability benefits can only be terminated upon the enumerated factors set forth in Section 8-42-106(2) (Claimant reaches MMI or refuses an offer of modified employment) or if Claimant is found to be responsible for her termination of employment. *See* Section 8-42-103(1)(g).

As found, due to her continued work restrictions, Claimant returned to work in a modified duty position on August 7, 2024. The ALJ finds and Concludes that Claimant established by a preponderance of the evidence that she consistently could not perform a full-time schedule of 40 hours per week of her modified duties due to her pain and

overall symptoms that were caused by her work injury. Moreover, she also established that the reduction in work hours, and the resulting decrease in earnings, i.e., wage loss, is causally related to the July 17, 2024, work injury. As Claimant established by a preponderance of the evidence that she suffered a partial wage loss as a direct result of her ongoing disability from her work injury and that she is entitled to temporary partial disability benefits from August 7, 2024, through November 18, 2024.

As set forth in the stipulation of the parties, the issue of whether Claimant's employment was terminated on November 18, 2024, due to attendance or other conduct-related factors—potentially impacting her continued eligibility for temporary disability benefits—has not been resolved in this decision. Accordingly, the question of whether Claimant is entitled to temporary partial disability benefits after November 18, 2024, is expressly reserved for future determination.

IV. Whether Claimant established by a preponderance of the evidence that she has the right to select Dr. Yamamoto as the authorized provider.

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Off.*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. indus. Claim Appeals Off.,* 148 P.3d 381, 383 (Colo. App. 2006).

The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO, Oct. 28, 2016); s*ee Love v. HD Supply Facilities Maint., Ltd.,* WC 5-217-323 (ICAO, Dec. 12, 2023) (claimant exercised his right of selection when he went to the Chambers Road Concentra and continued to receive treatment at the location for over six months without requesting a change of physician); *Murphy-Tafoya v. Safeway, Inc.*, WC 5-153-600 (ICAO, Sept. 1, 2021) (where right of selection passed to the claimant, six months of treatment with personal provider following her work injury demonstrated that the claimant exercised her right of selection).

In this case, the Employer failed to provide Claimant with a designated provider list following her work injury. Although the Employer drove Claimant to Concentra the day after the accident and she continued to receive treatment there for approximately six weeks, this does not satisfy the statutory requirement for designating a provider. Once the Employer had knowledge of the injury—sufficient to indicate that it might involve a potential workers' compensation claim—it was obligated to issue a written list of at least four designated providers. The Employer failed to comply with this obligation.

Because the Employer did not meet the statutory requirements for designating a provider, the right to select a treating physician passed to Claimant. The evidence does not establish that Claimant, through her words or conduct, affirmatively selected Concentra as her treating provider. Rather, her treatment there was arranged and directed by the Employer without her informed choice and thus does not constitute a selection by Claimant to ultimately treat with Concentra.

After retaining legal counsel, Claimant became aware of her right to choose a treating physician due to the Employer's failure to provide her with a designated provider list. She subsequently elected to treat with Dr. Yamamoto for her work-related injury. The manner in which Claimant learned of Dr. Yamamoto—whether through counsel, family, friends, or independent research—is not material to this ALJ in this case. What is dispositive is that, upon exercising her right of selection that had passed to her, she affirmatively chose to treat with Dr. Yamamoto through her words and conduct.

Accordingly, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that (1) the Employer failed to provide her a designated provider list; (2) Claimant did not select Concentra to treat her for her work injury; and (3) she exercised her right to select Dr. Yamamoto as her authorized treating physician.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that Dr. Yamamoto is her treating physician for her work injury.

ORDER

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

1. Claimant sustained a compensable left knee injury on July 17, 2024.
2. Respondents shall pay for all reasonable and necessary medical treatment related to Claimant's left knee injury provided by an authorized provider.
3. Respondents shall pay for the surgery recommended by Dr. Jeffers as reasonable, necessary, and causally related to the work injury.
4. Respondents shall pay Claimant temporary total disability benefits for the period from July 17, 2024, through August 6, 2024.
5. Respondents shall pay Claimant temporary partial disability benefits for the period from August 7, 2024, through November 18, 2024.

6. Respondents shall pay temporary total and temporary partial disability benefits based on an average weekly wage of $680.00 for the period from July 17, 2024, through August 9, 2024, and $720.00 from August 10, 2024, forward.
7. Dr. Yamamoto is authorized to treat Claimant for her work-related injury. Respondents shall pay for all reasonable and necessary medical treatment provided by Dr. Yamamoto that is related to the effects of the work accident.
8. For the week ending August 3, 2024, Respondents are entitled to an offset in the amount of $309.00 for unemployment compensation benefits received by Claimant.
9. Issues not expressly determined herein are reserved for future determination by the parties.

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 25, 2025

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-742-407

ISSUES

I. Whether Respondents proved by a preponderance of the evidence Claimant is subject to penalties under §8-43-304(1), C.R.S. for violation of WCRP 5-4(C) and failure to comply with a lawful order.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on November 20, 2007. The claim has remained open on maintenance medical benefits.

2. Theresa Knight works for Insurer as a large loss claims adjuster. Ms. Knight has worked as the adjuster on Claimant's claim for more than five years. Ms. Knight credibly testified at hearing on behalf of Respondents.

3. Ms. Knight testified that, in 2023, she received medical records for Claimant indicating Claimant had been involved in a motor vehicle accident ("MVA") potentially involving the same body parts or conditions related to this claim. Ms. Knight testified that she wanted to review Claimant's medical records related to the MVA to determine if any steps were necessary to further evaluate/adjust the claim.

4. After speaking with Claimant on the telephone, on June 2, 2023, Ms. Knight sent Claimant a letter requesting that Claimant provide updated medical authorization releases for medical records from Rocky Mountain Primary Care, Mountainview Pain Center and Centura St. Anthony Hospital. The letter requested that Claimant also confirm which hospital he was admitted to in November 2022. The letter is addressed to Claimant at [redacted] (the "Pierce Street address") and notes delivery by email to [redacted] ("Claimant's email address"). Ex. B3.

5. On June 8, 2023, Ms. Knight resent the request to Claimant's Pierce Street address and Claimant's email address. Ex. B2.

6. Claimant did not return executed medical releases within 15 days of June 2 or June 8, 2023.

7. On April 17, 2024, Ms. Knight Claimant another request for the signed medical authorization releases. Ex. B9. The letter is addressed to Claimant at the Pierce Street address. No email address was included for Claimant on this letter.

8. Claimant again did not return the executed medical authorizations within 15 days.

9. On June 4, 2024, Ms. Knight sent yet another letter to Claimant requesting the signed medical authorization releases. The letter was sent to the Pierce Street address and Claimant's email address. Ex. B6.

10. Respondents' counsel also sent Claimant a letter on June 4, 2024, requesting that Claimant provide the signed medical authorization releases. Respondents' counsel informed Claimant in the letter that Respondents would be filing a motion to compel the releases if the releases were not returned by June 11, 2024. The letter is addressed to Claimant at [redacted] (the "W 95th Avenue address"). The letter does not include an email address for Claimant. Ex. A1.

11. Claimant again did not return the executed releases within 15 days.

12. On June 25, 2024, Respondents filed Motion to Compel Medical Authorization and List of Medical Providers with the Division. The certificate of mailing included the W 95th Avenue address and Claimant's email address. Ex. C20-C22.

13. On July 8, 2024, Prehearing ALJ Marcus Zarlengo issued an order granting Respondents' motion to compel. PALJ Zarlengo ordered that, "Unless otherwise agreed by the parties, Claimant will produce to Respondents signed medical authorization releases with a medical provider history within ten (10) days of the date this order is served." Ex. C23. PALJ Zarlengo's order was sent to Claimant at the W 95th Avenue address and Claimant's email address. Ex. C24.

14. The parties did not otherwise agree to another date of production as referenced in PALJ Zarlengo's order. Accordingly, pursuant to PALJ Zarlengo's order, Claimant was required to provide the signed medical authorization releases to Respondents by July 18, 2024. Claimant did not provide the signed medical authorization releases by such time.

15. On October 8, 2024, Respondents filed an Application for Hearing ("AFH") endorsing the issue of penalties under 8-43-304(1) and 8-43-305 for failure to sign and return medical releases and medical history in violation of WCRP 5-4(C) and the July 8, 2024 order. Ex. D25-D26. The certificate of mailing on the AFH lists Claimant's Pierce Street address and Claimant's email address.

16. The Office of Administrative Courts ("OAC") did not receive any Response to Application for Hearing, other pleadings, or any communication from Claimant.

17. Claimant eventually provided the signed medical authorization releases to Respondents by mail on October 30, 2024, as indicated by the postmark date on the envelope. The releases were on the form Respondents sent to Claimant in April 2024 and again June 2024. Claimant listed the Pierce Street address as his return address on the envelope. Ex. B16-B17.

18. Ms. Knight testified that Insurer received the signed releases on November 4, 2024. Ms. Knight testified she that has since ordered Claimant's medical records but had not yet received all of the records as of the date of hearing in this matter.

19. The OAC sent Notice of Hearing ("NOH") to Claimant on October 30, 2024. The NOH states the hearing was scheduled to take place on January 16, 2025 at 8:30 a.m. The NOH specifically states, "The hearing will be held remotely, via Google Meet. The parties will receive an invitation email the day before the hearing with information on how to participate in the hearing. The OAC will send the invitation email to the email address we have on file for each party." The NOH was sent to Claimant at his Pierce Street address and to Claimant's email address.

20. ALJ Kara Cayce convened the hearing as scheduled on January 16, 2025. Claimant did not appear. At hearing, ALJ Cayce determined whether NOH was sent to an address likely to be received by Claimant. ALJ Cayce noted at hearing that the OAC case file did not include any indication the NOH was returned as undeliverable. Ms. Knight testified that, to the best of her knowledge, the Pierce Street address and Claimant's email address are the correct and current mailing and email addresses for Claimant. She testified that she has communicated with Claimant at those addresses and that the Pierce Street address is reflected on Claimant's current medical bills. Ms. Knight further testified that correspondence sent to those addresses has not been returned as undeliverable to Insurer.

21. At hearing, ALJ Cayce found that the OAC sent NOH to Claimant's last known mailing address and email address, addresses at which it was likely to have been received by Claimant. To ensure efficient resolution of the matter, ALJ Cayce proceeded with the hearing on the merits. However, to ensure the parties received due process, ALJ Cayce determined that, prior to issuing an order on the merits of the case, she would allow Claimant the opportunity to show good cause for his failure to appear at the hearing. The hearing adjourned at 9:02 a.m.

22. As ALJ Cayce was in the process of drafting the Order to Show Cause, at approximately 9:20 a.m., OAC staff notified ALJ Cayce via Google Chat that Claimant had just appeared in-person at the Denver office. No other information was provided to the ALJ. ALJ Cayce instructed the staff to notify Claimant that the hearing had concluded, and that she would be issuing an Order to Show Cause to which Claimant would have the opportunity to respond.

23. ALJ Cayce issued the Order to Show Cause on January 16, 2025, providing Claimant the opportunity to show good cause in writing for his failure to appear at the hearing. The Order to Show Cause specifically stated, in relevant part,

> The ALJ shall issue an order on the merits of this case based on the evidence presented at the January 16, 2025 hearing unless, within twenty-one (21) days of the date of this Order, Claimant shows good cause in writing for his failure to properly and timely appear at the January 16, 2025 hearing**. In the event the ALJ determines good cause has been shown**, a de novo hearing will be scheduled to take place in this matter.
>
> **If no good cause is shown** within twenty-one (21) days, Respondents' counsel shall notify the ALJ of the position statement deadline. Upon

receipt of the position statement, the ALJ will proceed to issue an order on the merits of the case based on the evidence presented at the January 16, 2025 hearing.

24. The OAC sent the Order to Show Cause to Claimant's Pierce Street address and Claimant's email address. The OAC case file contains no indication the Order to Show Cause sent to Claimant was returned as undeliverable.

25. Claimant did not provide any response to the Order to Show Cause and, as of the date of this order, the OAC case file contains no indication of any pleadings or other communication from Claimant to the OAC. Accordingly, Claimant did not show good cause for his failure to appear at the January 16, 2025 hearing.

26. Respondents proved by a preponderance of the evidence Claimant failed to timely provide medical authorization releases in violation of WCRP 5-4(C) and failed to comply with PALJ Zarlengo's lawful July 8, 2024 order. Claimant failed to provide executed medical authorization releases within 15 days of the date of mailing of Respondents' April 17, 2024 request, as well as by the deadline ordered in PALJ Zarlengo's order. Claimant's actions were objectively unreasonable. Accordingly, Claimant is subject to penalties under §8-43-304(1), C.R.S.

CONCLUSIONS OF LAW

Generally

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

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

Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Failure to Appear

Pursuant to §8-43-211(1), C.R.S., at least thirty (30) days before any hearing, the OAC shall send written notice to all parties by regular, electronic mail or facsimile. The notice must include, among other things, the time, date and place of the hearing. OACRP Rule 11 provides that the OAC shall send a Notice of Hearing to the addresses on the Application for Hearing, or if filed, the addresses on the Entry of Appearance or Response to Application for Hearing. Additionally, OACRP Rule 24 provides, in relevant part,

> If a party fails to appear at a hearing after the OAC has sent notice of the hearing to that party, prior to entering any orders against the non-appearing party as a result of that hearing, the ALJ will consider:
>
> A. The addresses to which the notice of hearing was sent are the most recent addresses provided by the non-appearing party to either the OAC or the Division of Workers' Compensation; or
>
> B. If no address for the non-appearing party is on file with the OAC or the Division of Workers' Compensation, the ALJ finds on the basis of other evidence that:
>
> 1. Notice of the hearing was sent to an address at which it is likely to be received by the non-appearing party or the non-appearing party's authorized representative; or
>
> 2. The non-appearing party in fact received notice of the hearing.

