OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-186-156-001; and 5-079-064-006

ISSUES

FINDINGS OF FACT

The ALJ make the following factual findings based on the admitted evidence:

Background and Procedural History

1. Claimant worked in Employer's meat packing plant for approximately seventeen years, removing sweetbreads[1] from hanging cattle carcasses on a moving conveyor system. Claimant's position required her to use a hook in her left hand to hold the sweetbreads, and cut them free from the carcass with a knife in her right hand. Claimant performed these tasks approximately every 2-4 seconds over her eight-hour shift. Claimant testified that on a typical day, she would remove sweetbread from 2,550 to 2,800 cow carcasses, and each carcass was divided into two sections, each of which would require sweetbread to be removed. As a result, Claimant removed between 5,100 and 5,600 sweetbreads over an eight-hour shift. Most of Claimant's work was performed between waist and shoulder level. Employer's Job Demands Summary indicates that Claimant's position required her to constantly lift, carry, push, and pull up to ten pounds, and required constant repetitive use of the hands and arms. (Ex. 12)

2. **WC No. 5-079-064-006**: On May 16, 2018, Claimant filed a Workers' Claim for Compensation alleging injuries to her left arm, from the shoulder to hand, arising out of her Employment with Employer. (Ex. L). Respondents filed a Notice of Contest on June 21, 2018, contesting Claimant's claim as not work-related. (Ex. L). Claimant filed an Application for Hearing in the present matter on January 6, 2022.

3. **WC No**. **5-186-156-001**: On October 26, 2021, Claimant filed a Workers' Claim for Compensation alleging repetitive motion injuries to the "bilateral upper extremities" with a date of "injury/disease" of June 7, 2018. (Ex. J). On February 18, 2022, Respondents filed a Notice of Contest stating claim was denied or contested because the alleged injury is not work-related. (Ex. K). Claimant filed an Application for Hearing on this claim on January 17, 2022.

4. On March 9, 2022, the two matters were consolidated for the purposes of hearing. Hearing commenced on May 25, 2022, but was continued to August 22, 2022. The record was held open to permit the parties to conduct post-hearing depositions, and the record

[1] A "sweetbreads" are a portion of the cow located in the neck.

was ultimately closed on April 17, 2023, when the final deposition transcript was lodged with the OAC.

Claimant's Medical History

5. In 2011, Claimant received treatment at Employer's clinic for pain in her right elbow and upper arm. (Ex. 4). Cathy Smith, M.D. diagnosed Claimant with right elbow lateral epicondylitis and a right shoulder strain. (Ex. 5). Claimant received physical therapy at Pro Active Physical Therapy for approximately one month, and Dr. Smith indicated Claimant's epicondylitis had resolved by November 28, 2011. (Ex. G & 5).

6. Between August 2, 2016 and August 12, 2016, Claimant was seen at Employer's in-house clinic and reported pain in her left shoulder, hand, and elbow. She was evaluated and received treatment consisting of cold compresses, "Biofreeze," and ibuprofen. The individuals who evaluated Claimant noted an assessment of "alteration in comfort," but provided no diagnosis for Claimant's condition. No evidence was admitted indicating Claimant was examined by a physician for these issues. (Ex. 3).

7. Between September 7 and September 9, 2017, Claimant was seen again at Employer's in-house clinic reporting bilateral shoulder pain and pain in the right hand and forearm. Claimant was treated with cold compresses, "Biofreeze," and provided a wrist guard. No evidence was admitted indicating Claimant was examined by a physician for these issues, nor was any diagnosis provided. (Ex. 2).

8. From April 6, 2018 to April 27, 2018, Claimant was evaluated and treated for pain in the neck on the left with radiation to the left elbow. The treatment records are labeled as "ART Daily Session Notes," and appear to indicate Claimant received "Active Release Techniques." The records contain no indication of the provider who performed the treatment, no substantive information regarding the nature of the treatment, and no diagnosis for Claimant's condition. (Ex. 7). Claimant testified that a therapist gave her massages during ART treatment.

9. On May 16, 2018, Claimant was seen at the Employer's in-house clinic reporting pain in her left arm, extending from her neck to her wrist. Claimant completed a pain diagram showing pain in her the left side of her neck, left shoulder, and down her left arm into her hand. Claimant reported she was performing her job saving sweetbread cutting meat with her left hand, pulling back, and throwing product to the side and behind her into a "combo" when she began to experienced pain in her left hand and arm. It was noted that Claimant reported a similar injury in September 2017. The individual who saw Claimant – [Redacted, hereinafter SS] - documented dark discoloration on the forearm below the elbow, less resistive strength in the left arm, and a positive "Jamar" test in the left hand. The assessment was "alteration in comfort," and Claimant was treated with a cold compress, ibuprofen, and Biofreeze. She was advised to take ibuprofen and home and apply cold therapy at home. (Ex. 1).

10. On May 17, 2018, Claimant was placed on modified duty, consisting of a "quarter count," meaning she would work 25% of her normal workload. These restrictions

remained in effect until at least May 30, 2018. (Ex. 1). Claimant's payroll records indicate she was paid her full wages during this time, and did not have a loss of earnings during this time. (Ex. I).

11. Over the next few weeks, through May 30, 2018, Claimant continued to report to the clinic twice per day, as requested. During this time, the clinic treated Claimant with cold and warm compresses, Biofreeze, and ibuprofen. Throughout, Claimant's "assessment" was "alteration in comfort." Claimant was not provided with a formal diagnosis, and did not see a physician between May 16, 2018 and May 30, 2018. (Ex. 1).

12. On May 25, 2018, Claimant reported bilateral trapezius pain at Employer's clinic. (Ex. 1). With the exception of these reports, Claimant did not report right-sided pain to either her shoulder or arm from November 28, 2011 until December 2020.

13. On June 5, 2018, Claimant saw Anjmun Sharma, M.D., at Banner Health for her continued left neck, shoulder, and arm complaints. Dr. Sharma examined Claimant's shoulder and cervical spine and opined that Claimant's symptoms were cervical in nature, a chronic issue, and not work-related because her job did not require overhead use of her left arm. His shoulder examination showed full range of motion and no shoulder weakness. He provided no work restrictions, placed Claimant at maximum medical improvement (MMI), and indicated Claimant was able to return to full duty on that day. (Ex. 6). Dr. Sharma did not refer Claimant for any additional treatment, and recommended that she take over the counter medications, use ice every 2-3 hours, and perform range of motion exercises.

14. Claimant testified that she selected Dr. Sharma from a list provided to her by Employer's clinic. She also testified that she did not recall whether she selected him from a list of doctors given to her by Employer. No other plausible explanation was provided for Claimant coming under Dr. Sharma's care. The ALJ finds that Claimant selected Dr. Sharma from a list of physicians provided to her by Employer. Dr. Sharma was Claimant's authorized treating physician (ATP), when he saw Claimant on June 5, 2018.

15. Claimant testified she returned to normal work after seeing Dr. Sharma, but was unable to perform the job without restrictions due to the pain in her left shoulder and arm. Claimant has not returned to Employer since, and voluntarily terminated her employment with Employer in June 2018. The date Claimant terminated her employment was not clearly articulated in the evidence, but medical records appear to indicate it was on or about June 7, 2018. (*See* Ex. C, p. 58). Claimant has not attempted to return to work since leaving Employer. She testified she does not believe she can return to work for Employer because of pain and repeated movements. Claimant applied for and received unemployment benefits at the rate of $287.00 per week beginning in January 2019 for an undetermined period.

16. Dr. Sharma was admitted as an expert in family and occupational medicine and testified through post-hearing depositions in lieu of live testimony. Dr. Sharma's testimony was inconsistent, confusing, and not credible. For example, he testified he is Board-

certified by the American Board of Family Practice (ABFP), and later that he has not been Board-certified by the ABFP since 2018, when his certification lapsed.

17. With respect to his opinions, the evidence demonstrates that Dr. Sharma based his opinion that Claimant's condition is not work-related on incomplete medical records and medical history and an incomplete understanding of her job duties. With respect to medical records and medical history, Dr. Sharma was not aware Claimant had been seen at Employer's clinic for approximately three weeks before seeing him, and appears to have assumed he was the first health care provider to evaluate her. He was not provided Claimant's records from Employer's clinic, and did not request them. He testified that he "was not aware [Claimant] had gone to physical therapy," but also documented in his June 5, 2018 treatment note that Claimant "went to physical therapy to better understand her symptoms." He then testified that he "did not ask her where she had gone to physical therapy." (Sharma, Vol. II, p. 65). He also testified he "was under the impression that she had been going for a non-work-related condition," because "she told me that she had been having pain for quite some time, and I don't recall why." (Sharma Vol. 2, p. 65). No credible evidence was admitted indicating Dr. Sharma asked Claimant the reason she had been in physical therapy. He offered no cogent explanation for this impression, and no credible evidence was admitted indicating Claimant had sought or received treatment for any non-work-related injury to her left shoulder. (No records were admitted indicating Claimant attended physical therapy in the months before she saw Dr. Sharma, although she was seen in Employer's clinic and attended ART treatment during this period.)

18. With respect to Claimant's job duties, Dr. Sharma testified that he reviewed a job description of Claimant's position, but his testimony and records demonstrate he had an incomplete understanding of Claimant's job duties when he made the determination that her condition was not work-related. He understood Claimant's job to be moving meat with a hook and placing it on a conveyor belt, and that the job did not require overhead movement. However, he was not aware of Claimant's the weight Claimant was required to move, her production quotas, the frequency she performed the task, how long she had performed the job, or whether her job required the use of both hands. Given that much of this information is contained in the Job Demands Assessment admitted as Exhibit H, the ALJ infers that Dr. Sharma did not review this document. Notwithstanding, his testimony demonstrated he did not consider the repetitive movements Claimant performed in her job when reaching his opinions.

19. Dr. Sharma testified that he believed Claimant's pain was chronic, non-work-related, and cervical in nature, but offered no cogent, credible explanation for this opinion. that Claimant's complaints were caused by something other than her employment. No credible evidence was admitted indicating Dr. Sharma attempted to determine whether Claimant's symptoms were related to any non-work-related activity. Based on his testimony and records, the ALJ finds that Dr. Sharma's opinion that Claimant did not sustain a work-related injury to her left shoulder unpersuasive and not credible.

20. No evidence was submitted indicating Claimant requested a Division independent medical examination to challenge Dr. Sharma's opinion that Claimant was at MMI as of June 5, 2018.

21. On June 8, 2018, Claimant self-referred to the SCHC Monfort Family Clinic, and was seen by Kelsey Hrenko, PA-C for her continued left shoulder pain. Claimant reported left shoulder pain radiating to her fingers. On examination, Ms. Hrenko noted tenderness to palpation over the left scapula, with full strength and range of motion, and recommended a chiropractic evaluation and possible referral to orthopedics. (Ex. 9). A left shoulder x-ray taken on June 8, 2018 was interpreted as unremarkable. (Ex. 8).

22. Claimant returned to the Monfort Clinic on June 19, 2018, and saw Steve Ponicsan, P.A. Mr. Ponicsan noted hypertonicity of the left trapezius with trigger point nodule that was painful to palpation. (Ex. 9).

23. On January 23, 2019, Claimant returned to the Monfort Clinic, and saw Ludia Battaglia, FNP. Claimant reported continued left shoulder pain with difficulty lifting her arm overhead, and attributed the condition to her job at Employer. Ms. Battaglia opined that Claimant's injury was likely from overuse at her former job. (Ex. 9). A left shoulder x-ray taken on January 23, 2019 was interpreted as unremarkable. (Ex. 8).

24. On November 14, 2019, Claimant saw Sara Curzon, PA-C, at the Monfort Clinic with continued reports of left shoulder pain. Ms. Curzon's assessment was left shoulder pain, resulting from overuse Claimant's prior job, and recommended physical therapy. (Ex. 9).

25. Claimant was next seen for her left shoulder on March 23, 2020, when she again saw Ms. Curzon. Ms. Curzon noted that physical therapy had helped somewhat, but Claimant's left shoulder pain persisted. Her assessment was of continued left shoulder pain, with suspected impingement. Based on her examination, Ms. Curzon recommended an MRI of Claimant's left shoulder, however the MRI was not performed. (Ex. 9).

26. Claimant returned to the Monfort Clinic on September 1, 2020, and saw Ms. Hrenko for continued left shoulder pain and to obtain an MRI referral, indicating that the prior MRI referral had been canceled. (Ex. 9). The MRI was performed on October 19, 2020, and showed a full-thickness tear of the supraspinatus tendon. (Ex. 8).

27. Claimant then came under the care of Mark Grossnickle, M.D., at UC Health. No credible evidence was admitted indicating whether Claimant was referred to Dr. Grossnickle or self-referred. Claimant initially saw Dr. Grossnickle on October 21, 2020, however no substantive medical records from that visit were offered into evidence. On December 3, 2020, Dr. Grossnickle examined Claimant and found left shoulder pain radiation from the neck to the fingers with numbness in the left hand. Claimant reported having left shoulder pain that was tolerable, except when lifting away from her body or above shoulder height. He noted that Claimant's left shoulder had positive impingement signs, and mild weakness on abduction. With respect to Claimant's right shoulder, Claimant reported that she had worsening shoulder pain over the "last few months" which was worse with activity. He noted positive impingement signs over the right supraspinatus tendon, positive Speed and empty can tests, mild biceps tenderness and weakness in external rotation and abduction. Dr. Grossnickle suspected a right rotator cuff tear and

ordered a right shoulder MRI. Dr. Grossnickle diagnosed Claimant with impingement syndrome of both shoulders. (Ex. B).