As found, NOH was sent to Claimant to a mailing address and email address at which it was likely to be received by Claimant. The OAC sent Notice of Hearing to Claimant's Pierce Street address and Claimant's email address, which Ms. Knight credibly testified are the correct and current addresses for Claimant. Claimant listed the Pierce Street address as his return address on the envelope in which he returned the signed releases. Claimant returned the releases on the form Respondents sent to Claimant in April 2024 and June 2024, indicating receipt at either the Pierce Street

address, Claimant's email address, or both. Claimant's appearance at the Denver OAC office on January 16, 2025 also indicates he received NOH.

Although Claimant showed up to the Denver OAC office on January 16, 2025 at approximately 9:20 a.m., Claimant failed to appear for the hearing. The NOH specifically states the hearing will be held remotely via Google Meet at 8:30 a.m. Claimant appeared in-person, approximately 50 minutes after the scheduled start time of the hearing, and after the hearing had been adjourned. ALJ Cayce could not participate in ex parte communication with Claimant regarding his failure to appear for the hearing, nor could she simply assume Claimant had good cause for his failure to appear on time and in the manner set forth in the NOH. Respondents properly appeared for the hearing, offered evidence, and the hearing concluded.

In issuing the Order to Show Cause, the ALJ provided Claimant the opportunity to provide an explanation and establish good cause, in writing, for why he failed to appear for the hearing. The Order to Show Cause specifically notified Claimant that, if he failed to establish good cause in writing for his failure to appear, the ALJ would proceed with issuing an order based on the evidence presented at the January 16, 2025 hearing. The Order to Show Cause was sent to Claimant's current mailing address and email address. Claimant did not provide any response to the Order to Show Cause. Claimant's failure to appear at the hearing on time in the proper venue and prior to the conclusion of the hearing (30 minutes after the scheduled start time) constitutes a failure to appear. Claimant was provided due process in receiving proper notice of the hearing and an opportunity to show good cause for his failure to appear at the hearing. Again, the ALJ could not simply assume Claimant had good cause for his failure to appear. It was incumbent upon Claimant to respond to the Order to Show Cause. Claimant's failure to do so is in keeping with a pattern of behavior that forms the basis for Respondents' request for penalties. As Claimant failed to show good cause for his failure to appear, pursuant to the Order to Show Cause, the ALJ proceeds with issuing this order on the merits of the case.

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. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

Section 8-43-304(1), C.R.S. also authorizes the imposition of penalties of not more than $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. *See* §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Industrial Claim Appeals Office,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves

undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

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 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.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the 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 claimant 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.*

Respondents seek penalties against Claimant for Claimant's failure to timely provide medical authorization releases pursuant to WCRP 5-4(C) and as ordered by PALJ Zarlengo in his July 8, 2024 order. Respondents seek penalties from May 3, 2024 to October 30, 2024.

WCRP 5-4(C) provides, in relevant part,

> A party shall have 15 days from the date of mailing to complete, sign, and return a release of medical and/or other relevant information. If a written request for names and addresses of health care providers accompanies the medical release(s), a claimant shall also provide a list of names and addresses of health care providers reasonably necessary to evaluate/adjust the claim along with the completed and signed release(s). Medical information from health care providers who have treated the part(s) of the body or conditions(s) alleged by the claimant to be related to the claim, during the period five years before the date of injury and thereafter through the date of the request, will be presumed reasonable.

As found, Claimant violated WCRP 5-4(C) by failing to return complete, signed medical authorization releases to Respondents within 15 days of Respondent's April 17, 2024 request, and within the 10 days ordered by PALJ Zarlengo in his July 8, 2024

lawful order. Claimant did not provide the medical releases to Respondents until October 30, 2024.

The ALJ notes that Respondents' Motion to Compel and PALJ Zarlengo's order list a different mailing address for Claimant than his Pierce Street address. No evidence or explanation was offered regarding the W 95th Ave address. Nonetheless, the certificates of service on the Motion to Compel and, as important here, PALJ Zarlengo's order, indicate the documents were also emailed to Claimant at his correct and current email address. There is no credible or persuasive evidence Claimant did not receive the April and June 2024 requests from Respondents, the subsequent communication from Respondents, or PALJ Zarlengo's order.

It was not until Respondents filed an AFH in the matter on October 8, 2024 that Claimant finally provided the executed releases on October 30, 2024. While Claimant ultimately provided the releases to Respondents, he did so beyond the 20-day period provided under section 8-43-304(4), C.R.S. to cure the violation. As such, Respondents are not required to prove by clear and convincing evidence Claimant knew or reasonably should have known he was in violation.

As found, Claimant's failure to provide the signed medical authorization releases within the timeframes required by WCRP 5-4(C) and PALJ Zarlengo's order was objectively unreasonable. Claimant was put on notice on several occasions regarding the need to provide the medical releases and had several opportunities to do so prior to October 30, 2024. There is no evidence as to why Claimant did not provide the medical releases by the applicable deadlines. Where the violator fails to offer a reasonable factual or legal explanation for its actions, it may be inferred that the violation was objectively unreasonable. *See Garcia v. Denver Convention Ctr.*, WC 5-248-255 (ICAO, May 30, 2024); *Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo.App. 1999). There is no evidence Claimant's actions were based on a rational argument in law or fact.

Amount of Penalties

"The imposition of penalties under § 8-43-304(1) is mandatory if there has been a violation and the violation was not reasonable under an objective standard." *Castro v. FBG Service Corporation*, 4-739-748 (ICAO Dec. 31, 2008). *See also Armbruster v. Rocky Mountain Cardiology,* W.C. No. 4-447-502 (ICAO Feb. 24 2003). *aff'd by Rocky Mountain Cardiology v. ICAO,* 94 P.3d 1182 (Colo. App. 2004).

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* WC 4-619-954 (ICAO, May 5, 2006). The amount of the penalty is to be based on consideration of several factors including the extent of harm, the duration and type of violation, the motivation for the violation, mitigation, and whether the misconduct is representative of a pattern of misconduct. *See Harper v. Dillon Companies Inc.*, WC 4-991-178-006 (ICAO, Dec. 4, 2023); *Ardon Gallego v. Wizbang Solutions*, WC 5-026-699 (ICAO, May 31, 2023); *Anderton v.*

Hewlett Packard, WC. 4-344-781 (ICAO, Nov. 23, 2004): *Grant v. Professional Contract Services*, WC 4-531-613 (ICAO, Sept. 16, 2005).

The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Industrial Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). In assessing proportionality, a court should consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in the same or other jurisdictions, and the ability of the individual or entity to pay the imposed fine. *Id*. The gross disproportionality analysis is applied in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses. *Id*.

Here, Claimant's failure to timely provide the medical releases interfered with Respondents' ability to properly evaluate and adjust his claim. Claimant's actions have delayed Respondents' ability to determine if an intervening event occurred such that they may no longer be liable for benefits on Claimant's claim. Respondents sent a request for the medical releases to Claimant in April 2024. Claimant did not provide the releases until six months later, after multiple requests by Respondents and a lawful order from a PALJ compelling Claimant to do so. That Claimant is pro se does not to absolve his responsibility to comply with applicable statutes, rules and lawful orders. *See Cornelius v. River Ridge Ranch Landowners Ass'n*, 202 P.3d 564, 573 (Colo. 2009) ("[P]ro se parties are held to the same regulations as parties represented by counsel."); *Manka v. Martin*, 200 Colo. 160, 614 P.2d 875 (1980) (pro se party is held to the same requirements as an attorney). The claimant is presumed to know applicable statutes and is required to act accordingly. *See Paul v. Industrial Commission, 632 P.2d 638* (Colo.App. 1981).

The ALJ does consider that Claimant has since returned the releases and did so two days after the cure period. Additionally, to the extent Respondents claim significant harm or delay resulting from Claimant's actions, the ALJ notes Respondents initially became aware of the MVA in 2023, issued a request for the releases in June 2023, and took no further action to follow up with Claimant regarding the releases until again sending the request at issue almost one year later in April 2024.

Based on the specific circumstances of this case, the ALJ concludes that a penalty of $10 per day from 5/3/2024 to 10/30/2024 (a period of 180 days, totaling $1,800.00) is appropriate and not grossly disproportionate in this case. There is no evidence regarding Claimant's ability to pay the imposed fine; however, the fine is minimal compared to the maximum amount the ALJ could assess by statute. A penalty is proportional to the gravity of the violation and is imposed to deter future violations. A fine of $10 per day is less harsh than fines for comparable offenses in the same or other jurisdictions. See, e.g., *Case v. Manpower International, Inc*., W.C. No. 4-688-233 (ICAO, Dec. 20, 2007) (imposing a fine of $20, $40 and then $60 dollars for different periods for the claimant's failure to provide executed medical releases in violation of WCRP 5-4(C) and an ALJ's order compelling the releases); *Matthys v. City of Colorado Springs*, W.C. No. 4-662-890 (ICAO, Apr. 2, 2007), (imposing a daily penalty of $25 for

the claimant's failure to provide full, executed medical releases pursuant to WCRP 5-4(C) and a PALJ's order compelling the releases).

ORDER

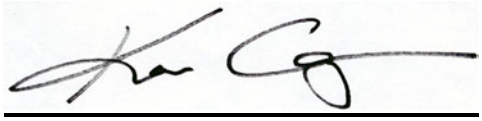
It is therefore ordered that:

1. Claimant shall Claimant total penalties of $1,800 for his violation of WCRP 5-4(C) and failure to comply with PALJ Zarlengo's July 8, 2024 order, pursuant to §§ 8-43-304(1) and 8-43-305, C.R.S. This represents a daily penalty of $10 per day for the period May 3, 2024 to October 30, 2024 (180 days).

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 26, 2025



Kara R. Cayce
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. 5-285-611-001

ISSUES

The issues determined by this decision are:

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his right knee on April 24, 2024.

II. If Claimant established that he suffered a compensable injury, whether he also established, by a preponderance of the evidence, that the right to designate the authorized treating physician to attend to this injury passed to himself.

FINDINGS OF FACT

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

Background and Claimant's Alleged April 24, 2024, Work Injury

1. Employer supports a large distribution warehouse as part of its business operations. Claimant alleges he was injured while working in the warehouse on April 24, 2024. For approximately two years prior to this alleged injury, Claimant worked for an independent contractor retained by Employer to maintain and service Employer's mechanized equipment. According to Claimant, the service contract between this independent contractor and Employer was terminated prompting Employer to hire him as a Maintenance Technician to continue the upkeep on Employer's equipment. Thus, while Claimant's employer changed, his work duties did not. Claimant's first full day of work as an employee of Employer was April 24, 2024, which is also the alleged date of injury in this case. (RHE C, p. 35).

2. Claimant's job duties require him to inspect and perform preventative maintenance (PM) on the automated equipment in the warehouse. To do so, Claimant walks between 8 and 12 miles in the warehouse per shift. Indeed, Claimant testified that he walks greater than 10 miles/day on 3-4 of the shifts that he works per week.

3. On April 24, 2024, Claimant was conducting equipment checks as part of his duties when he developed pain in his right knee. According to Claimant, he was walking on the mezzanine level of the facility to complete the last of his equipment checks when he experienced a sudden onset of severe pain in his right knee. Claimant acknowledged that he was not carrying anything heavy or awkward at the time.[1] He also agreed that he did not stumble, fall or misstep and that he did not twist his knee. To the

[1] During these checks, Claimant would carry various tools including a radio, flashlight, and other safety gear in his work vest.

contrary, Claimant was simply walking on what he described was a flat, smooth concrete surface when he developed a sharp pain around his right knee that went up to his thigh.

4. Prior to April 24, 2024, Claimant had no history of right knee problems. Indeed, he testified that he had no prior right knee injuries or treatment, and no issues performing his job functions or activities of daily living. Nonetheless, he conceded that the type of stepping he was doing at the time of his injury was identical to the walking (stepping) he performs while walking in non-work settings like the mall or the grocery store.

5. Claimant testified that the pain he experienced on April 24, 2024, was the "worst" he ever felt. Nonetheless, he testified that he was able to perform his usual job duties albeit in pain, including performing the necessary walking to discharge his obligations to Employer. Claimant testified that he completed his shift, approximately 7 hours after the incident, before leaving the warehouse for the evening. Claimant did not report the incident/injury at the time because there was reportedly no supervisor on duty.

Claimant's Initial Medical Care

6. Claimant testified that he reported his injury the next day, i.e. on April 25, 2024. A First Report of Injury (FROI) was subsequently completed describing the following mechanism of injury (MOI): "Walking along mezzanine while performing PMs pain started in right knee while walking". (CHE 1, p. 3). After he reported his alleged injury, Claimant then proceeded to AmCare, Employer's on-site medical clinic the same day (4/25/2024), where the following history regarding his injury was documented:

> [Claimant] came in with CC [current complaint] of pain in their right knee. They stated that they were walking on the mezz yesterday (4.24.24) when they notice (sic) a sudden onset on (sic) pain in their R [right] knee. [Claimant] did report that they did sustain a injury to that knee before but unsure on the diagnosis. They were still having discomfort today (4.25.24) and decide (sic) to report it. There was no observable deformities, swelling, or discoloration. [Claimant] was stating the pain was in the distal portion of their quad.

(CHE 6, p. 42). Claimant received KTape and heat therapy. *Id*.

7. Claimant returned to AmCare on April 26, 2024. (CHE 6, pp. 23-24). While in the clinic, he reported 1/10 right knee pain with random shooting pains while standing or walking. Claimant declined treatment but was advised to follow up if necessary. *Id*. at 23. At hearing, Claimant disputed the 1/10 pain rating documented in the 4/26/2024 AmCare note, testifying that it was considerably higher. He also clarified that he did not deny wanting ongoing care. Instead, Claimant testified that the AmCare provider told him it was probably a pinched nerve and that it would go away with time. Accordingly, Claimant testified that he did not "decline treatment," but, rather, the provider did not offer

him any treatment. Nonetheless, no care was rendered and Claimant returned to full duty work.

8. Claimant checked in with AMCARE on April 27, 2024. He testified that he would have to report in with them every day while his claim was open. He testified that no physical exam or medical care was rendered at these appointments. While he reported slightly higher subjective right knee pain (2/10), he reiterated that he did not want treatment at the time. Moreover, Claimant reported that he would "likely" close his case at his next shift if his pain lessened or maintained. (CHE 6, p. 25).

9. Claimant returned to AmCare everyday between April 28, 2024, and April 30, 2024. (CHE 6, pp. 27-32). Based upon the AmCare reports, it does not appear that any treatment was rendered during these appointments. On May 1, 2024, Claimant presented to AmCare at which time he consented to closure of his case. (CHE 6, p. 33). No medical care was rendered during this appointment. *Id*. Based upon Claimant's April 27, 2024, statements and subsequent consent to close his case, the ALJ infers that Claimant's right knee pain had either decreased or remained the same by May 1, 2024. Indeed, Claimant testified that while his symptoms never completely abated, the intensity of his pain decreased over time.

Claimant's Return to Full Duty Work and his September 26, 2024, Follow-Up with AmCare

10. Between May 1, 2024 and September 26, 2024, Claimant worked full duty which included the potential of having to walk between 8-12 miles per day. He did not allege he missed any time from work arising out of his right knee pain. However, he continued to have discomfort after May 1, 2024. Because Claimant's right knee pain never completely resolved, he elected to see his primary care provider (PCP). After seeing his PCP, Claimant returned to AmCare on September 26, 2024. (CHE 6, p. 35). During this encounter, the following update was documented:

> . . . [Claimant] followed up with their own doctor after saying the pain never went away. [Claimant] closed their case on 5/1/2024 after maintaining at a 1-2/10 pain. [Claimant] states their personal doctor did an x-ray and believes it is a torn meniscus, but they [Claimant] do not have any diagnostic paperwork. [Claimant] originally reported a previous knee injury but now states they confirmed with their doctor it is for their left knee, not the right.

(CHE 6, p. 35). Claimant was referred to the Medicine for Business and Industry (MBI) clinic, Employer's workers' compensation medical provider. *Id*.

Claimant's September 26, 2024, Appointment with MBI

11. Claimant presented to Physician Assistant (PA-C) Ashlyn P. Whittaker at MBI on September 26, 2024, at 4:00 p.m. at which time, Claimant reported an abrupt

onset of right knee pain five months prior. (CHE 5, pp. 16-18). The following description of injury/illness was obtained from Claimant: "I was walking during preventative maintenance". *Id.* at 16. PA Whittaker described the following MOI: "While walking through the Amazon warehouse, patient developed abrupt knee pain. He did not trip or misstep". *Id*. at 17. PA Whittaker opined that Claimant's condition did not appear work related as she could not be more than 50% certain that Claimant's discomfort was caused by a work-related incident. *Id*. Accordingly, she concluded that medical care, which she noted was important, should be obtained through Claimant's personal physician outside the workers' compensation system. *Id.*

12. As presented, the evidence persuades the ALJ that the cause of Claimant's right knee pain is unknown.

The Closure of Claimant's AmCare Case, Respondents' Notice of Contest and Claimant's Application for Hearing

13. On September 27, 2024, AmCare closed Claimant's claim. (CHE 6, p. 37; 40).

14. As noted, a FROI was filed and received by insurer on September 26, 2024. (CHE 1, p. 4). Insurer, through their claims representative Anna Interiano, then filed a "Notice of Contest" on October 9, 2024, contesting the claim on the basis that the injury was not work-related. (CHE 2, p. 6). In response, Claimant filed an "Application for Hearing" on October 23, 2024. (CHE 3, pp. 8-10).

CONCLUSIONS OF LAW

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

Generally

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

B. 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).

C. Assessing the weight, credibility, and sufficiency of evidence in a 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). In this case, Claimant has consistently reported that he developed pain in his right knee while walking on a level, smooth concrete floor. Moreover, Claimant acknowledged that he was not carrying anything heavy or awkward at the time and that he did not stumble, trip, fall, misstep or twist his knee while walking. Given the consistency of his reporting, the ALJ finds Claimant's statements regarding the MOI in this case credible.

Compensability

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

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In

this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. In this case, Claimant contends that his alleged injury is compensable under two of the three categories of risks that cause injuries to employees identified by the Supreme Court in C*ity of Brighton and Cirsa v. Rodriguez,* 318 P.2d 496, 502 (Colo. 2014) (hereinafter *City of Brighton*). In *City of Brighton*, the Colorado Supreme Court set forth the following three categories of risks that cause injury to employees in determining whether an unexplained fall down a flight of stairs at work was compensable: (1) employment risks which are directly tied to the work itself; (2) risks which are inherently personal or private to the employee; and (3) neutral risks that are neither employment-related, nor personal. *Id.* at 503.

G. Here, the evidence presented fails to establish that Claimant's injury is compensable under the second category of risks announced in the *City of Brighton* decision. As noted, the second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to his/her employment. Idiopathic conditions have been defined to mean "self-originated." *City of Brighton*, supra at 503. Purely idiopathic personal injuries generally are not compensable unless an exception applies. *Id.* at 503. One exception is when an idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. See *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985); *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). To be considered a special hazard, the employment condition cannot be a ubiquitous one; it must be a special hazard not generally encountered by the injured worker. *Id.* The rationale for this exception is that unless a special hazard of employment increases the risk or extent of injury, an injury due to a claimant's personal or idiopathic condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Gates, supra* at 7*.* Courts have previously held that hard level concrete floors, concrete stairs, and sidewalk curbs are not special hazards of employment. *Id.; Alexander v. ICAO*, No. 14CA2122 (Colo. App. June 4, 2015); *Gaskins v. Golden Automotive Group, LLC*, W.C. No. 4-374-591 (ICAO Aug. 6, 2009). In this case, no evidence was presented establishing that Claimant had a preexisting right knee condition at the time of his alleged injury or that a preexisting or idiopathic condition precipitated an accident which combined with a special hazard of employment to cause Claimant's injury. Consequently, the ALJ agrees with Claimant that his case does not fall under the personal risk category of injury. Therefore, an analysis of whether Claimant's injury is compensable under the second category of risk as announced in *City of Brighton* is unnecessary.

H. Instead, Claimant contends that his injury is compensable under the employment risk category because the excessive walking associated with Claimant's job represents an employment risk directly tied to his work duties. In support of his assertion, Claimant relies on an ALJs decision announced in *Jones v. Regional Transportation District*, WC No. 5-247-732, September 10, 2024. While noting that the decision reached by the ALJ in *Jones* is not binding, Claimant contends that the "facts are on point with the facts presented in this case". The undersigned ALJ is not persuaded. In *Jones*, the claimant walked approximately 28,000 steps, or 13 miles, setting up for a special event on the day his injury occurred. This was 2.5 to 3.5 times the typical distance claimant walked during his shifts and was deemed by the ALJ to cause the compensable aggravation of a pre-existing yet asymptomatic condition because claimant's need for treatment would not otherwise have been required but for the excessive walking he engaged in while setting up for the special event. Indeed, the ALJ noted that the "precipitating event was Claimant's excessive walking on August 5, 2023, combining with his pre-existing pathology to create the disability and need for treatment." *Id.* at 8. Accordingly, this ALJ finds the decision in *Jones* more akin to a category two type risk analysis in that the claimant's pre-existing condition combined with excessive walking to give rise to his need for treatment.

I. In contrast to *Jones*, the evidence presented in the instant case supports a conclusion that Claimant routinely walks 10 miles per shift, and he presented no persuasive evidence to establish that on the date of his alleged injury he was outside of his customary practice or that the condition of the area or walkway surface where he was allegedly injured caused his injury. Moreover, and unlike Mr. Jones, Claimant failed to present evidence of an aggravation of an asymptomatic pre-existing condition causally connected to his work duties. (See ¶ H). Rather, the medical evidence presented here supports a conclusion that the cause of Claimant's right knee pain is unexplained. Based upon the evidence presented, the ALJ is not convinced that Claimant has proven that his typical walking on a smooth, flat and unobstructed concrete walkway on April 24, 2024, constituted an employment risk that caused or contributed to his right knee pain. Accordingly, the ALJ is not convinced that Claimant's injury is compensable under the employment risk category announced by the Court in *City of Brighton*.

J. Alternatively, Claimant contends that his alleged injury is compensable under the third category of risks announced in *City of Brighton*, which includes injuries caused by "neutral risks." *City of Brighton*, *supra* at 503. Such risks are associated neither with the employment itself nor with the employee. *Id.* at 504. "An injury is compensable under the Act if triggered by a neutral source that is not specifically targeted at a particular employee and would have occurred to any person who happened to be in the position of the injured employee at the time and place in question". *Id.* citing *Horodyskyj*, 32 P.3d at 477. Concerning unexplained falls, the Court noted, "Under our longstanding 'but-for' test, such an unexplained fall 'arises out of' employment if the fall would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he or she was injured." *City of Brighton supra*. In contending that his injury is compensable under the neutral risk category of injuries because it stems from an unknown cause and would not have occurred but for the conditions and obligations of his

employment, Claimant relies on the Colorado Court of Appeals opinion in *King Soopers v. Indus. Claim Apps. Office*, 538 P. 3d 347 (Colo. App. 2023) (hereinafter *King Soopers*). The *King Soopers* decision makes clear that the "neutral risk" category analysis applies not only to unexplained falls as articulated in *City of Brighton*, but also unexplained injuries. *Id.* at 353.

K. Many of the facts presented in *King Soopers* are analogous to those in the present case. Indeed, in *King Soopers*, the claimant, while executing his job duties, was merely walking in the back of the store carrying some cardboard when he felt a pop in his knee and fell to the ground. Like the instant case, the cause of harm (injury) to the claimant in *King Soopers* was simply unknown, i.e., the reason for the knee pop, and subsequent fall, was unknown and no evidence was presented to establish that a pre-existing condition caused or contributed to the injury.[2] After finding that claimant was participating in an employment related function, i.e. carrying (walking) cardboard to the store's cardboard baler when the injury occurred, the ALJ in *King Soopers* applied the "but for" test announced in *City of Brighton*. Neutral risks causing unexplained injuries are analyzed under this "but-for" test. *King Soopers, supra* at 353-354. The "but for" test, as announced in *City of Brighton* provides that an injury from a neutral risk 'arises out of' employment 'if it would not have occurred but for the fact that the conditions and obligations of employment placed the claimant in the position where he was injured."[3] *City of Brighton*, at 504-505. For example, "if an employee was struck by lightning while at work, his resulting injuries would be compensable because any employee standing at that spot at that time would have been struck. Thus, but for the requirements of the job, no one would have been struck by the lightning." *Nielsen v. Tri State Generation and Transmission*, W.C. 5-103-366-001 (ICAO, April 1, 2020), citing *City of Brighton* at 505. In applying the "but for" test announced in *City of Brighton*, the ALJ in *King Soopers* determined that but for claimant's employment, he would not have been walking when and where he was walking when the injury occurred. Thus, the ALJ concluded that claimant had established that his knee injury arose out of his employment and was thus compensable.

L. On appeal, the Court of Appeals agreed, noting that as part of the *City of Brighton* decision, the "Colorado Supreme Court held that an employee meets the burden to prove that the injury 'arose out of' employment when the employee proves that the injury originated in work-related functions and 'arose from a neutral risk,' not due to a pre-

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[2] As in the present case, the ALJ in *King Soopers* "ruled out" the cause of claimant's injuries being from an employment risk because neither the physical condition of the area where claimant was working, i.e. a dry, clean floor nor the activity in which claimant was involved (carrying cardboard) caused his injury. Furthermore, the ALJ ruled out the cause of claimant's injury being from the personal risk category because, as in the instant case, there was no persuasive evidence that a pre-existing condition caused or contributed to claimant's injury.

[3] The Court distinguished between the "but for" test applied in Horodyskyj and the test it applied to the claimant in *City of Brighton* based on the personal nature of the forces present in the Horodyskyj case. Because the claim of injury in Horodyskyj involved targeted harassment by a co-worker towards Mr. Horodyskyj during regular business hours, the court concluded that the harassment was personal and not attributable to a neutral force. In short, the court concluded that the alleged injury would not have happened to any employee then and there because it was personal to Mr. Horodyskyj. Accordingly, compensation was denied. *City of Brighton*, *supra* at 473, 478.

existing condition or other personal risk." *King Soopers*, *supra* at 354, citing *City of Brighton*, ¶ 29 (citing 2013 Larson § 7.04[1][b], at 7-28). Because the ALJ is convinced that Claimant's injury in the instant case is unexplained and arose from a neutral risk without contribution from a pre-existing condition or other personal risk, the question here is whether Claimant established that his alleged injury had its origin in his work-related functions and was sufficiently related to those functions so as to be considered part of his employment.