28. On December 13, 2021, Claimant had a right shoulder MRI which was interpreted as showing high-grate tearing of the supraspinatus tendon, suspicion of a torn superior labrum, and moderate lateral acromial down sloping, which was thought to contribute to impingement. (Ex. 8). Claimant reported to multiple providers that her right shoulder pain began a few months before December 2020. Claimant testified that she did not recall when her right shoulder symptoms started.

29. On January 7, 2021, Dr. Grossnickle reviewed Claimant's right shoulder MRI and recommended right shoulder surgery to address the torn supraspinatus tendon and SLAP lesion. When addressing causation of Claimant's right shoulder, Dr. Grossnickle stated "this could be the result of the repetitive trauma from work but it would be difficult to say with certainty as it has been a few years it sounds like since she was actually working. I do not have all those old records for review." (Ex. B). Claimant did not return to Dr. Grossnickle and has not had the surgery he recommended.

30. On August 11, 2021, Claimant saw James Ferrari, M.D., for evaluation of both shoulders. Based on his examination and review of Claimant's right shoulder MRI, he diagnosed Claimant with non-traumatic bilateral rotator cuff tears. He opined that Claimant's rotator cuff tears were "secondary to the repetitive motion and that lifting she did for 17 years as a meat packer…" Dr. Ferrari recommended surgery on both shoulders. (Ex. D). No credible evidence was admitted indicating who referred Claimant to Dr. Ferrari.

31. Dr. Ferrari was admitted as an expert in orthopedic surgery, and testified at hearing. Dr. Ferrari examined Claimant and evaluated both shoulders, and reviewed the MRI reports. He did not review medical records at the time of his initial evaluation, but later reviewed medical records, including records from Employer's clinic, Dr. Grossnickle, and Banner Health.

32. Dr. Ferrari testified that Claimant's MRIs show tears in the rotator cuffs of both arms. He testified that patients of Claimant's age (*i.e.*, 50s), there is typically an underlying cause for rotator cuff tears, such as lifting a lot of weight, jobs with repetitive motion or old injuries. He testified that the motions Claimant employed in her job placed significant force and load on the shoulder joint, which increased when moving weight. He opined that the most medically probable cause of Claimant's rotator cuff tears is the repetitive motion used In her job over a period of years. He noted that there are no other documented non-work-related injuries or probable causes of the rotator cuff pathology. Dr. Ferrari also credibly testified that a person does not have to reach overhead to put strain on the rotator cuff.

33. With respect to her right shoulder, he testified that sometimes when a patient has bilateral rotator cuff pathology, only one side may be symptomatic, and that the tear can enlarge over a period of years.

34. Dr. Ferrari's opinion that Claimant's left shoulder injury Is causally related to her employment is credible and persuasive. However, with respect to Claimant's right shoulder, the ALJ finds Dr. Ferrari's opinion unpersuasive. No credible evidence was offered to cogently explain why Claimant's right shoulder would be asymptomatic from 2018 to 2020, if the Injury were work-related.

Claimant's Testimony

35. At hearing, Claimant demonstrated the motions she performed in the course of her job saving sweetbreads, using a hook and knife. Claimant held the knife in her right hand and the hook in her left. Claimant's right hand was partially extended away from her body at the mid-chest level using the knife, she cut sweetbread from the carcass. Once the sweetbread was on the hook, Claimant used the hook to throw it over her right arm at approximately biceps level into a tray behind her (*i.e.*, internally rotating her shoulder across her body).

36. She testified that she had pain in her left shoulder in the Spring of 2018., and that she received treatment in Employer's in-house clinic twice per day. She testified that her symptoms did not improve with the treatment provided by Employer's clinic. Claimant testified that she could not reach across her body or over her head with her left arm without causing pain, and that she had difficulty pushing up with her arm, such as getting out of a chair.

37. Claimant testified she had no outside activities that would account for her shoulder or arm pain. She had not been in any automobile accidents, or sustained any other injuries to her shoulder outside of work.

38. Claimant'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 ensure 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 bears 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 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; without bias toward either claimant's or respondents' rights; 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. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if

other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential 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).

WC 5-186-156-001

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

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. v. Blair*, 812 P.2d at 641; *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); *Marjorie Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO, Apr. 9, 2014).

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 Corp.,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those 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 onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, W.C. No. 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified, or aggravated the disease for which compensation is sought. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner, supra*. In this regard, the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO Aug. 18, 2005). 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).

Claimant has failed to establish by a preponderance of the evidence that she sustained a repetitive motion injury to her right shoulder arising out of the course of her employment with Employer. Claimant's first report of right shoulder pain consistent with a rotator cuff or impingement issue was in December 2020 when she saw Dr. Grossnickle. Claimant indicated the pain began a few months earlier. At hearing, Claimant testified that she did not recall when her right shoulder pain started. While Dr. Grossnickle commented that Claimant's right shoulder condition "could" have been caused by the repetitive motions associated with her job, he did not opine it was likely.

As found, Dr. Ferrari's opinion regarding Claimant's right rotator cuff injury is not persuasive. Dr. Ferrari's opinion fails to account for the significant gap in Claimant's complaints of right shoulder pain. When Claimant first reported right shoulder pain to Dr. Grossnickle, she had not worked for Employer for approximately 30 months, and had no documented complaints of right shoulder pain in the interim, despite seeing multiple health care providers for her left shoulder during that time. No credible evidence was admitted which explained how right shoulder pain that began in December 2020 was causally related to work activities occurring more than two and a half years earlier. Dr. Ferrari's opinion that Claimant's right shoulder condition was caused by her work activities that ended in June 2018 unpersuasive. Claimant not met her burden of establishing her right shoulder condition is work-related.

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. Industrial 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. Industrial 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). Medical benefits are not owed for a non-compensable claim.

Because Claimant has failed to establish a compensable injury to her right shoulder, Claimant has failed to establish an entitlement to medical benefits for her right shoulder condition.

Statute of Limitations

Notwithstanding the lack of causation, Claimant's claim for her right shoulder is time-barred by the Act. Under § 8-43-103 (2), C.R.S., Claimant's right to compensation and benefits is barred unless a "notice claiming compensation is filed with the division" within two years of the date of injury.[2] Claimant asserts her right shoulder injury began on or before June 7, 2018, her last date of employment with Employer. Accordingly, she had to file a claim with the Division before June 7, 2020. Claimant, however, did not file a

[2] Although exceptions to the two-year limitation period exist for certain causes of injury, the exceptions are not applicable. Claimant does not asset her injuries were the result of exposure to radioactivity, fissionable materials, uranium poisoning, asbestos, silicosis or anthracosis.

Worker's Claim for Compensation with the Division related to this alleged injury until October 26, 2021, more than three years later. Claimant has not established any reasonable excuse for the failure to file the required notice with the Division. Consequently, Claimant's claim designated as WC 5-186-156-001 is time-barred, and dismissed.

Because Claimant's claim related to her right shoulder is denied and dismissed, the remaining issues related to right shoulder surgery are moot.

WC 5-079-064-006

Compensability

Claimant has established by a preponderance of the evidence that she sustained a repetitive motion injury to her left shoulder arising out of the course of her employment with Employer. Although Dr. Sharma indicated he found no injury to Claimant's shoulder, her later providers did find objective evidence of shoulder pathology and clinical evidence of shoulder impingement. Claimant began reporting left shoulder problems in May 2018. She sought treatment from Employer's in-house clinic, and reported symptoms radiating from her neck throughout her left arm. Over the course of the next two-plus years, Claimant consistently reported the same symptoms to multiple health care providers.

Dr. Sharma's opinion that Claimant's position with Employer was not likely to cause a shoulder injury was not credible or persuasive. Claimant worked in the same position for nearly all of her 17 years working for Employer. Her job required her to use her left arm, removing sweetbreads with a hook and transferring them into a bin every 2-4 seconds (*i.e.*, 15-30 times per minute), for approximately seven and a half hours a day, for 17 years. Conservatively, Claimant repeated the same motion with her left arm 5,000-6,000 times per day, over the course of 17 years. Dr. Ferrari credibly testified that these repetitive motions of Claimant's were the most medically probable cause of her left shoulder rotator cuff tears. No credible evidence was admitted indicating Claimant participated in other activities which would have placed the same stress on her left shoulder as those sustained while working for Employer. The ALJ credits Dr. Ferrari's opinion and finds it more credible and persuasive than Dr. Sharma's. It is more likely than not the repetitive motion involved in Claimant's work with Employer resulted in the full-thickness tear of the supraspinatus tendon identified on Claimant's October 19, 2020 MRI.

Authorized Treating Physician

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 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."

The term "select," is unambiguous and means "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 Serv.,* WC 4-995-888-01 (ICAO, Oct. 28, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri, supra*.

Claimant could not recall whether she was provided a list of providers, but also testified she selected Dr. Sharma from a list given to her by Employer. The ALJ finds Claimant was, more likely than not, provided a list of physicians by Employer and selected Dr. Sharma (or Banner Health) from that list of physicians. Notwithstanding, if Respondents did not provide a list of physicians, Claimant, through her actions, selected Dr. Sharma for treatment and evaluation of her injury. As found, Dr. Sharma was Claimant's authorized treating physician.

Medical Benefits

Because Claimant has established a compensable injury to her left shoulder, Claimant has also established an entitlement to authorized medical treatment reasonably necessary to cure or relieve the effects of her industrial injury.

Specific Medical Benefits

The Act imposes upon respondents the duty to furnish medical treatment "as may reasonably be needed at the time of the injury…and thereafter during the disability to cure and relieve the employee from the effects of the injury." § 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). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009). The question of whether the claimant 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. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Claimant has failed to establish an entitlement to specific medical benefits for treatment provided by Monfort Clinic, UC Health, Dr. Grossnickle, or Dr. Ferrari, or for the recommended left shoulder surgery. As found, Dr. Sharma did not refer Claimant for further treatment after June 5, 2018. No credible evidence was admitted indicating

Claimant sought authorization from Respondents to obtain treatment through the Monfort Clinic, UC Health, Dr. Grossnickle, or Dr. Ferrari. As such, these were not ATPs or within the chain of referral from Dr. Sharma. Respondents are not required to pay for treatment that is unauthorized, even where the treatment is reasonable, necessary, and related to the industrial injury. § 8-43-404 (7), C.R.S., *see also Johnston v. Hunter Douglas, Inc.*, W.C. No. 4-879-066-001 (ICAO Apr. 29, 2014).

Similarly, although Claimant has established by a preponderance of the evidence that surgical repair of her left rotator cuff injury is reasonably necessary to cure or relieve the effects of her industrial injury, the procedure was not recommended by an ATP. Because no ATP has recommended surgery, the ALJ is without jurisdiction to authorize such treatment. *Potter v. Ground Serv. Co.*, W.C. No. 4-935-523-04 (ICAO, Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Mgmt. of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995).

Temporary Disability Benefits

Claimant seeks Temporary Total Disability benefits beginning on June 7, 2018, the date Claimant terminated her employment with Employer. Claimant asserts that because Dr. Sharma released her to full duty and Claimant was physically unable to perform her job without restrictions after that date, she was entitled to TTD benefits. For the reasons set forth below, Claimant has failed to establish an entitlement to TTD benefits after June 5, 2018.

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes 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). Impairment of wage-earning capacity 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 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).

Once an injured worker becomes entitled to TTD benefits, those benefits continue until terminated pursuant to § 8-42-105 (3), C.R.S., which provides: “Temporary total disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement; (b) The employee returns to

regular or modified employment; (c) The attending physician gives the employee a written release to return to regular employment; or (d) (I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment."

The evidence establishes that Claimant had a medical incapacity to perform her work due to pain and restrictions in her left shoulder beginning on or about May 16, 2018. At that time, the provider in Employer's clinic determined that Claimant had diminished strength in the left arm, difficulty with range of motion, and pain to palpation. The following day, Claimant was placed on a restriction to work a ¼ count (*i.e.*, 25% of her normal workload). Claimant then continued to work in a modified capacity, but she sustained no loss of earning capacity, because she was paid her full wages, and was not entitled to TTD benefits.

On June 5, 2018, Dr. Sharma found Claimant was at MMI, and released Claimant to return to regular employment. Claimant credibly testified that the condition of her left neck, arm and shoulder prevented her from performing her regular employment duties, and she stopped working for Employer on or about June 7, 2018. Because Dr. Sharma placed Claimant at MMI on June 5, 2018, her entitlement to TTD ended on that date.

Pursuant to section 8-42-107(8)(b), C.R.S., "if either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examination may be selected in accordance with section 8-42-107.2…" *See also* 8-42-107.2 (b), C.R.S. No credible evidence was admitted indicating Claimant requested a DIME to challenge Dr. Sharma's MMI determination. Thus, Claimant's request for medical benefits is a constructive challenge to Dr. Sharma's MMI determination. The ALJ lacks authority to decide the issue because no DIME was requested or performed to challenge Dr. Sharma's MMI determination. *See Ayala v. Conagra Beef Co.*, W.C. 4-579-80 (ICAO June 22, 2004).

ORDER

It is therefore ordered that:

WC 5-186-156-001

1. Claimant's claim designated for right shoulder injuries as WC 5-186-156-001 is denied and dismissed.

2. Claimant's requests for medical benefits and authorization of right shoulder surgery are denied and dismissed.

WC 5-079-064-006

3. Claimant has established by a preponderance of the evidence that she sustained a left shoulder repetitive use injury arising out of the course of her employment with Employer on or about May 18, 2018.

4. Claimant has established an entitlement to authorized medical care that is reasonable and necessary to cure or relieve the effects of Claimant's left shoulder injury.

5. Claimant's request for authorization of left shoulder surgery is denied. .

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

7. Claimant's authorized treating physician is Anjun Sharma, M.D.

8. Determination of Claimant's average weekly wage is moot.

9. 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: May 2, 2023

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

ISSUES

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

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24. The claimant asserts that the employer does not have workers' compensation insurance, as evidenced by the employer's failure to provide her with that information. MRG[Redacted] testified that the respondent does carry workers' compensation insurance for their employees. However, no evidence was provided of the respondent's workers' compensation policy and/or related coverage. In addition, no insurance company has been identified in this matter.

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

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

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

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

29. The ALJ calculates that as of July 12, 2022, the claimant's AWW from all employers was $1,132.16; (the total of $600.00, $307.16, and $225.00). The claimant's rate for temporary total disability (TTD) benefits is $860.44; (two-thirds of the AWW of $1,132.16).

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

- provided more than minimal training for the individual;

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

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

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

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

8. A document may satisfy the requirement to prove independence, but a document is not required. Section 8-40-202(2)(b)(III), C.R.S, provides that the existence of any one of those factors is not conclusive evidence that the individual is an employee. Consequently, the statute does not require satisfaction of all nine criteria in Section 8-40-202(2)(b)(II) in order to prove by a preponderance of the evidence that the

individual is not an employee. See *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. **App.** 1999).

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

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

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

12. The ALJ has considered the nine factors listed in Section 8-40-202(2)(b)(II), C.R.S. and the totality of the circumstances of the relationship of the parties and concludes that the claimant was an employee of the respondent. The respondent has failed, by a preponderance of the evidence, to overcome the presumption of an employee-employer relationship. In reaching this conclusion the ALJ notes that the claimant was paid an hourly rate and was paid in her own name. The claimant's business cards identified her as a general manager and funeral director. The respondent stated that the claimant "had total supervision and management over the

staff'. As found, such oversight and management would not be delegated to an independent contractor. In addition, the respondent provided the claimant with instruction, training, and tools. These facts indicate that the respondent exercised direction and control over the claimant in the performance of the work. The ALJ finds that the claimant did not engage in an independent trade or business providing similar services to others, nor did she intend to do so at the time of the injury.

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

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

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

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

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

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

19. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *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 inabiUty to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy* & Co., 964 **P.2d** 595 (Colo. **App.** 1998).

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

21. The ALJ must determine a claimant's AWW by calculating the monetary rate at which services are paid to the claimant under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon her AWW on a date other than the date of the injury. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid* & *Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning

capacity. *Ebersbach v. United Food & Commercial Workers Local No.* 7, W.C. No. 4-240-475 (ICAO, May 7,

22. As found, the claimant's AWW is $1,132.16 and her TTD rate is $860.44. The ALJ calculates that the claimant is owed unpaid TTD benefits totalling $17,331.72.

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

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

ORDER

It is therefore ordered:

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

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

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

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

5. The claimant is entitled to temporary total disability (TTD) benefits for the period of August 18, 2022 through January 5, 2023, totalling $17,331.72.

6. For failing to maintain workers' compensation insurance, the respondent shall pay the Colorado uninsured employer fund $17,331.72. The respondent shall also pay to the Colorado uninsured employer fund an amount equal to 25% of the TTD benefits due to the claimant for the period of August 18, 2022 through January 5, 2023, which is $4,332.93. The employer shall send such payment to the Colorado Uninsured Employer Fund to the Division of Workers' Compensation, 633 17th St., Suite 400, Denver, CO 80202, Attention: Iliana Gallegos.

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

a. Within ten (10) days of the date of service of this order, deposit the sum of $21,664.65 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, 633 17th St., Suite 400, Denver, CO 80202, Attention: Gina Johannesman, Trustee; **OR**

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $21,664.65 with the Division of Workers' Compensation within ten (10) days of the date of this order:

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

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

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

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

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

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

Dated May 2, 2023.

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

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-083-958-004

ISSUES

I. Whether Claimant has proven by preponderance of the evidence that he was injured in the course and scope of his employment on June 15, 2018.

II. If Claimant proved compensability, whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits that were reasonably necessary and related to the June 15, 2018 work injury.

III. If Claimant proved compensability, what is his average weekly wage.

IV. If Claimant proved compensability, whether he has proven by a preponderance of the evidence he is entitled to temporary total disability benefits beginning June 15, 2018 until through 2019.

V. If Claimant proved compensability, whether he has proven by a preponderance of the evidence that he is entitled to penalties for failure to admit or deny the claim as required by law.

PROCEDURAL HISTORY

Upon review of the file from the Office of Administrative Courts, this ALJ noted that three prior Applications for Hearing (AFH) were previously filed on Claimant's behalf. The first was on September 4, 2018 by attorney Robert F. James, Esq., on the same issues set for this hearing. No hearing was scheduled. A second AFH was filed also by counsel on October 10, 2018. A hearing was scheduled for February 7, 2019 at the OAC. The hearing was cancelled by counsel. The third AFH was filed on April 15, 2022 by pro se Claimant[1] on the same issues set for this hearing. There is an indication that the hearing was set for June 21, 2022 but no documents were in the file indicating why the hearing did not take place.

Pro se Claimant filed an Application for Hearing dated September 23, 2022 on the issues of compensability, medical benefits that are reasonably necessary and related to the injury, average weekly wage, permanent partial disability benefits, disfigurement and penalties from July 20 to December 2022.[2]

Respondents were provided notice at multiple addresses and failed to file a Response to Application for Hearing.

[1] There is no indication in the OAC file that counsel withdrew from representation. However, the Division chronological history form shows counsel filed a Motion to Withdraw on February 19, 2019 and it was granted on March 8, 2019.
[2] This ALJ inferred that the "July 20" date was July 20, 2018.

A Notice of Hearing for the December 20, 2022 hearing was sent to Employer at multiple addresses and all the notices were returned to the Office of Administrative Courts.

The December 20, 2022 hearing was convened and Claimant was provided with a *pro se* advisement. Claimant requested that the hearing proceed as he had attempted to obtain counsel and also Claimant attempted to go through a mediator, [Redacted, hereinafter NS], without success.

During the hearing, this ALJ noticed that all the NOH were returned and surmised that Employer did not have notice of the hearing.

Claimant provided a new address and a corrected address which coordinated with the one the Division had on file. This ALJ continued the hearing to be reset by the Office of Administrative Courts.[3]

The hearing was rescheduled for this 24th day of April, 2023 at 8:30 a.m. NOH were sent to all four addresses for Employer that were available. Additionally Claimant indicated that he had made a copy of the order and the NOH and sent a text directly to the Employer at his advertised telephone number, which is the same telephone number seen on a copy of a check from Employer to Claimant. This ALJ noted that three of the NOH were returned to the OAC and one of the NOH was not. The one that was not returned was the same address as was seen on a copy of a check from Employer to Claimant as well as in the Division file. This ALJ presumed that employer had notice of the hearing and the hearing proceeded as scheduled.

FINDINGS OF FACT

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

1. Claimant stated that he was working for Employer on June 15, 2018 as a laborer in the roofing industry. The accident happened at a customer's home close to Florida and Federal in Federal Heights, Denver Colorado. They were in the process of installing a new roof. Claimant was told by his boss that he needed to get down from the roof to retrieve a saw and bring it back up to the roof to cut some plywood for some roof repairs. He was carrying a measuring tape and a chalk line in his hand as he was going down the ladder.

2. The ladder was not correctly placed or secured. He was going down the rungs of the ladder from the roof, when the latter shifted and he lost his footing on the rung of the ladder, fell and immediately hit his head on a 2x6 an then fell onto his left side hurting his left upper extremity, his low back and left hip. Claimant fell onto a whole pile of wood. Claimant stated he had a left shoulder, left elbow, left arm, head, neck, low back and hip injury.

[3] The delay in resetting this hearing was cause by difficulties with communication by the OAC with Claimant, and was not Claimant's fault.

3. Immediately following the fall, his boss came down from the roof and tried to reassure Claimant that he was well. Claimant reported that he was not well and had a fracture of his arm.

4. Claimant was initially taken by his supervisor and boss (FM) to a chiropractor close to where they were working. But the chiropractor informed them that Claimant had a serious fracture of his left arm and needed to see a surgeon.

5. His boss then took Claimant to Denver Health Medical Center (DHMC). Claimant testified that his boss simply dropped him off at the hospital and did not stay with him.

6. Claimant stated that he was attended at DHMC but that they did not do the surgery for his right arm right away. They had to reduce the dislocation of the shoulder and allow it to heal first. The process was not easy. It was very painful. He was in the hospital for three days and then was sent home where he had to wait at home until his surgery was set up. He received a bill for $12,500.00. He was instructed to reinforce his defenses in order to be able to withstand the surgery because he was very weak. While Claimant was in the hospital, he called his boss, who came to the hospital to speak with him. His boss was not very nice. He screamed at him and gave him a box of noodle soup.

7. A month went by while Claimant was in very serious pain. He was in really bad shape as the pain was intolerable to the extent that he sometimes felt like he was going to die. Since he had heard nothing from the hospital to schedule his surgery, Claimant called them. The hospital staff were surprised that he had not had his surgery yet.

8. Claimant stated that he called his boss again, about a month later, which was when his boss gave him that last check of money that had been owed to him from work he had performed. That was all his boss gave him. This ALJ notes that the check mentioned by Claimant is dated July 2, 2018 in the amount of $400.00.

9. DHMC scheduled the surgery, which occurred around July 18, 2018. Claimant remained in the hospital approximately four days after the surgery. The surgery involved the elbow and up the upper arm. They placed a metal plate secured with screws to repair the severe fracture. Following the surgery he received a bill for $42,750.00. Claimant estimated that his medical bill were approximately $64,000.00. He believed Medicaid paid for his treatment.

10. Claimant credibly testified that he was off of work from the date of the injury on June 15, 2018, through all of the rest of 2018 until February 28, 2019 because the healing process took a long time. Claimant was in serious pain and unable to move his left upper extremity both at the elbow and the left shoulder for a very long time.

11. Claimant stated that to the day of the hearing, he continued to have pain going from the elbow to the shoulder. He also continued to have pain in his low back, his neck and in his left shoulder. Though the areas that continued to be the most painful included the left upper extremity from the elbow to the shoulder due to the severe fractures of the bone as well as dislocation of the shoulder joint.

12. This ALJ noted that Claimant was wearing a prosthesis on his left hand. Claimant explained that he had a crush injury to his left hand during a car accident on December 19, 2015 and the hand at the wrist was amputated. The amputation was not related to his work related claim of June 15, 2018.

13. Claimant had further communications from his boss who advised him that he had no insurance to take care of Claimant and that he was not to bother him any further because he was dealing with his own health problems, including diabetes. He advised Claimant to contact the contracting company [Redacted, hereinafter CG] directly. Claimant advised his boss that if the company was not going to help, then he would be filing a complaint. Claimant further credibly stated that he had also shown up at his boss' home to ask for help and was told never to show up there again. The boss told Claimant that if he filed a claim against him or the company that the boss would hire an attorney to fight the claim.

14. Claimant filed a Workers' Claim for Compensation on August 7, 2018. The form indicated that Claimant lost his balance and fell approximately 8 feet, hitting his head on a 2x6 board and injuring his left shoulder, left elbow, left arm, head, neck and hip, including a left distal humerus fracture.

15. Claimant clarified that the fall might have been approximately twelve feet instead of just eight, as it was a full floor and he was at the top of the ladder. The wood of the roof was rotten in the area that the ladder was attached with some screws and cord, which came loose when Claimant started his descent from the roof.

16. On August 10, 2018 Division sent Claimant's boss a letter, which enclosed a copy of the Workers' Claim for Compensation, requesting Employer's workers' compensation insurance information that was supposed to be submitted to Division within 20 days of the date of the letter. This ALJ noted that the address on this letter from Division to Employer is the same address of the NOH that was not returned to the OAC and this ALJ infers that this is a correct address for Employer.

17. Claimant had called his boss on many occasions. Always to the same phone number, the same number that is on the most recent website. He never said whether he would pay for benefits. He just said repeatedly that he would contact his attorney but never gave Claimant any information of how or if he would be compensated. Claimant's boss stated that he would no longer employ Claimant.

18. While he was in the hospital, he was provided with a check dated July 2, 2018 in the amount of $400.00, which were past due wages. Claimant testified that his earnings varied and was sometimes paid $720.00, sometimes $800.00 and sometimes $900.00 per week. Claimant stated that they would normally complete the roofs of two to four houses a week, depending on how big the houses were and the labor force.

19. Claimant was evaluated by Dr. Anthony Beardmore of DHMC and he was initially placed into a brace. Claimant was required to wait for a full month before they scheduled him for surgery with Dr. Beardmore.

20. Claimant was provided with multiple notes stating that he should continue off work. On August 27, 2018 Dr. Cyril Mauffrey of DHMC noted that Claimant should remain out of work until he was seen next in the Ortho Trauma Clinic in four weeks' time.

It states that they were following him for his left lower upper arm fracture. They placed a 10 lb. restriction on Claimant.

21. On September 6, 2018 Nurse Kelly Schmadeke on behalf of Dr. Mauffrey issued a second note. It stated as follows:

> It is my medical opinion that [Claimant] should remain out of work until his next appointment on September 24, 2018. At this visit, we will update his plan of care and are happy to write another work letter at [Claimant]'s request. If he is cleared to bear weight on affected arm on 9/24/18, he may likely need an additional 1-3 weeks to progress to full weight bearing and safely climb ladders, lift, etc.
>
> If you have any questions or concerns, please don't hesitate to call.