M. The "originated in work-related functions" component was deemed to have been met by claimant in *City of Brighton* because the employment causally contributed to claimant's injury since it obligated her to "engage in employment-related functions, errands, or duties at the time of injury." *City of Brighton*, *supra* at 504. In *King Soopers*, the ALJ found the same to be true. Specifically, the ALJ in *King Soopers* concluded that claimant was engaging in an employment function, i.e. "carrying cardboard to a baler while walking in employer's store – when the injury occurred." *King Soopers, supra* at 350. In the present case, Claimant contends that, like the claimant's in *City of Brighton* and *King Soopers*, he too was engaged in an employment related function when he developed pain in his right knee. Indeed, Claimant insists that walking to conduct preventative maintenance checks on the mezzanine level of the facility satisfies the requirement that his injury have its origins in his work-related functions because the circumstances (conditions) and responsibilities associated with his employment put him in the position to have to walk the floor to get to Employer's equipment to perform these maintenance checks. Because the cause of Claimant's knee pain (injury) is truly unknown, and because Claimant would not have been walking when and where he was when he developed right knee pain "but for" the obligations of his employment, he urges the ALJ to compense his April 25, 2024, injury.

N. Conversely, Respondents contend that Claimant failed to prove that he suffered a work-related accident resulting in a compensable injury. Indeed, Respondents assert that the alleged MOI in this case, specifically walking on a flat concrete floor without a misstep, stumble, trip or twist does not constitute an "accident" as is required to find the claim compensable. Moreover, Respondents maintain that Claimant failed to establish that he sustained a compensable "injury", which is defined as a harm that requires medical treatment or causes disability. (See *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). In support of this contention, Respondents note that Claimant declined treatment for his knee pain, noting further that no treatment was provided during Claimant's check-ins with AmCare during the pendency of his case. Finally, Respondents point out that while Claimant testified that he sought care through his PCP, he failed to present any medical records supporting this claim. Accordingly, Respondents argue that there is no competing medical evidence to rebut PA Whittaker's conclusion that Claimant's right knee condition did not appear work related since she could not be more than 50% certain that his discomfort was caused by a work-related incident. Accordingly, Respondent's encourage the ALJ to deny and dismiss the claim.

O. Under the Act there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without

the will or design of the person whose mere act causes it; an unexpected, unusual or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2) (injury includes disability resulting from accident).

P. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an incident occurring at work without sustaining a compensable "injury." This is true even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supported the ultimate finding that no injury occurred where a claimant experienced pain after being struck by a bed she was moving as part of her job duties). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury. Indeed, an incident which merely elicits pain symptoms without a causal connection to work activities does not compel a finding that the claimed injury is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

Q. In this case, the persuasive evidence demonstrates that Claimant simply experienced an onset of pain while walking at work. Based upon the evidence presented, the ALJ concludes that this MOI is not consistent with experiencing an "accident" as contemplated by the Act, particularly where it allegedly occurred while walking along a level, smooth concrete floor. Indeed, Claimant did not assert that he was carrying anything or walking awkwardly. Moreover, he did not take a stumble, misstep or trip. Rather, Claimant conceded he was merely stepping forward on a defect-free floor, which was the exact same action he could take in any other non-work setting, like a grocery store or at the mall.

R. Further, the evidence presented persuades the ALJ that Claimant failed to establish that he suffered an injury as the term is defined under the Act. Even if Claimant developed right knee pain as he alleges, the evidence presented supports a conclusion that he did not experience disability as a result. Indeed, Claimant was able to perform his normal full duties, including the ability to walk up to 10-12 miles per day for more than five months post alleged injury (and continuing to the hearing, nearly 10 months post alleged event). Furthermore, the ALJ is convinced that Claimant's right knee pain did not cause the need for medical treatment. In concluding that Claimant has failed to establish that he sustained a compensable injury, the ALJ finds the case of *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014) (hereinafter *McTaggart-Kerns*) instructive.

S. In *McTaggart-Kerns* an ALJ determined that a claimant who had been involved in a motor vehicle accident without resultant injuries, other than musculoskeletal chest pain suffered no compensable injury. Consequently, the ALJ denied the claim. Similar to the situation in *McTaggart-Kerns*, Claimant in the instant case presented for an

initial evaluation for subjective complaints of pain only. In this case, the ALJ agrees with Respondents that the objective medical evidence supports a conclusion that Claimant did not sustain an injury even if he developed right knee pain as he described. In support of this conclusion, the ALJ relies upon the following evidence:

- The initial report from AmCare dated April 25, 2024, fails to document any objective evidence of injury.[4] Rather, the report supports a conclusion that Claimant simply complained subjectively of pain in the right knee.

- The subsequent reports from AmCare dated, April 26, 2024, and April 27, 2024, specifically note that Claimant did not want treatment after receiving first aid in the form of KTape and a heat pack. and Claimant voluntarily closed his claim within days of the alleged event.

- At hearing, Claimant conceded that no physical examinations were performed, and no treatment was recommended. Thereafter, Claimant did not require medical intervention and did not pursue additional steps to obtain care through his employer until September 24, 2024, at which point PA Whittaker opined the condition was not work related. At that point, PA Whittaker did not feel Claimant required medical treatment, impairment, or restrictions. Indeed, the findings on PA Whittaker's examination of the right knee was akin to that documented at AmCare months earlier, specifically that Claimant's right knee was "normal in appearance without ecchymosis[5] or edema."[6]

- The wage records, medical records (or lack thereof) and Claimant's testimony establish that he did not experience a wage loss or the need for medical treatment as it related to the alleged April 24, 2024, incident. While the claimant testified that he did not decline treatment, the records from AmCare at the time of Claimant's appearance in the clinic document a contrary report. Moreover, Claimant closed his case just days after he allegedly developed pain. The ALJ finds Claimant's hearing testimony suggesting that he did not decline treatment after the incident unconvincing and inconsistent with his willingness to close his claim approximately one week after the incident giving raise to this claim.

- While the claimant testified to alleged care he sought from his PCP after the incident in question, he did not present medical records supporting same as evidence at hearing. Accordingly, there is no

[4] The report specifically notes that there were no "observable deformities, swelling, or discoloration. (CHE 6, p. 42).
[5] Discoloration/bruising.
[6] Swelling.

competing medical opinion rebutting PA Whittaker's opinion that Claimant did not sustain a work-related injury.

T. The ALJ credits the records presented, demonstrating that Claimant initially denied needing medical care and, when he presented for care, PA Whittaker found there was no work injury. Because Claimant failed to establish that he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim must be denied and dismissed.

U. To the extent that Claimant relies on the decisions announced in *City of Brighton* and *King Soopers* to assert that the alleged injury in the present case is compensable, the undersigned ALJ agrees with Respondent's that the facts of those cases are distinguishable from the facts of this case. In both *City of Brighton* and *King Soopers*, there was no dispute that the claimant's involved were injured. Here, however, the evidence supports a conclusion that Claimant did not suffer an injury as that term is defined in the Act. Without an injury, it is not necessary to query whether it "arose out of" Claimant's employment. However, even if Claimant had established that he suffered an "injury", the evidence presented fails to convince the ALJ that this injury originated in Claimant's work-related functions and was sufficiently related to those functions to satisfy the requirement that the injury arise out of Claimant's employment. In contrast to the claimant in *King Soopers*, who was actively engaged in a work-related task of carrying cardboard to a baler in the back of Employer's store, Claimant in the instant case was not similarly engaged in any work like activity, he was merely walking on a defect free walkway when he developed pain in his knee.

V. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury in question is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 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. In fact, the panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between a claimant's work and his/her symptoms does not mean there is a causal connection between a claimant's injury and his/her work. As presented, the evidence in the instant claim fails to persuade this ALJ that Claimant's right knee pain has its roots in his work-related functions. In other words, the ALJ is not convinced that Claimant established the requisite causal connection between his work duties and his right knee pain. Simply put, he failed to establish that his alleged injury "arose out of" his employment. Accordingly, his remaining claim surrounding the right to select the medical provider to attend to his alleged injury need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his right knee on April 24, 2024. Accordingly, his claim is denied and dismissed.

DATED: March 26, 2025

/s/ Richard M. Lamphere

Richard M. Lamphere
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-272-650-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered compensable injuries to her shoulders and neck during the course and scope of employment with Employer on May 1, 2024.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable and necessary medical benefits that are causally related to her May 1, 2024 injuries.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period May 7, 2024 until terminated by statute.

FINDINGS OF FACT

1. Employer is a concrete and paving company. On February 27, 2024 Claimant began working for Employer as an office manager and bookkeeper. Current office manager Susie Kozoh was training Claimant to be her replacement.

2. In March 2024 Ms. Kozoh expressed concerns to Claimant about her job performance. Notably, Claimant was not performing tasks as efficiently as expected. Ms. Kozoh mentioned additional concerns shortly before May 1, 2024 regarding erroneous data entry. On May 7, 2024 President of Employer Taylor Ratliff terminated Claimant's employment.

3. Later on May 7, 2024 Claimant contacted Ms. Kozoh via text and email. Ms. Kozoh remarked that Claimant verbally attacked her and she felt threatened. Later on the same day or the next, Claimant asked Ms. Kozoh for "Workers' Compensation paperwork." Claimant continued to use aggressive language. After Claimant refused to speak civilly, Ms. Kozoh ended the call.

4. Claimant later filed a Worker's Claim for Compensation. She asserted that she injured both arms while lifting a water meter on May 3, 2024. Notably, Claimant's Application for Hearing listed May 2, 2024 as the date of injury.

5. Claimant testified at the hearing in this matter. She explained that at about 1:00 p.m. on May 1, 2024 she entered the room in Employer's facility where water meters are stored. She sought to obtain information from a specific meter as part of her job duties. Claimant noted the water meter was lying face down on top of seven other meters on a table. The meter had a cast-iron top that protected the glass face. Claimant

estimated the meter weighed approximately 77 pounds. While lifting the meter to access the face, she felt pain in both shoulders and neck area.

6. Claimant explained that on May 1, 2024, she was holding her shoulder and Ms. Kozoh inquired about what was wrong. Claimant did not know at the time that the pain in her shoulders was an actual industrial injury. She believed she had merely pulled something, and the pain would subside. She thus worked the remainder of the day as well as May 2-3, 2024.

7. Claimant believed she had torn her rotator cuffs but offered no medical records supporting her claim. She did not produce any documentation that she sustained a work-related injury or ever received work restrictions.

8. In contrast, Ms. Kozoh, who has worked for Employer for approximately 20 years testified there was no reason for Claimant to have been attempting to read a water meter in the shop in early May 2024. The only water meter reading that was due during the first week of the month was for the City of Aurora. That meter was in the field, not in the shop. Ms. Kozoh also noted the meters would never be piled up as Claimant described. Technicians placed the meters face up on a shelf in a room in Employer's building so she could read them. Nevertheless, the only meter that needed to be read was from Aurora, and it remained in the field. Readings were then transmitted via e-mail or through a phone call.

9. Prior to the hearing, Respondents provided Claimant's counsel with a copy of an e-mail exchange from May 1, 2024 regarding the Aurora hydrant meter. Claimant received an e-mail from Employer's General Superintendent Michael Murry that included a picture of the Aurora water meter reading from the field. Claimant responded and thanked Mr. Murry for the photo.

10. Ms. Kozoh testified that on May 3, 2024 Claimant exclaimed that her shoulder was hurting and she could not lift it. When Ms. Kozoh inquired about what had happened, Claimant responded she did not know. However, now that she had health insurance, she would visit a doctor. Claimant did not mention any Workers' Compensation injury. Ms. Kozoh maintained that Claimant did not report a work injury until after her May 7, 2024 termination from employment. Notably, Claimant worked full duty from May 2-7, 2024.

11. Claimant has failed to establish it is more probably true than not that she suffered compensable injuries to her shoulders and neck during the course and scope of her employment with Employer on May 1, 2024. Initially, Claimant testified that at about 1:00 p.m. on May 1, 2024 she entered a room in Employer's facility where water meters are stored. She sought to read information from a specific meter as part of her job duties. Claimant noted the water meter was lying face down on top of seven other meters on a table. While lifting the meter to access the face, she felt pain in her shoulders and neck area. Claimant worked the remainder of the day as well as May 2-3, 2024.

12. The record reflects that Claimant has provided three different dates of her injuries. Notably, Claimant had specified both May 2 and May 3, 2024 as her date of injury. Prior to hearing Respondents provided Claimant's counsel with a copy of an email exchange from May 1, 2024. Specifically, Claimant received an e-mail from Employer's General Superintendent Mr. Murry that included a picture of an Aurora water meter reading from the field. Claimant responded and thanked Mr. Murry for the photo. Based on the new documentary evidence that there would have been no reason for her to physically read a meter on May 2 or 3, 2024 because the reading had already been emailed to her, Claimant changed her date of injury to May 1, 2024 at the outset of the hearing. The chronology of Claimant's amendments to her date of injury cast doubts on the reliability of her testimony.

13. Despite Claimant's contention, Ms. Kozoh's testimony is more credible and consistent with the record. Claimant did not likely suffer any injuries during the course and scope of her employment on May 1, 2024. Ms. Kozoh persuasively testified there was no reason for Claimant to have been attempting to read a water meter in the shop in early May 2024. The only water meter reading that was due during the first week of the month was for the City of Aurora. That meter was in the field, not in the shop. Moreover, Ms. Kozoh noted the meters would never have been stacked as Claimant described. In fact, technicians placed the meters face up on a shelf in a room in Employer's building so they could be read. Nevertheless, the only meter that needed to be read was from Aurora, and it remained in the field. Readings were transmitted by e-mail or through a phone call.