22. On September 11, 2018, Division sent Employer a letter requesting they respond, as they had sent Employer prior communication requesting Employer's insurance carrier. The letter informed Claimant that he could proceed with a hearing noting that Employer could be liable for medical bills, temporary and permanent disability, penalties in the amount of 25% of awarded benefits for failure to carry insurance. They were further advised that an additional penalty up to $250 per day could be assessed for failure to carry coverage. Claimant was evaluated on September 24, 2018 by Dr. Parker Prusick of DHMC Ortho Trauma Clinic. He noted that Claimant should continue off work until October 22, 2018 as he was still recovering from his injuries that required operative fixation. After that day he would be cleared to return to work.

23. Claimant indicated that he had no billing statements because they covered him under a waiver or government program. He was not aware of any other outstanding billing statements.

24. He received physical therapy and rehabilitation for some time as well, but had to stop sometime in 2019 because he no longer had the ability to pay, even though it was not much. He continued with a lot of pain in his left upper extremity, he did not know if it was just dysfunction or problems with the screws. But that continued for a long time. Now he is somewhat better but he has never returned to the way he was before the work injury. He has tried to work but it has been very difficult due to the loss of his left arm. He also continues with problems with his low back and neck.

25. Claimant showed the disfigurements related to his surgery of the left upper extremity. The main surgical scar was 7 inches long and started at right above the level of the elbow. This scar was discolored, white compared to rest of the skin on his upper extremity and looked indented. A large second area of scarring at the base of the surgical scar, which looked like it had been an open wound that had healed, was significantly discolored, was one inch round and somewhat keloid. A third scar of approximately three quarters inch that comes out from the surgical scar was also discolored. There were multiple stich scars that surrounded the main surgical scar that were also white in color and very visibly showing the appearance almost like a zipper. Further, it was noticeable that Claimant could not straighten his left elbow and there was swelling at the elbow, which Claimant stated really still bothered him, and which is larger than the opposite elbow. Claimant explained that he did not finish his rehabilitation to try and get his arm to straighten out due to his inability to pay for his care.

26. The ALJ finds and concludes that as a result of the June 15, 2018 work injury, Claimant has a visible disfigurements to the left upper extremity. Claimant's testimony was credible. Claimant, and on inspection by this ALJ, described surgical scars. The ALJ hereby finds that Claimant has sustained serious permanent disfigurements to areas of the body normally exposed to public view, which entitles Claimant to additional compensation pursuant to Section 8-42-108 (1), C.R.S.

27. Claimant called as a witness a coworker (JP). Mr. JP testified that he was working the day Claimant fell off of the roof. He was working on top of the roof. He heard the noise of the fall. And he went down to find out what had happened. But he did not see Claimant fall. He asked Claimant what had happened and Claimant showed him his head injury. He saw the elbow problem was not normal. After Claimant had fallen off the ladder, he could not work anymore because of the injuries.

28. Claimant testified that he had a significant damage to his head, which required seven stitches. Claimant showed the area where the scar was on the back of his head but it was not visible to the eye as he had a head full of hair. Around his waist line, he also had a scrape or an abrasion on the side of his ribs but it is no longer visible.

29. As found, Claimant has proven by a preponderance of the evidence that he incurred multiple injuries in the course and scope of his employment with Employer on June 15, 2018, including to his head, neck, hip, low back and left upper extremity. Claimant's testimony is credible. Further, Claimant's testimony was supported by the testimony of his coworker, JP.

30. As found, Claimant was taken personally by his supervisor and boss to Denver Health Medical Center, where he was treated for his injuries, including surgery and rehabilitation. DHMC is an authorized provider and the medical care he received was reasonably necessary and related to the June 15, 2018 work related injuries.

31. This ALJ determined that the fair computation of Claimant's average weekly wage was $806.67.

32. Claimant proved by a preponderance of the evidence that he is entitled to temporary disability benefits. TTD benefits at the rate of $537.78 from June 16, 2018 through February 28, 2019 are calculated to be $19,745.31.

33. Claimant has proven by a preponderance of the evidence that Employer failed to carry workers' compensation insurance and failed to admit or deny the claim, causing Employer to be responsible for penalties in this matter.

34. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable

cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To 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. Sec. 8-41-301(1)(b), C.R.S. (2022); *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). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold *D/B/A Atlas Logistics*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

The preponderance of the evidence demonstrates that Claimant's June 15, 2018 accident occurred within the scope of Claimant's employment when he was complying with his boss' request to retrieve the saw. As further found, Claimant's accident occurred arising out of Claimant's employment activities as he fell from the ladder, which his boss had secured to the roof and came lose, causing Claimant to fall hitting his head on a 2x6 and then to the concrete ground, causing injuries to his head, neck, left upper extremity, hip and low back. As found, Claimant met his burden of proof and Claimant's claim for injuries caused on June 15, 2018 are compensable.

C. Medical Benefits

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Sec. 8-42-101(1)(a), C.R.S., *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo.1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012); *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999)

As a result of the work injury of June 15, 2018, Claimant received medical treatment, including two stays at Denver Health Medical Center, undergoing surgery in July 2018 for the fractured left distal humerus at DHMC as well as physical therapy and rehabilitation. Claimant has proven by a preponderance of the evidence that he is entitled

to reasonably necessary medical benefits to cure and relieve him of the compensable work related conditions caused by the June 15, 2018 accident.[4]

As found, Medicaid likely paid for Claimant's treatment at Denver Health Medical Center and otherwise financed his care. Employer is thus financially responsible for the payment of Claimant's medical expenses, including any outstanding lien from the Colorado Department of Health Care Policy & Financing due to payments made by Medicaid.

D. Average Weekly Wage

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

Here, the wage records are not available. Claimant credibly testified that he would earn sometimes $720.00 per week, but at other times he would earn $800.00 or $900.00 in a given week. This ALJ determined that the fair approximation and calculation was to average out the three amounts, which provides for an average weekly wage of $806.67.

E. Temporary Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical

[4] This does not include any treatment due to the amputation of the left hand at the wrist.

opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbios* Logic, 952 P.2d 831 (Colo. App. 1997).

As found, the persuasive evidence shows Claimant was disabled by the June 15, 2018 injury because he could not use his left upper extremity. He was initially several days in the hospital following the reduction of the left shoulder dislocation. Then was sent home to recover in order to be able to proceed with the surgery for the left arm fracture. The surgery was performed in July 2018, when he stayed again in the hospital for several days. Further, following the surgery, Claimant could not work without limitations pursuant to multiple provider's restriction letters, including Dr. Mauffrey's. As found, Claimant was unable to return to work beginning on June 16, 2018. Claimant credibly testified that he was unable to return to work due to his injuries until March 2019. Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits beginning on June 16, 2018 through February 28, 2019. Based on Claimant's AWW of $806.67 and Claimant's TTD rate is $537.78, Claimant is owed TTD benefits from June 16, 2018 through February 28, 2019. TTD benefits calculated through February 28, 2019 (257 days or 36 week and 5 days) are in the amount of $19,745.31.

Any claim for temporary partial disability benefits from March 1, 2019 through the present is reserved.

F. Penalties

Insurance Coverage

Every employer subject to the provisions of the Workers' Compensation Act shall carry Workers' Compensation insurance. Sec. 8-44-101, C.R.S. Sec. 8-43-408(5), C.R.S.[5] in effect at the time of Claimant's June 15, 2018 injury provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

As found, Employer did not have an active Worker's Compensation insurance policy effective on or prior to Claimant's June 15, 2018 date of injury. Claimant spoke directly with his supervisor and boss on multiple occasions following the work injury of June 15, 2018. As found, Employer conveyed to Claimant that he did not have workers' compensation insurance coverage and that Claimant needed to communicate with the contractor. The contractor and Employer were provided with notice of the hearing in this matter and failed to show. Therefore, based on the evidence presented, it must be

[5] Due to statutory change as of July 1, 2017. The prior statutory provision of a 50% wage increase was paid to Claimant.

assumed that Employer did not have insurance on the date of the work injury. Claimant has shown that a penalty is due and owing for failure to insure.

As found, Respondent-Employer is liable for temporary total disability benefits and reasonable and necessary medical treatment related to the work injury. The ALJ was unable to determine the amount of unpaid medical benefits, as the evidence offered was an estimate and not the exact amount of the related medical costs incurred by Claimant other than an approximate cost of $64,000.00 based on Claimant's testimony. Based on Claimant's AWW of $806.67, Claimant's TTD rate is $537.78. Claimant is owed TTD benefits from June 16, 2018 until February 28, 2019. TTD benefits calculated through February 28, 2019 are in the amount of $19,745.31. It is undisputed Respondent-Employer did not carry workers' compensation insurance at the time of Claimant's industrial injury. Accordingly, Respondent-Employer shall pay an additional $4,936.33 (25% of $19,745.31) to the Colorado Uninsured Employer Fund.

Failure to Admit or Deny Liability

It if inferred by Claimant's statements at hearing Claimant argues that since the Division issued letters dated August 10, 2018 and September 11, 2018, stating that Division had not received a timely admission or denial from Respondents, that Claimant is entitled to penalties pursuant to alleged violations of Section 8-43-203(1)(a), C.R.S..

Section 8-43-203(1)(a) states that "The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested…"

Claimant seeks a penalty for failure to admit or deny liability. Pursuant under Sec. 8-43-203(2)(a), C.R.S. The employer must admit or deny liability within 20 days after it learns of an injury that results in "lost time from work for the injured employee in excess of three shifts or calendar days." An employer "may become liable" to the claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The maximum penalty for failure to admit or deny liability cannot exceed "the aggregate amount of three hundred sixty-five days' compensation." Fifty percent of any penalty shall be paid to the claimant and fifty percent to the Subsequent Injury Fund. See Sec. 8-43-203(2)(a), C.R.S.

The phrase "may become liable" means the imposition of a penalty under Sec. 8-42-203(2)(a), C.R.S. is discretionary. *Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of the requirement to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colo. Civil Rights Comm'n*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Assoc. Bus. Prod. v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Indus. Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant must prove circumstances justifying the imposition of a penalty under Sec. 8-43-203(2)(a), C.R.S. *Pioneer Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

As found, Employer knew or should have known Claimant had a significant injury that occurred on June 15, 2018 as employer was the one to take Claimant from the home that was being worked on to, first the chiropractor and then, the emergency room at Denver Health Medical Center. Claimant was credible in testifying that he had multiple conversations with employer and that Employer himself knew he was off work for greater than three shifts. Employer failed to file an Employer's First Report and failed to notify the Division what employer's position was. Division sent Employer a copy of the Workers' Claim for Compensation dated August 7, 2018 on August 10, 2018. Division further followed up advising Employer that it was likely that penalties may assessed against Employer by letter dated September 11, 2018. Claimant has suffered significantly by Employer's failure to comply with the requirements of the law. As found, Employer knew Claimant filed a Workers' Compensation Claim (WCC) on August 7, 2018, as Division provided Employer a copy of the WCC to Employer with their letter of August 10, 2018. Further, Employer knew that they may be subject to penalties pursuant to Division's letter of September 11, 2018. The deadline to admit or deny liability was August 30, 2018, but certainly no later than October 1, 2018. Employer has never filed an admission or denial of liability regarding Claimant's injuries.

Claimant's hearing initially started on December 20, 2022, but was continued to April 24, 2023 due to lack of notice to Employer. Claimant's case was been delayed, and Claimant has been prejudiced, by Employer's failure to admit or deny liability. Claimant's multiple filings, including the two Applications for Hearing filed by his prior counsel and later by Claimant, who stated he struggled to understand the workers' compensation process and had been suffering from the ongoing consequences of the work related injury, have created procedural challenges for Claimant in this case.

The ALJ finds Employer should be penalized $18,250.00, (calculated for $50.00 per day for 365 days)[6] for failure to admit or deny liability from August 30, 2018 through August 30, 2019. Respondents not only failed to admit or deny, but they failed to show at the hearing and presented no defenses or mitigating circumstances in challenge to the penalty. Further, Claimant testified to the hardships that he endured related to his injuries, including having no income and having to terminate his medical care due to lack of funds. The penalty of $18,250.00 is sufficient to penalize Employer's violation of the law and encourage future compliance without being excessively punitive. Fifty percent (50%) of this penalty shall be paid to Claimant in the amount of $9,125.00 and fifty percent (50%) to the Subsequent Injury Fund.

G. Disfigurement

[6] The maximum allowable by statute was 365 times Claimant's daily rate of $76.83 for a potential total of $28,042.95.

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." A disfigurement is an observable impairment of the natural appearance of a person, including a limp. See *Arkin v. Industrial Commission*, 358 P.2d 879, 884, 145 Colo. 463, 472 (Colo. 1961); *Piper v. Manville Products Corp*., W.C. No. 3-745-406 (July 29, 1993); *Josefiak v. Green and Josefiak, P.C.,* W.C. No. 3-783-081 (March 12, 1987); Marcelli v. Echostar Dish Network, W.C. No. 4-776-535, ICAO (August 30, 2012); *In re Claim of Nagle,* W.C. No. 5-105-891 (July 24, 2020). The ALJ finds and concludes that as a result of the June 15, 2018 work injury, Claimant has visible disfigurements to the left upper extremity. Claimant's testimony was credible. Claimant, and on inspection by this ALJ, described the surgical scars as stated above. As found, Claimant has sustained serious permanent disfigurements to areas of the body normally exposed to public view, which entitles Claimant to additional compensation pursuant to Section 8-42-108 (1), C.R.S. As determined, Respondent shall pay Claimant five thousand nineteen dollars and eighty three cents ($5,019.83) for those disfigurement as described above.[7]

H. Payment to Trustee or Posting of Bond

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

As found, this Order awards no ongoing benefits, so the present value equals the total benefits awarded. The Order awards no specific medical benefits at this time, but indemnity benefits of $19,745.31, disfigurement of $5,019.83, and penalties totaling 23,186.33[8], for total compensation of $47,951.47, which does not include the approximately $64,000.00 in medical benefits which was either paid by Medicaid or discounted by the provider. Employer is thus required to pay the trustee of the Division a total amount of $47,951.47. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

IT IS THEREFORE ORDERED:

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[7] Maximum allowable disfigurement for injuries occurring between July 1, 2017 and June 30, 2018.
[8] Only $9,125.00 of the total penalties are to be paid to Claimant.

1. Claimant suffered compensable work related injuries to his head, neck, low back and hip as well as his left upper extremity, including the elbow and left shoulder, on June 15, 2018 in the course and scope of his employment with Employer.

2. Respondent shall pay for all authorized, reasonably necessary treatment related to the June 15, 2018 injury from authorized providers to cure or relieve the effects of Claimant's compensable injury, including but not limited to the charges from Denver Health Medical Center and reimbursement to Medicaid (Colorado Department of Health Care Policy & Financing).

3. Claimant's average weekly wage is $806.67 and his temporary disability rate is $537.78.

4. Respondent shall pay Claimant TTD benefits at the rate of $537.78 from June 16, 2018 through February 28, 2019 in the amount of $19,745.31.

5. Employer shall pay penalties to Claimant in the amount of $9,125.00 for failure to admit or deny the claim.

6. Employer shall pay the Colorado Uninsured Employer Fund a total of $4,936.33 in penalties for failure to insure.

7. Employer shall pay the Subsequent Injury Fund a total of $9,125.00 in penalties for failure to admit or deny benefits in a timely manner.

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

a. Deposit the sum of $47,951.47, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee; or

b. File a bond in the sum of $47,951.47 with the Division of Workers' Compensation within ten (10) days of the date of this order:

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

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

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

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

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

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

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

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

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

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

DATED this 3rd day May, 2023.

Elsa Martinez Tenreiro

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant overcome the DIME's 14% whole person rating by clear and convincing evidence?
- If Claimant overcame the DIME rating, what is the proper rating, based on a preponderance of the evidence?
- Did Claimant prove his average weekly wage should be increased to $1,029.65?
- The parties stipulated Insurer is entitled to a credit for PPD previously paid in this claim if additional PPD is awarded.
- The parties agreed to reserve the issue of overpayment, pending the outcome of the hearing.
- There is no current dispute regarding medical treatment. The parties stipulated Claimant is entitled to a general award of post-MMI *Grover* medical benefits from authorized providers, subject to Respondents' right to contest the reasonable necessity or causal relationship of any specific treatment.
- Because the hearing was conducted virtually, the parties agreed to reserve the issue of disfigurement for determination on a future in-person docket.

FINDINGS OF FACT

1. Claimant worked for Employer as a medical assistant. The job was physically demanding and required frequent patient transfers. Claimant occasionally lifted up to 100 pounds, although the heavier patients were more commonly moved with a "two-person lift" approach.

2. Claimant suffered an admitted low back injury on January 16, 2014 while transferring a patient from a wheelchair to an x-ray table.

3. Claimant had a prior injury to his low back on October 27, 2004 while working as an automotive technician for [Redacted, hereinafter FM] He was treated conservatively, and put at MMI on March 10, 2005 with no impairment or restrictions. A Final Admission of Liability (FAL) dated May 19, 2005 shows no PPD was awarded. The only maintenance care admitted was a single follow up with the ATP within six months of MMI.

4. Claimant did not object to the May 19, 2005 FAL, and the claim closed.

5. Claimant underwent an L5-S1 microdiscectomy with Dr. Steven Zielinski on April 4, 2006. The surgery was covered by Claimant's private health insurance.

6. On April 20, 2006, Claimant filed a Petition to Reopen the 2004 claim based on a change in condition. Claimant attached Dr. Zielinski's surgical report to the Petition. The insurance carrier on the 2004 claim did not voluntarily reopen the claim, and Claimant did not pursue a hearing. The ALJ infers the Petition to Reopen was abandoned.

7. Claimant received no PPD award or settlement for the 2004 injury.

8. Claimant recovered well after the 2006 surgery and returned to work with no restrictions or limitations. He started working for Employer in 2007. Despite performing a demanding job, Claimant missed no work and never modified his job in any way because of the previous injury. Nor did Claimant have any difficulty engaging in regular exercise, including running and weightlifting.

9. Employer presented no persuasive evidence to refute Claimant's testimony regarding the exertional requirements of his job or his functional abilities before the 2014 work accident.

10. Claimant received no treatment for his low back from 2007 until 2014. However, imaging studies were performed on his low back approximately one year before the work accident. Lumbar x-rays on December 11, 2012 showed some minor osteophytes at L3-4, but no acute findings. According to the report, the clinical indication for the x-rays was "Back pain."

11. Claimant subsequently had a lumbar MRI on January 7, 2013. The indication was listed as "Chronic back pain. Surgery in 2005." The MRI showed an L5-S1 disc osteophyte complex with facet arthropathy, postsurgical scarring, and a small lateral recess disc protrusion.

12. The MRI report identifies the ordering provider as Dr. Robert Nolan, a physician in Employer's practice. Claimant testified that Dr. Noland ordered the MRI "as a favor," to investigate the cause of persistent gastrointestinal issues. Respondents' IME, Dr. Primack, doubted Claimant's explanation because "[Dr. Noland] could be in a lot of hot water . . . by putting something in there, quote, just to get it scanned." Nonetheless, there are no treatment records from Dr. Noland, and no persuasive evidence Dr. Noland recommended any treatment.

13. There are no additional records relating to Claimant's low back until the work accident on January 16, 2014.

14. After the January 2014 injury, Claimant was sent to physical therapy and prescribed medications. A lumbar MRI on February 10, 2014 showed no nerve root compression or other acute pathology. Comparison with the previous MRI from January 2013 showed interval improvement in an L5 S1 disc protrusion.

15. Claimant underwent right L2-L5 rhizotomies in March 2014, which were helpful.

16. Dr. Daniel Olson at CCOM put Claimant at MMI on July 28, 2014. Dr. Olson calculated a 16% whole person rating, comprised of 10% for specific disorders under Table 53, combined with 7% for range of motion. However, Dr. Olson noted Claimant's previous work-related low back injury in 2004, with an L5-S1 laminectomy in 2006. Even though Dr. Olson noted Claimant "was released without restrictions and evidently had no problems with his back since the [2005] surgery," he apportioned the rating because the prior injury was work-related. Dr. Olson subtracted 8% for the prior surgery from the 10% specific disorder rating. Dr. Olson did not apportion the range of motion impairment because he had no evidence showing functional impairment or treatment within 12 months before the current injury. Dr. Olson provided an overall rating of 9% whole person after apportionment.

17. Insurer filed a Final Admission of Liability (FAL) on September 30, 2014, admitting for Dr. Olson's 9% rating and for medical benefits after MMI. Claimant did not contest the FAL, and the claim closed. Insurer paid Claimant $18,261.59 in PPD benefits.

18. Claimant received regular post-MMI treatment, including multiple epidural steroid injections (ESIs) and repeat rhizotomies. He was eventually referred for a surgical consultation because of continued and progressive back and leg symptoms.

19. Dr. Bryan Castro performed an L5-S1 laminectomy, microdiscectomy, and decompression on December 12, 2019.

20. Insurer voluntarily reopened the claim and reinstated TTD benefits in December 2019 based on Claimant's worsened condition and surgery.

21. Claimant initially reported complete resolution of his leg symptoms after surgery. However, his right leg pain recurred after approximately four months. An MRI on April 18, 2020 showed a central disc protrusion at L5-S1 producing right L5 nerve root effacement and postoperative scar formation.

22. Claimant followed up with Dr. Castro on May 15, 2020. Dr. Castro did not believe the MRI showed recurrent herniation. He recommended ESIs.

23. Bilateral L5-S1 ESIs were performed on June 30, 2020, and provided approximately 75% pain relief.

24. Dr. Thomas Centi put Claimant at MMI on July 30, 2020. He released Claimant to full duty with no restrictions and referred him to Dr. Malinky for maintenance care.

25. Dr. Dwight Caughfield performed a DIME on January 12, 2021. Dr. Caughfield determined Claimant was not at MMI "given his progressive leg pain and cramps that presented before MMI and have resulted in gradual functional declined that is not responding well to injections." Dr. Caughfield recommended lower extremity

electrodiagnostic testing, a repeat MRI, a psychological evaluation, and a "surgical second opinion" to consider a possible fusion.

26. Claimant was referred to Dr. Timothy Sandell to complete the DIME recommendations. Dr. Sandell performed electrodiagnostic testing on February 23, 2021. The testing was normal with no evidence of nerve entrapment or radiculopathy.

27. A repeat lumbar MRI was completed on March 9, 2021. It was largely unremarkable aside from post-surgical changes and a slight bulge at L5-S1.

28. Claimant was evaluated by Dr. Sana Bhatti, a neurosurgeon, on April 23, 2021. Claimant described severe low back pain and radiating pain and numbness in his thighs. Dr. Bhatti reviewed the MRI and considered it "essentially unremarkable" with no evidence of neurologic compromise or other findings to account for Claimant's symptoms. Dr. Bhatti did not think Claimant was a surgical candidate and recommended therapy and pain management.

29. Claimant underwent additional injections and rhizotomies with Dr. Malinky in July 2021.

30. Dr. Sandell put Claimant at MMI on August 4, 2021. Dr. Sandell calculated a 16% whole person rating, including 13% under Table 53 and 4% for range of motion. Dr. Sandell did not perform apportionment because he was "unclear" whether Claimant had previously received a rating for the 2014 injury or for the 2004 injury. Dr. Sandell recommended a permanent work restriction of no lifting more than 50 pounds. He recommended periodic follow-up with Dr. Malinky as maintenance care.

31. Claimant had a follow-up DIME with Dr. Caughfield on November 2, 2021. Dr. Caughfield determined that Claimant reached MMI as of September 16, 2021.[1] Dr. Caughfield calculated a 21% whole person rating, based on 9% under Table 53 and 13% for range of motion loss. Dr. Caughfield further opined,

> However, since he had a lumbar Laminectomy at L5-S1 prior to 2008 (2004 surgical date), apportionment is appropriate Per Division Apportionment Calculation Worksheet. His prior table 53 impairment is IID lumbar which is 8%. This is apportioned from his current injury table 53 rating of 9% for one percent table 53 impairment apportionment. There is no prior injury ROM or impairment available to apportion the ROM impairment which results in a 13% whole person impairment for range of motion. . . . [H]is total lumbar spine impairment is 14% whole person apportioned.

32. Dr. Caughfield attached a copy of the Apportionment Calculation Worksheet he completed to determine whether apportionment applied to the rating. The worksheet reflects a critical error at Step 2:

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[1] This date appears to correspond with the date of the electronic signature on Dr. Sandell's August 4, 2021 report.

Step 2: The date of the *current injury* is:

☑ **Before** July 1, 2008 → Apportion - proceed to **Step 4**

☐ **After** July 1, 2008 → Proceed to **Step 3**

33. Claimant's "current injury" occurred in 2014, which is "After July 1, 2008." Therefore, Dr. Caughfield should have moved to Step 3 of the worksheet. Instead, he applied Step 4, which simply instructs the physician to "Apportion by subtracting the previous impairment from the current total rating." As a result of this error, he neglected to consider the appropriate factors under the version of the apportionment statute applicable to Claimant's injury.

34. Dr. Caughfield noted Claimant had "No residual symptoms or functional impairment" after the 2006 surgery.

35. Respondents filed a FAL on November 29, 2021 admitting for Dr. Caughfield's 14% rating.

36. Dr. Scott Primack performed an IME for Respondents on May 25, 2022. Dr. Primack documented, "[Claimant] tells me that he did extremely well following his [2006] spine operation and was able to return to work." Dr. Primack agreed with Dr. Caughfield's rating methodology. He opined apportionment for the 2006 surgery was necessary "to prevent double dipping." However, Dr. Primack could point to no evidence showing Claimant's prior low back condition was "disabling" before January 16, 2014.

37. Claimant overcame the DIME's 14% rating by clear and convincing evidence. Dr. Caughfield's application of apportionment was highly probably incorrect because it is inconsistent with the law in effect on the date of injury. Although Claimant had a prior work-related low back injury in 2004, he received no award or settlement. Moreover, he recovered well from the 2006 surgery and the prior injury was not "independently disabling" at the time of the 2014 injury. Therefore, apportionment is not permitted.

38. Claimant proved the correct rating is 21% whole person, the rating calculated by Dr. Caughfield before apportionment.

39. Insurer initially admitted an AWW of $559.49 based on Claimant's earnings on the date of injury.

40. When the claim was reopened in December 2019, Insurer voluntarily increased the admitted AWW to $661.84, based on post-injury pay raises.

41. Claimant continued working for Employer until July 2020, when he left to take a new job at [Redacted, hereinafter PM]. Claimant was earning on average $760 per week when he resigned from Employer. Claimant changed jobs because of COVID-related issues and commuting time, not the effects of the work injury.

42. Claimant earned $720 per week at PM[Redacted], from August 2020 until February 2021.

43. Claimant was unemployed from February 2021 until October 2021. Claimant conceded he was still unemployed on the date of MMI.