14. Ms. Kozoh testified that on May 3, 2024 Claimant exclaimed that her shoulder was hurting and she could not lift it. When Ms. Kozoh inquired about what had happened, Claimant responded she did not know. However, now that she had health insurance, she would visit a doctor. Claimant did not mention any Workers' Compensation injury or request treatment until after she was terminated on May 7, 2024. The exchange is inconsistent with Claimant's assertion that she suffered injuries at work while lifting a water meter.

15. A review of the record demonstrates that Claimant likely did not sustain any injuries during the course and scope of her employment with Employer on May 1, 2024. The various inconsistencies in Claimant's account, in conjunction with Ms. Kozoh's credible testimony, demonstrate that Claimant did not likely suffer any work injuries. Claimant's work activities on May 1, 2024 did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Claimant's claim for Workers' Compensation benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. 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 claimant's injury and work activities.

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

8. As found, Claimant has failed to establish by a preponderance of the evidence that she suffered compensable injuries to her shoulders and neck during the course and scope of her employment with Employer on May 1, 2024. Initially, Claimant testified that at about 1:00 p.m. on May 1, 2024 she entered a room in Employer's facility where water meters are stored. She sought to read information from a specific meter as part of her job duties. Claimant noted the water meter was lying face down on top of seven other meters on a table. While lifting the meter to access the face, she felt pain in her shoulders and neck area. Claimant worked the remainder of the day as well as May 2-3, 2024.

9. As found, the record reflects that Claimant has provided three different dates of her injuries. Notably, Claimant had specified both May 2 and May 3, 2024 as her date of injury. Prior to hearing Respondents provided Claimant's counsel with a copy of an email exchange from May 1, 2024. Specifically, Claimant received an e-mail from Employer's General Superintendent Mr. Murry that included a picture of an Aurora water meter reading from the field. Claimant responded and thanked Mr. Murry for the photo. Based on the new documentary evidence that there would have been no reason for her to physically read a meter on May 2 or 3, 2024 because the reading had already been emailed to her, Claimant changed her date of injury to May 1, 2024 at the outset of the hearing. The chronology of Claimant's amendments to her date of injury cast doubts on the reliability of her testimony.

10. As found, despite Claimant's contention, Ms. Kozoh's testimony is more credible and consistent with the record. Claimant did not likely suffer any injuries during the course and scope of her employment on May 1, 2024. Ms. Kozoh persuasively testified there was no reason for Claimant to have been attempting to read a water meter in the shop in early May 2024. The only water meter reading that was due during the first week of the month was for the City of Aurora. That meter was in the field, not in the shop. Moreover, Ms. Kozoh noted the meters would never have been stacked as Claimant described. In fact, technicians placed the meters face up on a shelf in a room in Employer's building so they could be read. Nevertheless, the only meter that needed to be read was from Aurora, and it remained in the field. Readings were transmitted by e-mail or through a phone call.

11. As found, Ms. Kozoh testified that on May 3, 2024 Claimant exclaimed that her shoulder was hurting and she could not lift it. When Ms. Kozoh inquired about what had happened, Claimant responded she did not know. However, now that she had health insurance, she would visit a doctor. Claimant did not mention any Workers' Compensation injury or request treatment until after she was terminated on May 7, 2024. The exchange is inconsistent with Claimant's assertion that she suffered injuries at work while lifting a water meter.

12. As found, a review of the record demonstrates that Claimant likely did not sustain any injuries during the course and scope of her employment with Employer on May 1, 2024. The various inconsistencies in Claimant's account, in conjunction with Ms. Kozoh's credible testimony, demonstrate that Claimant did not likely suffer any work injuries. Claimant's work activities on May 1, 2024 did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Claimant's claim for Workers' Compensation benefits is thus denied and dismissed.

ORDER

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

Claimant's request for Workers' Compensation benefits is denied and dismissed.

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 28, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-277-242-001

PROCEDURAL MATTERS

Prior to the commencement of the hearing, the parties reached the following stipulation:

The parties agreed to hold the endorsed issue of pertinent offsets in abeyance pending the ALJ's ruling regarding compensability of the claim. This stipulation was approved and accepted by the ALJ.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable psychological injury on June 17, 2024.

II. If Claimant's injury is compensable, whether she demonstrated, by a preponderance of the evidence, that she is entitled to reasonable, necessary and related medical benefits to cure and relieve her of the effects of her psychological injury.

III. If Claimant's injury is compensable, whether she demonstrated, by a preponderance of the evidence, that she is entitled to temporary disability benefits.

IV. If Claimant's injury is compensable, a determination of her average weekly wage at the time of said injury.

Because the ALJ concludes that Claimant failed to prove the elements required to establish a claim of mental impairment as required by C.R.S. § 8-41-301(2) (a), this order does not address issues II- IV.

FINDINGS OF FACT

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

1. Claimant was hired by the Employer as a Continuing Care Assistant (CCA) on September 5, 2023. She was subsequently assigned to work at the Colorado Mental Health Hospital in Pueblo (CMHHIP). She had been working at CMHHIP in this capacity for about 9 months at the time of her alleged injury on June 17, 2024.

The June 17, 2024, Incident

2. On June 17, 2024, Claimant was assigned to monitor a male patient who had been identified as a suicide risk. Because the patient was on suicide watch, Claimant testified that she was tasked to make sure that his hands and face were visible at all times. According to Claimant, the hospital care team had advised her that the

patient had been violent in the past, but she was not given any specific information on his “tendencies”.

3. Consistent with the hospital’s policy, Claimant testified that the patient required a two-to-one staff to patient ratio given his overt self-harming behavior. As Claimant and her partner entered the patient’s room, Claimant noticed that he was laying down with a blanket over himself. Per Claimant, the patient suddenly jumped out of bed and while fully nude began walking towards her while masturbating. Claimant testified that she was shocked and frightened as per the hospital’s suicide watch policy, she had to remain within 6-8 feet of the patient at all times. Claimant and her partner tied to redirect the patient and informed him that his conduct was inappropriate. According to Claimant, the patient asked for his pants, but because he was not allowed to have clothes at the time, he was provided a “safety smock” to wear. After donning the safety smock, Claimant testified that the patient proceeded to the bathroom and continued to masturbate in front of her.

4. During her testimony, Claimant referenced that the patient attempted to grab her breast while she was in the hallway with him at some point during her shift. Although she did not provide additional context regarding the timing of this incident during her testimony, a June 22, 2024, telephonic report to a representative at Conduent regarding the incident describes the events more clearly. Indeed, Claimant provided the following “Accident Description”:

> Caller states that she was with a patient (sic) when he went out bed masturbating, so patient (sic) went to the back room and continue to masturbate and told her that is her job to watch him, he attempted (sic) to (sic) grab her breast but he couldn't since she blocked him with her right arm, no injuries on it, but he told her that if he worked there he would grab and squeeze (sic) hard her breast, EE felt harassed, the police was notified of the incident and she pressed charges and they told her that it was not a sexual assault since the patient (sic) didn't touch her so they offer to report it as a job injury, she declined, on the 06/18 the police asked some questions to finish the report. staffing (sic) was contacted by the EE and they explained that this was expected working there and the only option that they gave her it was to end her contract and report it to CCMSI, EE refused to end her contact and now is seeking mental health (sic) treatment.

5. Claimant testified that the CMHHIP police responded to the incident and asked her if she wanted to press charges. According to Claimant, the responding officer asked her if she was okay to which Claimant answered “yes” and that she “didn’t receive any physical - - ‘physical injury’, because [the patient] made contact with [her] arm from trying to grab [her] breast, but [her] arm didn’t sustain any injury.” (Hearing Transcript, (H.T.), p. 34, ll. 8-10).

6. During cross-examination, Claimant testified that the patient’s aggression was directed to her specifically. She also testified that the patient actually grabbed her breast. (H.T., p. 59, ll. 18-23). The suggestion that the patient made physical contact

with Claimant's breast is inconsistent with her prior statements to the representative at Conduent and her direct testimony.

7. Based upon the evidence presented, the ALJ is not convinced that the patient physically contacted Claimant's breast or that she suffered any physical injuries as a consequence of the June 17, 2024, incident.

Reporting of the June 17, 2024, Incident

8. Claimant testified that she was informed that incidents of the type she reported were "expected" when working at the facility. (H.T., p. 35, ll. 9-15). She added that she was told to contact the Employer to report the alleged workplace injury. (H.T., p. 36, ll. 10-16).

9. Employer is headquartered in The Woodlands, Texas. While Claimant and Employer discussed her options, Claimant went on Family and Medical Leave Insurance (FAMLI) leave following the alleged workplace incident. (H.T., p. 44, ll. 2-5).

10. Claimant testified that her assignment with the CMHHIP was terminated as a result of her FAMLI leave. (H.T., p. 44, l. 24). Based upon the totality of the evidence presented, the ALJ is persuaded that Claimant was not terminated, but rather Employer did not have any new assignments for Claimant. (H.T., p. 45, ll. 2-4).

Claimant's Medical Treatment Following the June 17, 2024, Injury

11. Despite what she described as an effort to seek psychological treatment following the June 17, 2024, incident, Claimant admitted at hearing that she has not received any treatment for her alleged mental injury. (H.T., p.55, ll. 10-12, 25; 56, l. 11).

12. Claimant did not produce any medical evidence, medical report or expert testimony from a licensed psychologist or psychiatrist that would support or substantiate the compensability of her alleged mental injury or impairment. See C.R.S. § 8-41-301 (2) (a). Rather, Claimant testified that she was able to see Dawn Derosier with whom she has an established counseling relationship for the incident occurring June 17, 2024. (H.T., p. 60, ll. 17-21). Review of the medical records supports a finding that Claimant established a treatment relationship with Ms. Derosier on February 4, 2022, due to symptoms consistent with post-partum depression and anxiety. (RHE A). A review of the medical records admitted into evidence supports a finding that Ms. Derosier is credentialed as a licensed clinical social worker (LCSW). *Id.* She is not a licensed psychologist or psychiatrist. Moreover, careful review of the exhibits admitted into evidence fails to support that Claimant was seen by Ms. Derosier or any other mental health provider after June 17, 2024.

13. Based upon the evidence presented, the ALJ finds that the Claimant has presented no credible medical evidence or persuasive testimony that supports her claim for a mental injury as required by statute.

CONCLUSIONS OF LAW

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

A. To receive compensation or medical benefits, a claimant must prove that he/she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *see also, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. In this case, the evidence presented supports a conclusion that Claimant alleges to have sustained purely psychological injuries that she contends are related to the events surrounding her interaction with a mentally disturbed patient on June 17, 2024.

B. "Mental-mental" injuries are injuries in which mental impairment follows a solely emotional stimulus. *Oberle v. Indus. Claim Appeals Office,* 919 P.2d 918, 920 (Colo. App. 1996). "An injury that is 'the product of purely an emotional stimulus that results in mental impairment' requires a 'heightened standard of proof' to 'help prevent frivolous or improper claims.'" *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205–06 (Colo. App. 2012) (internal citations omitted). This is true because "[c]ases in which a claimed disability is based on emotional or psychological cause and in which physical injury is absent are less subject to direct proof and more susceptible to being frivolous in nature." *Dushane v. Beneficial Colorado, Inc.,* W.C. No. 4-218-217 (ICAO July 17, 1996). The question presented here is whether Claimant satisfied the statutory elements necessary to prove the compensable nature of her claim of mental impairment.

C. Section 8-41-301(2) (a), C.R.S., addresses the heightened burden of proof necessary to prove the compensable nature of a claim for mental impairment. Prior to July 1, 2018, the law provided:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed *physician* or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is

> the basis of the claim shall have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

(C.R.S. § 8-41-301(2) (a), (2017) (emphasis added).

D. Effective July 1, 2018, the mental impairment law changed. The "new law" removed the term licensed "physician" and replaced it with licensed "*psychiatrist or psychologist*. (C.R.S. § 8-41-301(2) (a), (2024) (emphasis added). In this case, the ALJ concludes that Claimant's mental impairment claim is governed by the "new law", which as noted above, requires that the claim be proven by evidence "supported by the testimony of a licensed psychiatrist or psychologist". §8-41-301(2) (a), C.R.S. (2016).

E. The Colorado Supreme Court has interpreted the phrase "supported by the testimony of a licensed psychiatrist or psychologist" broadly to include their work product, which "may include letters, reports, affidavits, depositions, documents, and/or oral testimony." See, *Colo. Dept. Of Labor & Emp't v. Esser*, 30 P.3d 189, 196 (Colo. 2001). In the absence of any oral testimony from a medical provider in this case, the ALJ has, carefully considered the records of Claimant's medical providers and the balance of the documents admitted into evidence. Review of the records submitted persuades the ALJ that none of Claimant's health providers, have causally connected Claimant's alleged psychological condition(s) to her work and in particular the events surrounding her interaction with the aforementioned patient on June 17, 2024. Indeed, Claimant submitted no medical records or reports substantiating such causal connection. Although Claimant raises the events of June 17, 2024, as factors causing her mental injury, it is well settled that a claim of mental impairment must be proven by evidence supported by the testimony of a licensed psychologist or psychiatrist.