44. In October 2021, Claimant started a new job for Employer as an anesthesia technician. His base pay in the new position is $22.90 per hour.

45. Claimant failed to prove his AWW should be increased to $1,029.65. Claimant's AWW is most fairly calculated by his earnings immediately before he left Employer in 2020, which is $760 per week. In reaching this conclusion, the ALJ has considered the alternative computations of $661.84 (the admitted AWW), $720 (Claimant's wage immediately before MMI), and $1,029.65 (advocated by Claimant for his post-MMI position).

CONCLUSIONS OF LAW

A. Claimant overcame the 14% DIME rating by clear and convincing evidence

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

Apportionment of permanent medical impairment is governed by § 8-42-104 (the "apportionment statute").[2] The current statute distinguishes work-related and nonwork-related prior impairments. Sections 8-42-104(5)(a), (b). If the prior impairment was work-related, apportionment applies if the prior impairment involved "the same body part" and resulted in "an award or settlement" in a workers' compensation claim. In such a case, the prior rating "as established by the award or settlement" is subtracted from the rating for the current injury. In the case of prior nonwork-related impairment, the statute only allows apportionment if the prior impairment was "independently disabling" at the time of the subsequent injury.

[2] There have been several iterations of the apportionment statute since 1991. From July 1, 1991 to June 30, 1999, apportionment of PPD was codified in § 8-42-104(2). From July 1, 1999 to June 30, 2008, apportionment of PPD was codified in § 8-42-104(2)(b). Effective July 1, 2008, apportionment of PPD is governed by § 8-42-104(5).

The parties disagree whether Dr. Caughfield performed "apportionment" or made a "causation" determination regarding prior impairment. If the issue is "apportionment," the rating can only be reduced if the requirements of § 8-42-104(5) are satisfied. On the other hand, if the issue is solely one of "causation," the apportionment statute is not applicable, and Claimant must overcome the causation determination by clear and convincing evidence. The *AMA Guides* define apportionment as "the determination of the degree to which each of various occupational and nonoccupational factors have contributed to a particular impairment." *See also, Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). By contrast, the issue of "causation" involves whether an entire component of the claimant's impairment is or is not related to the industrial injury. *E.g.,* Coble v. Pioneer Group Inc., W.C. No. 4-290-596 (August 24, 2001); *Johnson v. Christian Living Campus*, W.C. No. 4-354-266 (October 5, 1999).

Several factors persuade the ALJ that Dr. Caughfield addressed "apportionment" rather than "causation." First, Dr. Caughfield explicitly stated "apportionment is appropriate," and he used the term "apportion" or "apportionment" no less than five times. Second, he applied the algorithm set forth in the Division's Apportionment Calculation Worksheet, which attempts to distill the requirements for apportionment under § 8-42-104(5). Third, and more important, his methodology was the essence of apportionment, *i.e.*, he calculated an overall rating and subtracted the prior impairment rating to the same body part. This is to be contrasted with a "causation" determination wherein an entire body part or component of impairment is simply not included in the rating. *E.g., Hernandez v. Dairy Farmers of America*, W.C. No. 5-028-658-001 (February 4, 2020).

As found, Claimant overcame the DIME's 14% rating by clear and convincing evidence.[3] Dr. Caughfield's application of apportionment was highly probably incorrect because it is inconsistent with the law in effect on Claimant's date of injury. Although Claimant had a prior work-related low back injury in 2004, he received no award or settlement for any permanent impairment. Moreover, Claimant recovered well from the 2006 surgery and the prior injury was not "independently disabling" at the time of the 2014 injury.

Admittedly, Claimant's testimony that his low back was asymptomatic before the January 16, 2014 work accident is not entirely credible. As Dr. Primack pointed out, the x-rays and MRI in December 2012 and January 2013 indicate he probably had some symptoms at the time. But he received no treatment for any such symptoms. Regardless, the apportionment statute focuses on prior "disability," which is not synonymous with "symptoms." The term "disability" pertains to a claimant's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). The persuasive evidence clearly and convincingly shows Claimant was not "disabled" by the prior back injury immediately

[3] Arguably, the DIME's determinations regarding apportionment are not entitled to presumptive weight, and the applicability of § 8-42-104(5)(a) and (b) are factual issues for determination by the ALJ under the preponderance standard. *Public Service Co. v. Industrial Claim Appeals Office*, 40 P.3d 68, 71 (Colo. App. 2001). But in this case, the persuasive evidence strong enough to overcome the DIME even under the clear and convincing evidence standard.

before the 2014 work accident. Claimant maintained a physically demanding job for years, with no restrictions, limitations, or difficulty. He also engaged in strenuous avocational activities such as weightlifting and running. Claimant worked many years for Employer, and the ALJ expects Respondents would have called a manager or coworker at hearing were Claimant's testimony regarding his pre-injury functional abilities exaggerated or untrue.

B. The correct rating is 21% whole person

When the DIME rating is overcome "in any respect," the proper rating becomes a matter for the ALJ's determination based on the preponderance of the evidence. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). The ALJ is not limited to merely choosing from competing ratings offered by Level II physicians, but may independently determine the rating based on the evidence in the case. *Garlets v. Memorial Hospital, supra*. The only constraint is that the rating must be supported by the evidence and consistent with the *AMA Guides* and other rating protocols. *Gallegos v. Lineage Logistics Holdings LLC*, W.C. No. 5-054-538-002 (February 11, 2020). Even if the ALJ finds the DIME rating has been overcome, the ALJ does not have to reject every other component of a DIME rating. *Lee v. J. Garlin Commercian Furnishings*, W.C. No. 4-421-442 (December 17, 2001).

Claimant proved the correct rating is 21%, as calculated by Dr. Caughfield. Aside from the erroneous apportionment, Dr. Caughfield's rating is otherwise supported by the evidence and consistent with the *AMA Guides*.

C. Average weekly wage

Section 8-42-102(2) provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Avalanche Industries v. Clark*, 198 P.3d 589 (Colo. 2008). The "entire objective" of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

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

Here, Claimant did not endorse temporary disability as an issue for hearing, so any adjustment to the AWW is moot with respect to TTD and TPD. The only issue for

determination in this proceeding is whether the AWW should be increased for purposes of calculating PPD benefits.

The discretionary authority to deviate from the "default" AWW formula extends to PPD benefits, which compensate a claimant for a permanent loss of "future earning capacity." *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). But such cases are less common than those involving TTD, partly because the correlation between a claimant's *future* earning capacity and wages earned in a specific post-injury job is more tenuous with respect to permanent disability benefits.

The outcome in *Pizza Hut* was heavily influenced by the relatively unique circumstances in that case. At the time of the injury, the claimant was working part-time as a pizza delivery person while attending nursing school. By the time he reached MMI, the claimant had already received his degree and was working full time as a nurse, earning much higher wages than during the pizza delivery job. Ultimately, the ALJ determined it was manifestly unjust to calculate the claimant's PPD award—which is intended to compensate for loss of future earning capacity—based on wages from a temporary, part-time pizza delivery job. The court upheld the ALJ's determination as a reasonable exercise of the discretionary authority regarding AWW.

Similarly, in *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 857 (Colo. 1992), the court cited several "unique" factors in finding the "default" AWW provision to be manifestly unjust with respect to calculating the claimant's permanent total disability benefits.

As found, Claimant failed to prove his AWW should be increased to $1,029.65. Instead, the ALJ agrees with Respondents that the most appropriate AWW at the time of MMI is $760. This case presents no "unique" or unusual circumstances, such as those in *Pizza Hut* and *Vigil*. Claimant's only permanent work restrictions is a 50-pound lifting limit, and there is no persuasive evidence that this relatively liberal restriction has or will impact his future earning capacity. In fact, Claimant secured a higher-paying job after MMI, despite the restrictions. Increasing Claimant's AWW to $760 accounts for all post-injury pay raises in the job Claimant held at the time of his injury, and "fairly compensates" for his loss of future earning capacity.

ORDER

It is therefore ordered that:

1. Claimant's request to increase his average weekly wage to $1,029.65 is denied and dismissed.

2. Claimant's AWW is $760 as of the date of MMI.

3. Insurer shall pay Claimant PPD benefits based on a 21% whole person rating. Insurer may take credit for any PPD previously paid in connection with this claim.

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

5. Insurer shall cover reasonably necessary and related medical treatment after MMI from authorized providers.

6. The issues of disfigurement and overpayments are reserved for future determination.

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

DATED: May 3, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-195-255-001

ISSUE

Whether Claimant has established by a preponderance of the evidence that the robotic repair of his paraesophageal hiatal hernia requested by Authorized Treating Physician (ATP) Philip Woodward, M.D. and performed on December 5, 2022 was reasonable, necessary and causally related to his admitted December 30, 2021 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a firefighter. He explained that in 2001 he was diagnosed with Gastroesophageal Reflux Disease (GERD) or acid reflux. He received omeprazole, generically named "Prilosec" to control his symptoms. Claimant specifically took 20mg of Prilosec twice daily to subdue the burning sensation in his stomach.

2. On December 30, 2021 Claimant was assigned to assist with evacuations during the [Redacted hereinafter MF] fire in the town of [Redacted, hereinafter SC]. He was specifically locating individuals and taking them to safety. Claimant was not wearing a respirator or breathing mask. He worked from 10:35 p.m. on December 30, 2021 until he was relieved at 11:30 a.m. on December 31, 2021.

3. Claimant explained that during the evacuations he was exposed to large quantities of smoke from burning vegetation, houses, plastics, trash cans and various other materials. He was coughing and found it difficult to breathe at times. Claimant also experienced a runny nose, watery eyes and a sore throat.

4. On January 14, 2022 Claimant visited Authorized Treating Physician (ATP) Workwell Occupational Medicine for an initial evaluation. He reported wheezing and shortness of breath with exertion as a result of his December 30, 2021 work activities. Claimant did not mention any increase in GERD symptoms. He was diagnosed with respiratory conditions due to smoke inhalation and received work restrictions.

5. On January 24, 2022 Claimant returned to Workwell and visited Felix Meza, M.D. for an examination. Because Claimant's respiratory symptoms failed to improve, Dr. Meza referred him to National Jewish Health for an evaluation.

6. On February 6, 2022 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged that Claimant was entitled to receive medical and Temporary Total Disability (TTD) benefits.

7. On March 17, 2022 Claimant visited Annyce Mayer, M.D. at National Jewish for an examination. Dr. Mayer remarked that Claimant had a previous diagnosis of

seasonal asthma and a prescription for albuterol that he rarely used. She also recounted that Claimant had been diagnosed with GERD in 2001 and had good symptom control by taking 20mg of omeprazole every morning. Dr. Mayer noted that Claimant had not only suffered more heartburn since the MF[Redacted] fire, but began to develop acid brash in his mouth that aggravated his cough. She commented that Claimant sleeps with his bed elevated 15 to 20 degrees with a wedge and tries not to eat anything two hours before bedtime to alleviate his GERD symptoms.

8. At the March 17, 2022 evaluation Dr. Mayer concluded that Claimant's exposure to smoke and other inhalants on December 30, 2021 exacerbated his GERD condition. She detailed that Claimant suffered the following:

> Significant exacerbation of previously well-controlled GERD on daily omeprazole, with frequent heartburn and symptoms of brash. GERD is an established sequelae of [Redacted hereinafter WC] exposures, and given the high level exposure and prolonged exposure to the complex mixture including irritant vapors, dust, gas, and fumes contained within the smoke in the absence of respiratory protection, in my opinion to a reasonable degree of medical probability was also swallowed and caused the exacerbation of his previously well-controlled GERD.

9. On April 29, 2022 Claimant returned to National Jewish for an examination. Dr. Mayer prescribed Famotidine to address Claimant's stomach acid and reflux. Additionally, Claimant's Prilosec was doubled to 40mg twice daily prior to address his symptoms.

10. On July 8, 2022 Claimant again visited National Jewish for an evaluation. Dr. Mayer recounted that, because of additional GERD symptoms, Claimant "had increased his omeprazole to 40mg in the morning and 20mg at night that did help the reflux but did not change the symptoms in his throat." Claimant also remained on Famotidine for his GERD.

11. On August 22, 2022 Pranav Periyalwar, M.D. at National Jewish Health, Division of Gastroenterology performed an "Ambulatory Gastroesophageal and Supraesophageal Reflux Monitoring" test on Claimant. The testing involves the placement of electrodes in the esophagus to determine whether ph levels decrease due to increased acid levels from reflux. The monitoring revealed normal results with 0.2% total distal esophageal acid exposure. Overall acid and nonacid reflux events remained within normal levels throughout the daytime and while lying down at night. Although Claimant reported three drug and 21 respiratory symptoms they did not correlate with observed underlying reflux events. Notably, because there were zero observed episodes of supra-esophageal reflux events, the study was considered within normal limits.

12. Based on a referral from Dr. Meza, Claimant underwent a psychological evaluation with Melanie Heto, Psy.D. on August 30, 2022. Claimant reported stressors predominantly with the uncertainty of his condition, perceived delays in treatment, and wondering if his providers were withholding information about their prognosis. He was

concerned about his future health. The thoughts were consuming 70-80% of his day. Claimant reported that "his stress response included a high level of irritability, anger, feeling 'super negative,' and feeling helpless to provide for his family."

13. After extensively interviewing Claimant, Dr. Heto performed a battery of psychological testing. On the Beck Depression Inventory – Second Edition (BDI-II), Dr. Heto documented the following:

> [Claimant] has a total level of depressive symptoms in the severe range. He endorsed moderate distress from the following symptoms: feelings of failure, self-disappointment, self-criticism, loss of interest, difficulty making decisions, feelings of worthlessness, loss of energy, loss of sleep, increased appetite, and loss of interest in sex. He endorsed mild sadness, pessimism, loss of pleasure, guilt, passive suicidal ideation without intent, crying, restlessness, irritability, difficulty concentrating, and fatigue.