F. Even if the evidence presented had supported a conclusion that Claimant's medical providers, including Ms. Derosier had causally connected Claimant's alleged mental health conditions to her work duties on June 17, 2024, the question as to whether the testimony of a primary care physician, a Nurse practitioner (NP) (Sandra Ewer or a LCSW, is sufficient to meet the statutory requirement that a claim for mental impairment must be proven by evidence supported by the testimony of a licensed psychiatrist or a psychologist remains. Workers' Compensation Rules of Procedure (W.C.R.P.) 16-2(Q) defines physicians as individuals who are licensed by the State of Colorado through: (i) Colorado Medical Board; (ii) Colorado Board of Chiropractic Examiners; (iii) Colorado Podiatry Board; or (iv) Colorado Dental Board. W.C.R.P. 16-2(N) recognizes a psychologist to include the following credentials: PsyD, PhD, and EdD. Additionally, W.C.R.P. 16-2(N) (12) indicates that nurse practitioners are non-physicians and 16-2(N) (20) notes that Licensed Professional Counselors (LPC) are also non-physicians.

G. In the present case, the admitted medical evidence comes primarily from Ms. Derosier who, as noted, is a LCSW. While there are references to Dr. Lawrence O'Connell, Claimant failed to present the ALJ with his credentials nor is there any substantive reports from Dr. O'Connell supporting Claimant claim of mental impairment to her work activities on June 17, 2024. Rather, it appears that Dr. O'Connell may have

may referrals for Claimant to be evaluated in the past by "Behavioral Health". (RHE A, p. 9). Finally, the records submitted reference the involvement of NP Sandra Ewer, who appears to have managed Claimant's prescription medications arising out of her prior episode of postpartum depression. While NP Ewer and LCSW Derosier may have psychiatric experience, neither is a physician or a psychologist. Thus, even if they had opined that Claimant's mental health conditions were causally related to her June 17, 2024, work duties, neither possesses the qualifications required by the statute to support a claim of mental impairment. Consequently, their testimony/reports would not have satisfied the threshold requirement of the statute. See *Department of Labor and Employment v. Asser,* supra; *Martinez v. Department of Corrections*, W.C. No. 4-202-359 (July 2, 1996) (testimony of social worker not sufficient to support claim for mental impairment). Indeed, the plain language of the statute requires that a licensed "psychiatrist or psychologist" provide testimony that the Claimant suffered a mental impairment related to his work duties. C.R.S. § 8-41-301(2) (a).

H. Further "Mental impairment" as defined by statute means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event. C.R.S. § 8-41-301 (3) (a). A "psychologically traumatic event" means an event that is generally outside of the worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. C.R.S. § 8-41-301 (3) (b) (I).

I. While the behavior of the patient in question may have been repugnant and shocking, the ALJ is not at liberty to ignore required elements of the statute to conclude that Claimant has proven his claim of mental impairment. Here, Claimant failed to present an opinion from a licensed psychiatrist or psychologist that she suffered a psychologically traumatic work-related event that was generally outside of the worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances, including Claimant's anger, frustration, anxiety and depression. While a psychologically traumatic event may also include an event within a worker's usual experience in cases where the worker is diagnosed with post-traumatic stress disorder by a licensed psychiatrist or psychologist after a worker has been exposed to either or an attempt by another person to cause the worker serious bodily harm or death through the use of deadly force, or visual and/or audible witnessing of death or the immediate aftermath of death as a result of a violent event, or repeatedly visually and/or audibly witnessing serious bodily injury, none of those situations are present in this case. See C.R.S. § 8-41-301(3).

J. Although expert and non-expert testimony is admissible to approve that an injury occurred outside of a worker's usual experience, and that similarly situated workers would have reacted similarly, (*Davison v. Indus. Claim Appeals*, 84 P.3d 1023, 1029 (Colo. 2004)), the evidence presented in this case supports a conclusion that Claimant has failed to establish that the events she was subjected to on June 17, 2024 were outside of a mental health workers usual experience at CMHHIP or would evoke significant symptoms of distress in a worker in similar circumstances. Indeed, Claimant admitted that she was told such an incident was expected for workers at the Colorado Mental Health Hospital and that she would need to resign if she was not willing to

witness the type of activities that mental patients, such as the patient in question, engage in at such a facility. Simply put, Claimant failed to present persuasive testimony that would support any contention that the June 17, 2024, incident occurred outside of the usual experience of a worker at CMHHIP such that it may be considered a psychologically traumatic event under C.R.S. § 8-41-301(3). Accordingly, the ALJ agrees with Respondents that Claimant has failed to establish all necessary statutory elements to prove she suffered a compensable mental impairment injury pursuant to C.R.S. § 8-41-301(2) (a). C.R.S. (2023).

ORDER

It is therefore ordered that:

1. Claimant has failed to meet the statutory requirements set forth in C.R.S. § 8-42-301(2), C.R.S. to establish a claim of mental impairment. Accordingly, her claim is **denied** and **dismissed**. Because Claimant failed to carry her burden to prove the compensable nature of her psychological injury, her remaining claims need not be addressed.

Date: March 28, 2025

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

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

ISSUES

1. Whether Respondent proved by clear and convincing evidence that DIME Dr. Sacha's impairment ratings were erroneous, and, if so, what the correct impairment rating is.

FINDINGS OF FACT

1. Claimant is a school bus driver who on January 12, 2023, was rear-ended by another driver while she was unloading a wheelchair from the school bus lift. She was jerked to the left. Claimant would later report that she had an acute onset of low back pain with radiation to the right leg with numbness and tingling in the toe and a right wrist bruise.

2. Claimant sought treatment at Concentra Urgent Care Center on January 13, 2023, where she was attended by Valerie Skvarca, PA-C. Claimant complained of mild, aching, constant pain in her left dorsal wrist. Claimant also complained of mild bilateral knee pain radiating to the lower legs. Elsewhere, the record documented a "soreness pain in both legs/ hands." Claimant's complaints did not include the lumbar spine. The assessment was of strains of the left wrist and bilateral knees.

3. Claimant returned to Concentra on January 17, 2023, where she was attended by Dr. Eric Chau. Claimant reported worsening pain in her hand and legs. Claimant also began to complain of low back pain radiating down her leg, without the record specifying which leg. Claimant reported the left knee was feeling better. Physical examination showed tenderness on the dorsal and radial aspects of Claimant's left wrist but no tenderness in the right wrist was noted.

4. Claimant returned to PA Skvarca at Concentra on January 30, 2023, for her knees and upper and lower back. Claimant reported that she had worsening pain in her upper and lower back after driving over some bumps in the bus a week earlier. Claimant reported low back pain radiating down her leg. Her low back pain was about the left and right paraspinal musculatures, but "not right sciatic notch, not left sciatic notch, not the right sacroiliac joint and not the left sacroiliac joint." Physical examination of the right knee was normal, but the left knee had tenderness over the medial joint line and diffusely over the lateral knee. Claimant was to resume physical therapy and massage therapy.

5. At a February 15, 2023 visit with Dr. Chau, Claimant reported worsening bilateral upper extremity pain and tingling in the fingers. Claimant also reported lumbar pain radiating into both legs. Dr. Chau ordered a lumbar MRI.

6. Claimant returned to Dr. Chau on March 8, 2023. Claimant reported continued pain and discomfort that she described as "heavy and tired." Claimant continued to complain of radiating back pain as well as bilateral wrist pain, left worse than right, with intermittent numbness. Dr. Chau provided Claimant a wrist brace, but did not clarify in the report which wrist it was for.

7. Claimant underwent a lumbar MRI on March 9, 2023, which showed multilevel disc bulges, findings of facet arthropathy predominantly at L3-L4 and L4-L5, and mild facet arthropathy at LS-S1, with grade 1 anterolisthesis L4 on L5. No significant neural foraminal narrowing was identified.

8. On March 13, 2023, Claimant returned to Concentra where she was attended by Dr. Chau. Claimant continued to have radiating back pain into her right leg. Dr. Chau noted that the MRI showed disc bulging at multiple levels with foraminal narrowing. Dr. Chau noted that Claimant continued to have pain and numbness in both wrists despite wearing wrist braces during the workday. Claimant told Dr. Chau that she had a history of carpal tunnel syndrome that was aggravated by her work injury.

9. On March 23, 2023, Claimant saw Dr. John Aschberger, a physiatrist, at PA Skvarca's referral. Dr. Aschberger reviewed Claimant's medical record history and took Claimant's subjective history, noting Claimant to be a suboptimal historian. Claimant reported that her constant pain was across the lumbar spine with burning pain into the left leg without a specific distribution. Dr. Aschberger ultimately assessed Claimant with a lumbar strain. Although Claimant's MRI showed some mild degenerative changes in the lumbar spine, and although Claimant reported radiating symptomology to the left leg, Dr. Aschberger noted negative provocative testing and no neuromuscular deficits. Dr. Aschberger felt electrodiagnostic testing was not indicated at that time in light of his assessment, despite Claimant's report of radiating symptoms, but that he would revisit the possibility in three weeks. Dr. Aschberger recommended continued participation in her home exercise program.

10. Claimant visited with Dr. Chau again on April 3, 2023. Claimant reported pain over the right low back that was described as "shooting" pain going up the back. On physical examination, Claimant exhibited hip flexor tenderness and SI joint tenderness. A straight-leg test resulted in pain in the back and left buttocks with increased pain on extension. Dr. Chau assessed Claimant with: persistent back pain; grade 1 anterolisthesis, L4 on L5 with mild-to-moderate bilateral foraminal narrowing; symptoms of radiculitis without neuromuscular deficit; and posterior element irritation suggested with the examination at the facets and SI area. Dr.

Chau recommended electrodiagnostic testing, which Claimant declined pending further massage therapy.

11. On April 5, 2023, Claimant underwent an ultrasound of her right wrist to rule out deep vein thrombosis. It showed only "nonspecific heterogeneous hyperechoic nonvascular lesion which could represent a bruise."

12. At an April 12, 2023 appointment with Dr. Aschberger, Claimant reported back and buttocks pain on the left during straight leg testing.

13. Claimant saw Dr. Chau on April 17, 2023. On examination, Dr. Chau noted that Claimant exhibited tenderness present in both lumbar paraspinal musculatures with muscle spasm and limited range of motion. However, straight leg testing was negative for both the left and right.

14. At an April 26, 2023 appointment, Dr. Chau noted that Claimant's low back pain had improved as had Claimant's symptoms of radiculitis, which he noted to be "cleared."

15. At a May 9, 2023 visit with Dr. Chau, Claimant exhibited negative straight leg testing bilaterally.

16. Claimant returned to Dr. Aschberger on May 11, 2023. Claimant reported that massage therapy had been helpful, and she did not describe any radicular symptoms. Claimant did report numbness and tingling in several fingers bilaterally. On physical examination, Claimant exhibited positive median nerve Tinel testing and compression testing in the bilateral wrists. In her lumbar spine, Claimant exhibited 70 to 80 degrees of flexion with 15 to 20 degrees of extension with positive facet loading. The seated straight leg raise was negative. Dr. Aschberger noted that, in contrast to his prior examination, Claimant exhibited increased irritation with positive response to provocative testing on the lumbar spine. With regard to the wrists, he noted that Claimant had symptoms consistent with bilateral median nerve irritation, which he noted had not been observed with previous assessments and that presentation has not been consistent with an initial wrist injury. He suspected that there had been an underlying issue with recurrent irritation, noting that Claimant had reported undergoing prior electrodiagnostic testing of her wrists years ago.

17. On May 30, 2023, Dr. Chau determined that Claimant had reached maximum medical improvement (MMI) with no permanent impairment. By that visit, Claimant was tolerating full work duties without restrictions. Dr. Chau noted that Claimant's physical examination showed no muscle spasms, full range of motion in the lumbar spine, and negative straight leg raise tests bilaterally. Dr. Chau recommended Claimant complete her course of massage therapy with an additional six sessions to be performed under maintenance medical care. Dr. Chau also recommended that Claimant follow up with one or two visits with Dr. Aschberger in one year.

18. On July 1, 2024, Claimant attended a DIME with Dr. John Sacha. Dr. Sacha reviewed Claimant's medical history and examined Claimant. Claimant reported that her current symptomology included pain localized to the low back and right leg with intermittent numbness and tingling to the foot as well as right wrist pain in the mid wrist with some stiffness but no numbness, tingling, or weakness. Claimant denied any knee pain. On physical examination, Claimant exhibited lumbar paraspinal muscle spasms, pain with lumbar extension and flexion, and pain with straight leg raise and neural tension testing on the right. Examination of the right wrist showed a positive carpal tunnel compression test, no carpal row instability, a negative Finkelstein's test, and no tenderness of the fibrocartilage. Claimant also exhibited diminished range of motion in the wrist. Ultimately, Dr. Sacha felt that Claimant did not have any knee injuries or carpal tunnel syndrome related to Claimant's work injury. However, he felt that Claimant did have lumbar radiculopathy as well as a wrist strain. He opined that Claimant had reached maximum medical improvement, noting that Claimant declined an EMG and epidural steroid injection for her lumbar spine. For impairment, Dr. Sacha determined that Claimant's limited range of motion in the right wrist warranted a 2% upper extremity impairment. He felt that no neurologic or other impairment was warranted. For the lumbar spine, Dr. Sacha assigned a 7% whole-person impairment on the basis of Claimant's lumbar displaced disc and Table 53 of the *AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*. He noted that Claimant had no range-of-motion deficits in the lumbar spine warranting an impairment rating.

19. Dr. Sacha later issued a supplemental comment to his DIME report responding to a Division letter indicating that the DIME was incomplete due to an erroneous 7% impairment rating for the lumbar spine. Dr. Sacha responded in his supplemental comment that the notice in the Division's letter was incorrect and that Table 53, on which the impairment was based, provided for an impairment for discogenic or radicular pain regardless of the timeframe.

20. Respondent commissioned an independent medical examination (IME) pursuant to Rule 8-8, WCRP, with Dr. Jeffrey Wunder, which took place on October 17, 2024. Dr. Wunder reviewed Claimant's medical history and examined Claimant. Claimant reported that her current symptoms included mid-to-right-sided low back pain that was constant and aching as well as pain radiating up her spine to her lower thoracic level but with no extremity pain radiation. Claimant did not report numbness or tingling in her lower extremities. Claimant reported no right wrist pain, though she had occasional tingling in the second and third digits consistent with a median nerve distribution.

21. On physical examination of the lumbar spine, Dr. Wunder noted that Claimant exhibited nonphysiologic, diffuse tenderness from T4 to the coccyx, with overreactive pain behaviors disproportionate to minimal palpation, particularly over the sacrum and gluteal areas. Lumbar muscle tone could not be assessed due to

morbid obesity. Dr. Wunder also noted the presence of several Waddell signs, including nonphysiologic pain distribution, inconsistent straight leg raises, and invalid inclinometer readings, which suggested a nonorganic component to the symptoms. Despite reported limitations, Claimant performed seated straight leg raises to 90 degrees without pain, which was inconsistent with her observed normal gait.

22. Regarding the right wrist, Dr. Wunder found no tenderness or palpable abnormalities. Although range of motion was mildly restricted in extension, it was symmetrical with the left wrist and likely age-related in his opinion. There was a positive carpal tunnel compression test and weakness in the abductor pollicis brevis muscles in both wrists, but more pronounced on the right side.

23. Ultimately, Dr. Wunder concurred with Dr. Sacha regarding the date of MMI, but he disagreed that Claimant had any impairment at all. He noted substantial inconsistencies between his evaluation and that of Dr. Sacha, including invalid lumbar range-of-motion measurements and prominent Waddell signs suggestive of nonorganic symptom magnification. Dr. Wunder specifically questioned the 7% impairment rating based on Claimant's complaints of right lower extremity radiculopathy, observing that Claimant's records consistently documented symptoms in the left leg, not the right, and that no objective sensory or motor deficits were present. He also disagreed about the right wrist impairment rating, noting that the left wrist was initially reported as symptomatic and that his bilateral examination showed symmetrical range of motion consistent with age-related osteoarthritis. Additionally, Dr. Wunder felt that the lumbar MRI findings were age-appropriate degenerative changes lacking any correlation with pain generation. Based on these discrepancies, he adopted Dr. Chau's 0% impairment rating.

24. Dr. Wunder testified at hearing. He testified that Claimant did not have any complaints of back pain until her January 17, 2023 visit with Dr. Chau. He testified that 93 percent of those with back injuries would be expected to report symptoms within twenty-four hours of the injury, and 100 percent would be expected to report such complaints within seventy-two hours.

25. Dr. Wunder expressed in his testimony that he felt the MRI findings of the low back were age-related and did not correlate with radiculopathy. He explained that Claimant's initial radicular complaints involved the left leg, including when Claimant went to Concentra in March 2023 and when she saw Dr. Aschberger that same month. He observed that a year later Claimant was complaining of right-sided radicular symptoms. He felt that an injury to a nerve root would lead to symptoms that are consistently associated with one side or the other, but which would not migrate. Dr. Wunder testified that testing for radiculopathy would involve performing a transforaminal epidural steroid injection (ESI) to verify whether the injection, when properly placed, improves the pain. He further testified that Claimant's refusal to undergo injections for the low back pain was inconsistent with a patient who was experiencing genuine pain.

26. Dr. Wunder testified that during his IME, there was an absence of pain behaviors by Claimant. She appeared calm and did not show much pain behavior compared to her rated pain. However, during the physical examination, Dr. Wunder testified, Claimant's presentation changed dramatically, raising a red flag for Dr. Wunder.

27. Dr. Wunder testified that he attempted to perform range of motion measurements during his physical examination, but that with each attempt at measuring range of motion, Claimant's range of motion would decrease significantly to the point where she was giving only five degrees of motion.

28. Dr. Wunder testified in reference to Dr. Sacha's findings of muscle spasms that muscle spasms are not an objective finding and, in fact, turn out to be unverified when tested with electrodiagnostic studies. When Dr. Wunder was asked whether he examined Claimant for muscle spasms, he explained that Claimant's excess adipose tissue was such that he could not get a good feel of the underlying musculature.

29. Regarding Claimant's wrists, Dr. Wunder testified that he examined both of Claimant's wrists during his physical examination and observed no evidence of metacarpal instability, though she had mildly reduced range of motion in both wrists, equal bilaterally. Therefore, Dr. Wunder felt that Dr. Sacha erred in assigning an impairment rating for the right wrist.

30. The Court finds Dr. Wunder's testimony credible.

31. The Court finds that it is highly probable and free from serious or substantial doubt that Dr. Sacha erred in assigning Claimant impairments for her right wrist and lumbar spine.

32. As to the right wrist, there is an absence of persuasive, contemporaneous documentation supporting an acute injury to that wrist attributable to the work injury. Claimant's initial medical visits, including on January 13 and January 17, 2023, reflect complaints primarily regarding the left wrist and knees, with no persuasive indication of right wrist involvement aside from vague references to soreness and pain in the bilateral hands. The initial records document left wrist tenderness on the dorsal aspect, but no tenderness documented on the right, which contrasts with documentation of soreness and pain in both hands. Dr. Wunder credibly testified that his examination revealed symmetrical, age-consistent motion in both wrists, with no objective evidence of instability, trauma, or impairment specific to the right side. He concluded that the impairment rating lacked a valid medical foundation. This testimony, corroborated by the contemporaneous medical records, strongly supports a finding that Dr. Sacha's right wrist impairment rating was in error. Furthermore, to the extent that Dr. Sacha did not inquire further into the discrepancy regarding the medical records' documentation of no tenderness in the right wrist for several visits after the work

injury, the Court finds that Dr. Sacha's causation analysis was deficient; and, in that regard, he erred.

33. Similarly, with regard to the lumbar spine, Dr. Sacha assigned a 7% whole-person impairment on the basis of Claimant's lumbar displaced disc and associated discogenic or radicular pain. However, Claimant's reported radicular symptoms were inconsistent in location and chronology—initially involving the left leg, later migrating to the right—contrary to the expected clinical presentation of unilateral, dermatomal symptoms associated with nerve root involvement. Importantly, no objective neurologic deficits were documented by treating providers, and Claimant declined to undergo diagnostic procedures, including electrodiagnostic testing and epidural steroid injections, which might have substantiated the presence of radiculopathy. Both Drs. Chau and Aschberger assessed Claimant with a lumbar strain without evidence of persistent radicular symptoms. Dr. Wunder credibly testified that Claimant's MRI showed only age-appropriate degenerative changes without correlating findings to support radiculopathy. He noted several Waddell signs during his IME, suggesting nonorganic symptom amplification, and concluded that the lumbar impairment rating assigned by Dr. Sacha lacked clinical validity.

34. Taken together, the inconsistency of Claimant's subjective complaints, the absence of objective medical findings, the persuasive testimony of Dr. Wunder, Dr. Sacha's lack of inquiry into resolving the inconsistencies, and the weight of the medical evidence all lead to the conclusion that Dr. Sacha's impairment ratings for both the right wrist and lumbar spine were erroneous. Accordingly, the Court finds that it is highly probable and free from serious or substantial doubt that Dr. Sacha erred in assigning these impairments.

35. The Court therefore finds that Respondent has proved by clear and convincing evidence that Dr. Sacha erred in assigning impairments for Claimant's right wrist and lumbar spine and that Claimant, upon reaching MMI, did not have any permanent impairment in either region.

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 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).

Overcome DIME as to impairment

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8- 42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). However, the increased burden of proof required by DIME procedures is only applicable to non-scheduled impairments and is inapplicable to scheduled injuries. Section 8-42-107(8), C.R.S. A DIME physician's finding as to a scheduled permanent impairment rating may be overcome by a preponderance of the evidence. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo.App.2000).

For the reasons found above, Respondent has proved by clear and convincing evidence that Dr. Sacha erred in assigning impairments for Claimant's right wrist and lumbar spine and that Claimant, upon reaching MMI, did not have any permanent impairment in either region.

ORDER

It is therefore ordered that:

1. Respondent has overcome the DIME physician's impairment determination.

2. Respondent has proved that Claimant had no ratable impairment upon reaching MMI.

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 28, 2025.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-954-335-011

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that various recommended treatment modalities constitute reasonable medical treatment necessary to maintain Claimant at maximum medical improvement (MMI)? The specific treatment requested is as follows:

a. ongoing pelvic floor physical therapy;

b. compound cream and suppositories as recommended by Claimant's physical therapist, Amanda Osborne, PT, DPT;

c. injections as recommended by Dr. Robert Moghim;

d. magnetic resonance imaging (MRI) of Claimant's lumbar spine:

e. radiofrequency ablation (RFA);

f. ongoing massage therapy;

g. ongoing chiropractic therapy;

h. prescription medications percocet and ibuprofen; and

i. treatment with a Nurse Practitioner and/or Dr. Hulon in Dr. Moghim's practice.

2. Alternatively, have Respondents demonstrated, by a preponderance of the evidence, that Claimant no longer needs post-MMI maintenance medical treatment to prevent further deterioration to her physical condition pursuant to *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988), thereby allowing Respondents to withdraw the admission for post-MMI medical treatment?

FINDINGS OF FACT

1. Claimant suffered a work related injury on June 20, 2014. Respondents have admitted liability for Claimant's injury. During this claim, Claimant has undergone various treatment modalities[1]. These treatments have included hip surgeries,

[1] Due to the length of this claim (over ten years), the ALJ does not recite each and every treatment Claimant has undergone or every provider Claimant has seen..

chiropractic treatment, imaging, massage, injections, medial branch blocks (MBB), and pain medications.

2. Following a Division-sponsored independent medical examination (DIME), Dr. Thomas Higginbotham opined that Claimant had reached maximum medical improvement (MMI) on October 23, 2017.

3. Following an August 31, 2021 hearing, ALJ Timothy Nemechek issued a Summary Order. In that order, ALJ Nemechek ordered Respondents to continue to pay for reasonable and necessary post-MMI medical treatment. Specifically, Respondents were ordered to pay for pelvic floor physical therapy.

4. Claimant asserts that as of the date of the current hearing, she is in need of ongoing treatment for her symptoms. Claimant further asserts that if she is not able to continue with these various treatment options she will worsen. Claimant testified that her medical providers have not "gotten to the root of the issue". As noted above, Claimant is requesting that Respondents authorize a number of treatment modalities that have been ordered and/or recommended by her treating providers.

5. On June 26, 2024, Claimant was provided a prescription from Dr. Moghim's practice for chiropractic therapy with Dr. Keith Graves.

6. In an undated prescription, Dr. Moghim referred Claimant to Dr. Megan Orlando for treatment of "pelvic and perinea! pain".

7. On October 30, 2024, Dr. Moghim issued a number of orders for treatment of Claimant's low back and hip symptoms. These orders included:

six sessions of chiropractic treatment;
six visits of massage therapy;
oxycodone-acetaminophen 10 mg-325 mg tablet;
ibuprofen 800 mg tablet;
radiofrequency ablation (RFA) at the L4-L5 and L5-S 1 levels;
a lumbar spine MRI; and
hip x-rays.

8. On November 6, 2024, Claimant attended an independent medical examination (IME) with Dr. Allison Fall. In connection with the IME, Dr. Fall reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In her IME report, Dr. Fall opined that there is no additional medical treatment indicated for post-MMI treatment related to Claimant's right wrist and hip injuries. In support of this opinion, Dr. Fall noted that Claimant "has an extensive and adequate home exercise program" and a gym membership. Dr. Fall further opined that that Claimant has had "the appropriate amount of' pelvic floor physical therapy.

9. On November 14, 2024, Dr. Fall authored an addendum to the IME report. The reason for the addendum was that Dr. Fall had received specific prescriptions/orders from Dr. Moghim. These orders included medications, massage therapy, chiropractic therapy, lumbar spine radiofrequency neurotomy, and hip x-rays. Dr. Fall reiterated her opinion that there was no additional treatment necessary as maintenance care for Claimant. Dr. Fall also specifically opined that the treatment modalities ordered by Dr. Moghim are not medically reasonable, necessary, or causally related to Claimant's June 20, 2014 work injury.

10. On February 12, 2025, surgeon Dr. Brian White wrote a letter to Claimant in response to a number of queries from Claimant. In that letter, Dr. White stated that pelvic floor muscles "do crossover to the hip joint", but he considers these to be "relatively [two] separate issues, but they can affect each other." Dr. White further opined that the pelvic floor "is a high maintenance area" that requires "a lot of work with physical therapy".

11. On February 13, 2025, Claimant's pelvic floor physical therapist, Amanda Osborne, PT, DPT, authored a letter regarding her current treatment recommendations. In that letter, PT Osborne opined that Claimant's pelvic floor dysfunction is contributing to her hip and low back symptoms. Specifically, PT Osborne recommends that Claimant be seen by Dr. Orlando for "medical intervention of her pelvic floor and/or genitourinary system."

12. Dr. Megan Orlando is Claimant's O8/GYN. On February 14, 2025, Dr. Orlando authored a letter in which she opined that Claimant would benefit from the use of vaginal muscle relaxants. Specifically, Dr. Orlando recommends "baclofen 10mg PV". Dr. Orlando further opined that Claimant should pursue "multimodal therapy" that would include pelvic floor physical therapy, medications, and injection therapies.