14. On the Beck Anxiety Inventory (BAI), Dr. Heto documented that Claimant had endorsed a total level of anxiety in the moderate range. On the Battery for Health Improvement (BHI-2), Dr. Heto noted the following:

> His level of somatic complaints was higher than that seen in 94% of patients, indicating the perception of severe illness symptoms. He endorsed 20 of the 26 Somatic Complaints items. This level of complaints is very unusual. Patients with this profile tend to be preoccupied with their physical functioning. Somatic hypervigilance may be present, with the patient interpreting common symptoms as being problematic.

15. On September 27, 2022 Claimant returned to National Jewish for an evaluation. Dr. Mayer remarked that Claimant had "normal pulmonary function testing, negative methacholine challenge testing and high-resolution CT imaging revealing only mild large and small airway collapse." She commented that he had significant acceleration of his underlying GERD that was likely the result of prolonged exposure to fumes and smoke. Dr. Mayer commented "whether or not this is the cause of his ongoing burning of the throat and swallowing difficulties remains to be determined." She remarked that Claimant remained on Famotidine and 40mg of omeprazole twice daily.

16. Dr. Mayer also addressed the results and data from Dr. Periyalwar's "Ambulatory Gastroesophageal and Supraesophageal Reflux Monitoring" test, the maximum multistage exercise treadmill test and continuous laryngoscopy performed at National Jewish. Regarding reflux monitoring, Dr. Mayer only noted an "Abnormal study on PPI and H2 blocker." She failed to document Dr. Periyalwar's findings of a "normal study," and that "overall acid and non-acid reflux events remain[ed] within normal limits throughout the daytime upright and nocturnal recumbent monitoring." Dr. Mayer also did not mention Claimant's inconsistent reported complaints "that did not correlate with

observed underlying reflux events." Specifically, there were zero episodes of supra-esophageal reflux events observed during the study.

17. On October 4, 2022 the medical providers at National Jewish submitted a request to Respondents for a GI consultation. On October 11, 2022 Respondents authorized the procedure.

18. On October 21, 2022 Claimant presented to Dr. Periyalwar for a consultation. He remarked that Dr. Mayer referred Claimant because of a history of irritant exposure based on a "high level of ongoing GERD and abnormal impedance testing despite max does of omeprazole 20 mg twice daily and famotidine 40 mg at night." Dr. Perioyalwar commented that he reviewed Claimant's previous ph impedance testing that showed significant nonacid reflux but no elevated acid exposure. He recommended an upper endoscopy and a screening colonoscopy.

19. On November 18, 2022 Claimant visited Philip Woodward, M.D. at the "Institute for Esophageal and Reflux Surgery" for a GI consultation. Dr. Woodward stated that Claimant suffered from the primary symptom of regurgitation. He remarked that Claimant was not able to lie down on flat surfaces because gastric juices come into his mouth. He requested surgical authorization for a "Robotic Repair of PEH and ARS (A180) … with Fundo/MSA (Simple)." On November 30, 2022 Respondents denied Dr. Woodward's request based on a Peer Review by Mahdy Flores, D.O.

20. On December 5, 2022 Claimant underwent robotic surgery of his paraesophageal hiatal hernia with Dr. Woodward under private insurance. Claimant remarked that the surgery significantly improved his condition so that he no longer requires any medication for GERD.

21. On January 6, 2023 J. Tashof Bernton, M.D. performed an independent medical examination of Claimant. He conducted a physical examination and reviewed Claimant's medical records. Dr. Bernton also testified at the hearing in this matter. He concluded that that Claimant's robotic paraesophageal hiatal hernia was not reasonable, necessary and causally related to his December 30, 2021 work exposure to smoke and other irritants.

22. In reviewing Claimant's medical history prior to the December 30, 2021 incident, Dr. Bernton noted that Claimant had diagnoses of asthma and GERD. He remarked that, although prior records reflect that Claimant suffered from pre-existing asthma, testing after the exposure revealed that he does not suffer from the condition. In fact, Dr. Bernton described that Claimant underwent methacholine challenge testing that induces asthma symptoms and is the gold standard for assessing the condition. However, Claimant had a negative result. Moreover, Claimant exhibited 98% maximum oxygen consumption on an exercise treadmill test. Dr. Bernton thus reasoned that Claimant does not have asthma. Instead, Claimant likely suffers from a somatoform disorder that constitutes a significant portion of his symptoms.

23. In addressing Claimant's alleged aggravation of GERD as a result of the December 30, 2021 exposure, Dr. Bernton commented that, in Claimant's initial evaluation at Workwell two weeks after the smoke exposure, he did not mention any increase in his GERD symptoms. However, Dr. Bernton remarked that, if Claimant's GERD had been aggravated by his occupational exposure on December 30, 2021, his symptoms would have been the most pronounced shortly after the incident. Moreover, Dr. Bernton explained that physicians performed ambulatory gastroesophageal and supraesophageal reflux monitoring on August 22, 2022 to assess Claimant's GERD condition. The testing involves the placement of electrodes in the esophagus to determine whether ph levels decrease due to increases in acid levels from reflux. The monitoring revealed normal results with .2 percent total distal esophageal acid exposure. Overall acid and nonacid reflux events remained within normal levels throughout the daytime and while lying down at night. Claimant had reported three drug and 21 respiratory symptoms but they did not correlate with observed underlying reflux events. Dr. Bernton summarized that there was no acid coming into Claimant's esophagus or mouth and the events that Claimant correlated to his symptoms were not attributable to acid based on long-term monitoring. He reasoned that Claimant thus did not suffer from GERD. In conjunction with the asthma testing, Dr. Bernton explained that Claimant has reported symptoms for conditions that do not exist. Testing simply did not support Claimant's subjective complaints of both asthma and GERD.

24. Dr. Bernton further discussed the importance of Claimant's somatoform condition in assessing his reported symptoms.

> [P]sychologic evaluation did show not only anxiety and depression, but findings consistent with a somatoform contribution to the patient's symptom profile with a level of somatic complaints, which was described as "higher than that seen in 94% of patients."
>
> Further, it is clear that a somatoform component plays a major role in the patient's symptom presentation, and simply relying on subjective symptoms as reported by the patient over time is not a sufficient basis to determine an occupational causation without objective correlation. The patient's ambulatory study for gastroesophageal and supraesophageal reflux monitoring on 08/22/2022 was normal.

25. In his hearing testimony Dr. Bernton further clarified his reasons for determining that Claimant's robotic paraesophageal hiatal hernia was not reasonable, necessary and causally related to his December 30, 2021 work exposure to smoke and other irritants.

> The work-relatedness…even if you accept his symptoms at face value, the record doesn't document an abrupt increase in those symptoms at the time or directly after that event.
>
> Second, at the time of the work-related impact the symptoms would have been the greatest and they were not. So the second thing is, I have had

> an opportunity to review the literature on WC[Redacted] workers and esophageal reflux, and it's not very strong. I mean, they found that some workers had -- and I can quote the specific literature if that's helpful -- but they found that some workers had an increased risk of esophageal reflux, but those workers were workers that also specifically had pulmonary disease. And, also, it wasn't correlated to the amount of time that they were exposed to the site. So, you know, that's -- it's a pretty weak association to begin with. And that goes to the work-relatedness of it. The reasonableness of it is directly contradicted by that study. You don't do fundoplication for acid reflux on patients with normal acid studies, and he had one. And that's -- that, I think, speaks for itself.

Dr. Bernton also determined that Claimant's surgery "clearly wasn't medically necessary."

26. Claimant has failed to establish that it is more probably true than not that the robotic repair of his paraesophageal hiatal hernia requested by ATP Dr. Woodward and performed on December 5, 2022 was reasonable, necessary and causally related to his admitted December 30, 2021 industrial injury. Initially, Claimant explained that while assisting with evacuations from the MF[Redacted] fire, he was exposed to large amounts of smoke from burning vegetation, houses, plastics, trash cans and various other materials. On January 14, 2022 Claimant visited Workwell for an evaluation and reported wheezing and shortness of breath with exertion as a result of his December 30, 2021 work activities. Claimant did not mention any increase in GERD symptoms. After a referral to National Jewish, Dr. Mayer concluded that Claimant suffered a "significant exacerbation of previously well-controlled GERD." She reasoned that, based on Claimant's prolonged exposure to irritant vapors, dust, gas, and fumes contained within the smoke in the absence of respiratory protection, Claimant aggravated his pre-existing GERD condition. Claimant ultimately underwent robotic surgery of his paraesophageal hiatal hernia with Dr. Woodward under private insurance to alleviate his GERD symptoms.

27. Despite Dr. Mayer's opinion, the record reveals that Claimant likely did not suffer an aggravation of his GERD condition during the course and scope of her employment with Employer on December 30, 2021. Objective testing for GERD was normal. Specifically, in his report of August 22, 2022, Dr. Periyalwar documented that the ambulatory gastroesophageal and supraesophageal reflux monitoring test was a "normal study" and "considered within normal limits." As Dr. Bernton persuasively explained, the testing revealed normal results with .2 percent total distal esophageal acid exposure. Overall acid and nonacid reflux events remained within normal levels throughout the daytime and while lying down at night. Claimant had reported three drug and 21 respiratory symptoms but they did not correlate with observed underlying reflux events. Dr. Bernton summarized that there was no acid coming into Claimant's esophagus or mouth and the events that Claimant correlated to his symptoms were not due to acid based on long-term monitoring. Similarly, as Dr. Bernton reasoned, Claimant does not have a diagnosis of asthma. The methacholine challenge test, or gold standard of asthma testing was negative for reactive airway disease. Furthermore, the exercise treadmill test demonstrated 98% of predicted maximum oxygen consumption. Therefore, Dr. Bernton reasoned that Claimant does not suffer from asthma.

28. Dr. Bernton persuasively explained that Claimant's somatoform disorder was the most likely source of his perceived symptoms. He agreed with Dr. Heto's psychological evaluation and report from August 30, 2022. The BHI-2 testing noted that Claimant's "level of somatic complaints was higher than that seen in 94% of patients indicating the perception of severe illness symptoms…somatic hypervigilance may be present with the patient interpreting common symptoms as being problematic." Dr. Bernton commented that Claimant was not likely consciously misrepresenting his symptoms but instead presented precisely what he actually perceived. However, the diagnostic testing revealed that there was no physiological basis for Claimant's complaints. Specifically, objective testing for GERD and asthma demonstrated that the symptoms are not physiologically-based. Therefore, Claimant's somatoform condition is the source of his perceived symptoms.

29. Based on the medical records and persuasive opinion of Dr. Bernton, the surgery performed by Dr. Woodward was not reasonable, necessary and causally related to Claimant's December 30, 2021 work activities. The surgery was intended to address Claimant's GERD symptoms. However, the objective diagnostic record is replete with evidence that Claimant did not, and does not, suffer from GERD. Furthermore, because Claimant did not suffer from GERD on December 30, 2021, his work activities at the MF[Redacted] fire did not aggravate his condition and require surgery. The surgery was thus not causally related, reasonable or necessary. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. 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 Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms. It does not follow 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); *cf. 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 the robotic repair of his paraesophageal hiatal hernia requested by ATP Dr. Woodward and performed on December 5, 2022 was reasonable, necessary and causally related to his admitted December 30, 2021 industrial injury. Initially, Claimant explained that while assisting with evacuations from the MF[Redacted] fire, he was exposed to large amounts of smoke from burning vegetation, houses, plastics, trash cans and various other materials. On January 14, 2022 Claimant visited Workwell for an evaluation and reported wheezing and shortness of breath with exertion as a result of his December 30, 2021 work activities. Claimant did not mention any increase in GERD symptoms. After a referral to National Jewish, Dr. Mayer concluded that Claimant suffered a "significant exacerbation of previously well-controlled GERD." She reasoned that, based on Claimant's prolonged exposure to irritant vapors, dust, gas, and fumes contained within the smoke in the absence of respiratory protection, Claimant aggravated his pre-existing GERD condition. Claimant ultimately underwent robotic surgery of his paraesophageal hiatal hernia with Dr. Woodward under private insurance to alleviate his GERD symptoms.

9. As found, despite Dr. Mayer's opinion, the record reveals that Claimant likely did not suffer an aggravation of his GERD condition during the course and scope of her employment with Employer on December 30, 2021. Objective testing for GERD was normal. Specifically, in his report of August 22, 2022, Dr. Periyalwar documented that the ambulatory gastroesophageal and supraesophageal reflux monitoring test was a "normal study" and "considered within normal limits." As Dr. Bernton persuasively explained, the testing revealed normal results with .2 percent total distal esophageal acid exposure. Overall acid and nonacid reflux events remained within normal levels throughout the daytime and while lying down at night. Claimant had reported three drug and 21 respiratory symptoms but they did not correlate with observed underlying reflux events. Dr. Bernton summarized that there was no acid coming into Claimant's esophagus or mouth and the events that Claimant correlated to his symptoms were not due to acid based on long-term monitoring. Similarly, as Dr. Bernton reasoned, Claimant does not have a diagnosis of asthma. The methacholine challenge test, or gold standard of asthma testing was negative for reactive airway disease. Furthermore, the exercise treadmill test demonstrated 98% of predicted maximum oxygen consumption. Therefore, Dr. Bernton reasoned that Claimant does not suffer from asthma.