13. Dr. Fall's testimony was consistent with her reports. Dr. Fall testified that there is no additional post-MMI maintenance medical treatment indicated for Claimant's June 20, 2014 work injury. Dr. Fall further testified that the requested medical treatment is not appropriate as "maintenance". Dr. Fall explained that none of the requested treatment would provide Claimant with any functional improvement.

14. The ALJ credits the opinions of Dr. Fall over those of PT Osborne and Ors. White and Orlando. The ALJ credits Claimant's testimony that she continues to experience symptoms, and the ALJ sympathizes with Claimant and her chronic condition. However, the ALJ also credits Dr. Fall's opinions that none of the requested medical treatment is reasonable, necessary, or related to treat Claimant's work related condition. Furthermore, the recommended treatment modalities are not reasonable or necessary to maintain Claimant at MMI. Claimant has undergone exhaustive treatment in the over ten years since her injury. The ALJ finds that Claimant has failed to demonstrate that it is more like than not that the recommended treatment (including ongoing pelvic floor physical therapy; compound cream and suppositories as recommended by Claimant's physical therapist; injections; a lumbar spine MRI; RFA;

ongoing massage therapy; ongoing chiropractic therapy; the prescription medications percocet and ibuprofen; and treatment with a Nurse Practitioner and/or Dr. Hulon in Dr. Moghim's practice) constitute reasonable medical treatment necessary to maintain Claimant at MMI.

15. The ALJ further credits the opinions of Dr. Fall and finds that there is no maintenance medical treatment indicated to treat Claimant's conditions related to the June 20, 2014 work injury. Therefore, the ALJ finds that Respondents have demonstrated that it is more likely than not that Claimant no longer needs post-MMI maintenance medical treatment to prevent further deterioration to her physical condition.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; Sims *v. Industrial Cla;m 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., 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. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that various recommended treatment modalities (including ongoing pelvic floor physical therapy; compound cream and suppositories as recommended by Claimant's physical therapist; injections; a lumbar spine MRI; RFA; ongoing massage therapy; ongoing chiropractic therapy; the prescription medications percocet and ibuprofen; and treatment with a Nurse Practitioner and/or Dr. Hulon in Dr. Moghim's practice), constitute reasonable medical treatment necessary to maintain Claimant at MMI. As found, the medical records and the opinions of Dr. Fall are credible and persuasive.

6. As found, Respondents have demonstrated, by a preponderance of the evidence, that there is no further medical treatment necessary to maintain Claimant at MMI related to her June 20, 2014 work injury. Therefore, Respondents may withdraw the admission for post-MMI medical treatment. As found, the medical records and the opinions of Dr. Fall are credible and persuasive.

ORDER

It is therefore ordered:

1. Claimant's request for additional maintenance medical treatment (including ongoing pelvic floor physical therapy; compound cream and suppositories as recommended by Claimant's physical therapist; injections; a lumbar spine MRI; RFA; ongoing massage therapy; ongoing chiropractic therapy; the prescription medications percocet and ibuprofen; and treatment with a Nurse Practitioner and/or Dr. Hulon in Dr. Moghim's practice), is denied and dismissed.

2. Respondents' request to terminate post-MMI maintenance medical treatment is granted. Maintenance medical treatment is hereby terminated.

Dated March 31, 2025.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

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

ISSUES

Have Respondents demonstrated, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment with Employer, thereby terminating his entitlement to temporary total disability (TTD) benefits?

STIPULATION

At the hearing, the parties stipulated to an average weekly wage (AWW) of $1,474.56.

FINDINGS OF FACT

1. Claimant worked for Employer as the Culinary Director at a residential community. This community primarily provides services for residents with memory and dementia related conditions.

2. On August 16, 2024, Employer became the owner of the community. Claimant had worked for Employer's predecessor at the same location. Upon Employer taking ownership on August 16, 2024, Claimant (and other individuals) began employment with Employer on August 17, 2024.

3. Claimant's job duties included oversight and supervision of all aspects of the kitchen and dining room. This included managing the departmental budget, ordering food, menu development, preparing food, supervising kitchen and dining room staff, oversight of preparation and service, and cleaning.

4. The department's budget is based upon the number of residents living in the community. The total amount of the monthly budget is calculated using an amount of "PRO" or "per resident, per day". Claimant testified that prior to the ownership by Employer, Claimant budgeted based upon a PRO of $12.00. When Employer took ownership in August 2024, Claimant was informed that the PRO would be $6.50.

5. By way of example, the ALJ calculates that if there were 50 residents, and the PDR was $6.50 per day, during a 30 day month the total budget would be $9,750.00; (50 times $6.50 equals $325.00 per day, times 30 days equals $9,750.00). [1]

[1] The ALJ further calculates that the prior monthly budget would have been $18,000.00; (PDR of $12.00 times 50 residents is a daily rate of $600.00, times 30 days is $18,000.00).

6. On August 28, 2024, Claimant suffered an injury to his low back while at work. The injury occurred when Claimant was tossing a full trash bag into a dumpster. Claimant testified that as he lifted the trash bag and turned, he felt a pain in his back.

7. Claimant's authorized treating physician (ATP) for this claim is Dr. Joshua Fullmer with Grand Valley Occupational Medicine. Claimant was first seen by Dr. Fullmer on September 5, 2024. On that date, Dr. Fullmer placed Claimant on temporary work restrictions. Those work restrictions included no lifting, pushing, or pulling more than ten pounds. In addition, Claimant was to limit waking, and to take "seated breaks as tolerated".

8. Tara Killinger-Welle is Chief Operations Officer with Employer. After Employer obtained ownership of the community where Claimant was employed, Ms. Killinger-Welle oversaw the operations of that community. Ms Killinger-Welle testified that there were concerns regarding Claimant's fulfillment of his job duties. Ms. Killinger-Welle further testified that Employer was specifically concerned with Claimant's inability to meet the budget expectations for his department.

9. Ms. Killinger-Welle testified that Claimant was aware that he was expected to meet the PDR of $6.50 per day. (She further testified that it was her understanding that the prior owners budgeted based upon a PDR of $7.50[2].) Ms. Killinger-Welle testified that the new PDR and related budget was communicated to Claimant by the executive director in early August, prior to the ownership change.

10. Following the change of ownership on August 16, 2024, Ms. Killinger-Welle emailed Claimant regarding various issues in his department. In an email dated August 22, 2024, Ms. Killinger-Welle instructed Claimant to use food items already in the freezer. Ms. Killinger-Welle also informed Claimant to inform her if he would be putting in any food orders.

11. On August 26, 2024, Claimant responded to Ms. Killinger-Welle via email. That email stated, in part:

> I will be making orders today to Sysco and What Chef[s] want. I will keep them at a minimal level. We are working from the freezer as asked . . . I did look at the menus that you had forwarded. They are a bit dull in my opinion. I do understand the simplification that is needed at the lower PRO. The $6.50 PRO really isn't applicable in this market. I was using that dollar amount 3.5 years ago. Grand Junction is an isolated market. There's not a lot of choices to draw from. Pricing and demographics are very different.

[2] Utilizing a PDR of $7.50, the monthly budget under prior ownership would have been $11,250.00; ($7.50 times 50 residents is a day rate of $375.00, times 30 days in a month equals $11,250.00}.

12. Additional emails from Ms. Killinger-Welle indicated her desire to speak with Claimant about the budget and menus. In addition, in an email dated August 28, 2024, Ms. Killinger-Welle instructed Claimant on how dining staff should clean placemats. That same email stated "As for the PRO and menus we can talk more about that next week but please go into the month understanding the budget I've provided you."

13. Claimant responded on August 28, 2024 regarding the placements. In that reply, Claimant stated that if he were to follow the instruction given by Ms. Killinger-Welle "we will be in a potential health hazard. I'm not comfortable with that risk."

14. On September 5, 2024, Ms. Killinger-Welle met with Claimant to address a number of concerns she had regarding his operation of his department. The budget was again discussed at that time. Ms. Killinger-Welle also raised concerns regarding Claimant's failure to follow her instructions regarding butter, butter knives, and salt and pepper being present on every table. In addition, Ms. Killinger-Welle raised concerns regarding Claimant's failure to comply with nutritionist approved menus. The meeting ended with Ms. Killinger-Welle informing Claimant that they would have additional communications at a later time and would "need to get past this".

15. Ms. Killinger-Welle testified that during the September 5, 2024 meeting Claimant was "dismissive", "aggressive", "insubordinate", "smirking", and "condescending".

16. Ms. Killinger-Welle further testified that in the days immediately following the September 5, 2024 meeting, she observed that butter, butter knives, and salt and pepper were not present on tables. Ms. Killinger-Welle also observed that Claimant was ignoring the required menus. Based upon these behaviors, Ms. Killinger-Welle determined that Claimant was refusing to follow her instructions. As a result, Ms. Killinger-Welle decided to terminate Claimant's employment.

17. On September 11, 2024, Ms. Killinger-Welle sent the following text message to Claimant:

> Mike - I did not get a chance to speak with you today before you left. I want to thank you for the time you've given to Western Slope and notify you that we have decided to terminate your employment. I would not usually send this in text but I will not be around to meet with you tomorrow.
>
> Please work with Melissa to coordinate dropping off your keys and picking up your final check.
>
> Thank you.

18. A "termination form" dated September 11, 2024, was admitted into evidence. This document provides that Claimant's employment was terminated because he violated Employer's standards of conduct. The specific violations are listed as: "[i]nsubordnation, including the failure or refusal to carry out orders of instructions ... [u]nsatisfactory work performance ... (f]ailure to fulfill the responsibilities of the job."

19. Claimant testified that he was not provided with the termination form. Claimant also testified that the only information he received regarding the termination was the September 11, 2024 text message.

20. Ms. Killinger-Welle testified that she prepared the termination form. Ms. Killinger-Welle further testified that she made two attempts to reach Claimant by telephone to inform him of his termination. However, each time she reached Claimant's voicemail. It was at that time that she decided to send the text message.

21. Claimant testified that he understood the instructions given to him by Ms. Killinger-Welle. Claimant further testified that he was taking steps to meet all of Ms. Killinger-Welle's expectations. Claimant testified that he was working to meet the budgetary expectations. However, the date of the meeting was only five days into the month. Claimant further testified that he was working from food already on hand and in the freezer, as instructed. Claimant testified that he was following the designated menus to the best of his ability based upon the food available from his distributors and the freezer items. Claimant explained that given the nature of the dementia related diagnoses of many of the residents, it had been necessary in the past to take steps to ensure resident safety. However, Claimant testified that at the time of his termination he was working with his staff to comply with the salt and pepper, butter, butter knife, and placemat directives.

22. On September 19, 2024, Claimant returned to Dr. Fullmer. At that time, Claimant continued to have work restrictions that included no lifting, pushing, or pulling over ten pounds. Thereafter, Claimant continued to undergo treatment under the direction of Dr. Fullmer and his referrals. On January 7, 2025, Dr. Fullmer increased Claimant's lifting, pushing, and pulling restriction to 30 pounds.

23. On February 26, 2024, Respondents filed a General Admission of Liability (GAL) admitting for medical benefits related to the August 28, 2024 work injury.

24. Claimant testified that he has attempted to obtain other employment since his termination from Employer. However, he has not worked since September 11, 2024. Claimant testified that as of the date of the hearing, he continues to have work restrictions related to the work injury. Those restrictions include no lifting over 30 pounds. Claimant further testified that in the food service industry, most positions require the ability to lift 50 pounds.

25. The ALJ finds Claimant's testimony to be credible and persuasive. The ALJ also credits the email communications and other records admitted into evidence. The ALJ does not find Claimant's behavior at the September, 2024 meeting or in his email communications with Ms. Killinger-Welle to be insubordinate. The ALJ is persuaded that Claimant was taking reasonable and necessary steps to meet all of Employer's expectations. The ALJ also finds that Respondents' decision to end Claimant's employment a mere eleven days into a new budget period, and only six days after the September 5, 2024 meeting, did not provide Claimant with the necessary and reasonable amount of time to improve or correct any issues. Therefore, the ALJ finds that Claimant did not engage in any volitional act that led to the termination of his employment. The ALJ also finds that Respondents have failed to demonstrate that it is more likely than not that Claimant was responsible for termination of his employment with Employer. Therefore, the ALJ finds that Claimant's entitlement to temporary total disability {TTD) benefits shall not be terminated.

26. The ALJ further credits Claimant's testimony and the medical records and finds that Claimant's current wage loss is due his ongoing work restrictions. Therefore, Claimant is entitled to TTD benefits beginning September 12, 2024.

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. 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 they left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy* & Co., 964 P.2d 595 (Colo. App. 1998).

5. Sections 8-42-105(4) and 8-42-103(1)(9), C.R.S., 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." In *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing,* W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

6. As found, Respondents have failed to demonstrate, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment with Employer. As found, Claimant did not engage in any volitional act or exercise any choice or control over the actions that led to the termination of his employment. As found, Claimant was taking reasonable steps to meet Employer's expectations, but was not given sufficient time to do so. As found, Claimant's TTD benefits shall not be terminated. Therefore, Claimant is entitled to TTD benefits beginning September 11, 2024, and ongoing until terminated by law.

ORDER

It is therefore ordered:

1. As stipulated, Claimant average weekly wage (AWW) is $1,474.56.

2. Claimant is entitled to TTD benefits beginning September 11, 2024, and ongoing until terminated by law.

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

Dated March 31, 2025.

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

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