10. As found, Dr. Bernton persuasively explained that Claimant's somatoform disorder was the most likely source of his perceived symptoms. He agreed with Dr. Heto's psychological evaluation and report from August 30, 2022. The BHI-2 testing noted that Claimant's "level of somatic complaints was higher than that seen in 94% of patients indicating the perception of severe illness symptoms…somatic hypervigilance may be present with the patient interpreting common symptoms as being problematic." Dr. Bernton commented that Claimant was not likely consciously misrepresenting his

symptoms but instead presented precisely what he actually perceived. However, the diagnostic testing revealed that there was no physiological basis for Claimant's complaints. Specifically, objective testing for GERD and asthma demonstrated that the symptoms are not physiologically-based. Therefore, Claimant's somatoform condition is the source of his perceived symptoms.

11. As found, based on the medical records and persuasive opinion of Dr. Bernton, the surgery performed by Dr. Woodward was not reasonable, necessary and causally related to Claimant's December 30, 2021 work activities. The surgery was intended to address Claimant's GERD symptoms. However, the objective diagnostic record is replete with evidence that Claimant did not, and does not, suffer from GERD. Furthermore, because Claimant did not suffer from GERD on December 30, 2021, his work activities at the MF[Redacted] fire did not aggravate his condition and require surgery. The surgery was thus not causally related, reasonable or necessary. Accordingly, Claimant's request for Workers' Compensation benefits is 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: May 3, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-144-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence the C4-C6 ACDF surgical procedure recommended by authorized treating provider ("ATP") Michael Rauzzino, M.D. is reasonable, necessary and related medical care.

FINDINGS OF FACT

1. Claimant, who is 46 years of age, worked for Employer as a return ramp agent. His job duties included inspecting returned rental cars, providing receipts to customers and driving customers to the airport. Claimant also works as a barber.

2. Claimant sustained an admitted industrial injury on March 22, 2022 when he was involved in a rollover motor vehicle accident ("MVA") while traveling on the highway at approximately 45 miles per hour. Claimant was the restrained driver in a vehicle that rolled over at least once and landed on the driver's side. Claimant extricated himself from the vehicle by kicking out the front windshield.

3. Denver paramedics arrived at the scene of the MVA. The paramedics noted chief complaints of dizziness and nausea. Under "Assessments" no abnormalities were documented. Claimant was alert and able to walk to the ambulance without assistance.

4. An ambulance transported Claimant to the emergency department at UC Health for further evaluation. The ambulance records note reports of dizziness, visual disturbance/photosensitivity, giddiness, low back pain, leg pain and nausea. Physical assessment revealed tenderness to palpation of left lower back and left lower leg. No visible head trauma or other visible signs of injury or abnormality were documented.

5. Claimant was admitted at the emergency department at UC Health at approximately 8:41 a.m. The approximately 56-page medical record from this visit notes Claimant was evaluated by multiple providers over the course of several hours. Jenn Fickes, RN noted at 8:43 a.m. that Claimant reported pain in the left lower back and left lower extremity and headache, but denied neck, abdomen and chest pain. Claimant endorsed light sensitivity and back pain. A musculoskeletal review of symptoms was positive for back pain. Attending physician Barbara Kay Blok, M.D. noted on examination tenderness to palpation of the lower thoracic T11-T12, left paraspinal and the left anterior forehead. There was no tenderness to palpation to the cervical spine with full cervical range of motion without paresthesia. Claimant underwent x-rays of the chest and pelvis, as well as a brain CT, none of which revealed any abnormalities. A CT scan and x-rays of the lumbar spine demonstrated anterior wedge compression deformities at L1 and L2.

6. Angela E. Downes, M.D. performed a neurosurgical consultation of Claimant at approximately 1:20 p.m. Review of systems was negative for facial swelling, neck pain, neck stiffness and arthralgias and back pain. HENT was documented as normocephalic, atraumatic. On examination, Dr. Downes noted midline lumbar spine tenderness with no neurological deficits.

7. Michael Cripps, M.D. in the acute care surgery trauma unit evaluated Claimant at approximately at 3:36 p.m. Dr. Cripps documented Claimant's chief complaint as neck/back pain. The review of symptoms for HENT was positive for neck pain and back pain. Dr. Cripps noted cervical tenderness on examination.

8. The emergency department providers diagnosed Claimant with a lumbar compression fracture and discharged him with instructions to follow up with his primary care provider.

9. Claimant established care for the work injury with authorized provider Concentra on March 29, 2022. Claimant initially presented to Nicole K. Huntress, M.D. who noted Claimant was involved in a rollover MVA with injuries to his head and back. Claimant reported back soreness. Dr. Huntress also noted Claimant "Reports R thumb numbness which he states was preexisting and he is following with his PCP." (Cl. Ex. 7, p. 259). Specific cervical complaints and examination of the cervical spine are not documented. Dr. Huntress diagnosed Claimant with a work related lumbar compression fracture and released him to modified duty.

10. Claimant saw Kathy Okamatsu, FNP at Concentra on March 31, 2022. Claimant complained of soreness in the mid spine of his lower back. Specific cervical complaints and examination of the cervical spine are not documented. NP Okamatsu's assessment was a lumbar compression fracture.

11. Claimant subsequently saw either NP Okamatsu or Leah Johansen, M.D. on April 4, April 11, April 25, May 9, May 23, and June 6, 2022. These evaluations focused on Claimant's lumbar condition. Specific cervical complaints and examination of the cervical spine are not documented.

12. Claimant attended several physical therapy sessions for his low back from April 6, 2022 through June 8, 2022. The physical therapy records from these sessions do not specifically document cervical spine complaints or examination of the cervical spine.

13. On June 14, 2022 Claimant presented to Ruth Vanderkooi, M.D. at Concentra. Claimant reported that he was having right arm pain for which he went to see his primary care physician, who ordered a cervical MRI. Dr. Vanderkooi noted that the cervical MRI obtained on June 3, 2022 showed

> C3-4 disc bulge and posterior endplate degenerative change, eccentric to the right with mild facet arthropathy, mild canal and moderate neural foraminal stenosis, C4-5 right central disc protrusion moderate to severe tight and mild left foraminal narrowing, C5-6 broad based disc bulge with mild facet arthropathy mild to moderate thecal sac, moderate right and

> mild to moderate left foraminal narrowing, C6-7 moderate right and mild to moderate left foraminal narrowing, C6-7 mild facet arthropathy, no stenosis, C7-T1 mild facet arthropathy, no stenosis.

(Cl. Ex. 7, p. 204).

14. Claimant complained to Dr. Vanderkooi of right neck pain with right arm loss of strength and numbness. Dr. Vanderkooi noted Claimant "[t]ried going back to work for 5 h, was sent home because right side seized up. Not able to do job – requires too much neck and arm movement." (Id. at 205). Physical examination of the shoulder was normal. Cervical spine range of motion was limited and there was a positive Spurling's test. Dr. Vanderkooi assessed Claimant with, *inter alia*, cervical radiculopathy due to degenerative joint disease of the spine. She noted, "Pt also has cervical disc disease with radiculopathy (new diagnosis) likely causally related to the MVA." (Id.). She referred Claimant to John Aschberger, M.D. for evaluation of his neck pain.

15. Claimant presented to Dr. Aschberger on June 22, 2022. Dr. Aschberger noted,

> [Claimant] was involved in a motor vehicle rollover accident on 3/22 and did have workup regarding the head and brain. He subsequently developed issues of cervical tightness and his main complaints are radiating symptoms to the upper extremities. He indicates to the lateral arm and radial forearm to the thumb and index finger. He has numbness, tingling, as well as pain predominantly proximal at the arm. He has had findings of weakness in therapy. Numbness has been fairly constant form.

(Id. at 200).

16. On examination, Dr. Aschberger noted good cervical flexion with mild restriction and irritation with extension. Spurling's maneuver was positive with radiating symptoms to the radial forearm. Facet loading showed no localized irritation. Dr. Aschberger assessed Claimant with cervical radiculitis, noting symptom distribution in a C6 pattern. He further noted that the 6/3/2022 cervical MRI showed disc protrusions and bulging at multiple levels C3 through C7 with moderate to severe C4-C5 foraminal narrowing on the right and moderate at C5-C6. Dr. Aschberger recommended proceeding with an EMG. He also referred Claimant to Robert Kawasaki, M.D. for a cervical epidural injection.

17. Claimant returned to Dr. Vanderkooi on June 28, 2022 reporting constant pain in the right side of his neck and down his right arm. Shoulder exam was normal. Examination of the cervical spine revealed tenderness in right paraspinal and right trapezius muscle and limited range of motion.

18. At a follow-up evaluation with NP Okamatsu on July 13, 2022, NP Okamatsu noted Claimant reported experiencing constant pain in the right trapezius and right side of his neck with an onset approximately 3-4 weeks prior. He reported that he was unable to feel his right arm and had constant numbness and decreased feeling in his

fingers. On examination NP Okamatsu noted tenderness in right paraspinal and right trapezius muscle, no bilateral muscle spasms, and full cervical range of motion with painful flexion. NP Okamatsu noted similar complaints and exam findings on July 27, 2022.

19. Claimant returned to Dr. Aschberger on August 3, 2022 with continued pain at the right neck with radiation of symptoms to the right arm, radial forearm to the thumb and index finger. On examination, Dr. Aschberger noted positive Spurling's maneuver with radiation into the arm, thumb and index finger. Facet loading was negative. Dr. Aschberger performed EMG testing of the right upper extremity and associated cervical paraspinal musculature. The EMG did not identify any abnormalities indicating a radicular process. Nerve conduction values were within normal range. Dr. Aschberger's assessment was persistent symptoms of cervical radiculitis.

20. On August 5, 2022 Claimant reported to Dr. Huntress increased neck pain, pain in his right arm, and numbness in his thumb and second digit. Dr. Huntress noted the cervical MRI demonstrated moderate foraminal narrowing at C5-6 and moderate to severe foraminal narrowing at C4-5. She remarked that Claimant's symptoms were consistent with C6 radiculopathy. Examination revealed tenderness of the cervical spine and right trapezius muscle with full range of motion and sensory deficits of the right thumb and lateral aspect of the second digit.

21. Claimant began physical therapy for his neck on August 15, 2022. Katrina Palmer Seal, PT at Concentra noted

> Pt reports that he has been experiencing neck pain and radicular symptoms since the accident on 3/22/22. He states that he thought it was originally related to his lower back compression fractures, however did not improve. MRI showed compression of C6 nerve root. He states that he primarily has pain along the R side of his neck and R UE. He has constant numbness in this thumb and index finger. Pain radiates from lateral shoulder to volar forearm into radial hand. Symptoms increase with any activity.

(Cl. Ex. 7, p. 168).

PT Palmer Seal noted tenderness to cervical paraspinals, normal cervical range of motion, and a positive Spurling's test on the right. Claimant subsequently attended multiple physical therapy sessions at Concentra for treatment to his neck, which did not result in any significant improvement.

22. Claimant presented to Dr. Kawasaki on August 24, 2022 with complaints of neck pain with radiation down the right upper extremity with numbness and tingling. Dr. Kawasaki noted that a cervical MRI showed evidence of right-sided foraminal narrowing at C5-6. He administered a right C5-C6 transforaminal epidural steroid injection/C6 spinal nerve block to Claimant at this visit.

23. On September 15, 2022 Dr. Aschberger noted Claimant underwent a right C5-6 transforaminal injection on 8/24/2022, with pain level pre-injection of 5-8/10 and post-injection 0-2/10. Claimant confirmed relief of symptoms from the injection, including decreased irritation in the arm and hand but persistent recurrent numbness. On examination, Dr. Aschberger noted mild restriction of cervical extension and lateral flexion. Spurling's maneuver resulted in radiation to the lateral arm. There was mild weakness in the triceps compared to the left side. Dr. Aschberger opined Claimant had a diagnostic response to the first injection and referred Claimant for second injection at C7-T1.

24. On October 12, 2022 Claimant underwent a right C7-T1 interlaminar epidural steroid injection performed by Dr. Kawasaki.

25. On October 27, 2022 Dr. Aschberger noted Claimant's pain levels pre-injection on 10/12/2022 were 4-9/10 and post injection pain levels were 0-3/10. Claimant reported no long term gains from the second injection with persistent neck pain radiating into the right arm. Spurling's test resulted in radiation down to the radial forearm and radial hand. Dr. Aschberger opined that the second injection was diagnostic but provided no long term benefit. He referred Claimant for a surgical consultation for his C6 radiculopathy, noting Claimant had a positive Spurling's maneuver and corresponding MRI.

26. Claimant first presented to neurosurgeon Michael Rauzzino, M.D. on November 7, 2022. Dr. Rauzzino noted that the first injection by Dr. Kawasaki was diagnostic, but not therapeutic and the second injection was not helpful. He further noted that the cervical spine MRI showed disc herniation at C5-6 and foraminal stenosis at C4-5. On examination there was a positive Spurling maneuver sign with paresthesia in the right C6 distribution along with some weakness at his biceps on the right compared to the left. Dr. Rauzzino discussed Claimant's treatment options, including undergoing either a two-level ACDF or two-level disc replacement. He recommended Claimant undergo an updated cervical MRI, CT, and x-rays.

27. A repeat cervical MRI was performed on November 14, 2022. William Wall, M.D. gave the following impression: C4-C6 age-indeterminate disc protrusion with moderate central canal narrowing and severe bilateral neural foraminal narrowing; C5-C6 degenerative disc osteophyte complex with moderate central canal narrowing and severe right and moderate left neural foraminal narrowing; cervical cord is normal without cervical cord compression, myelomalacia, syrinx formation, or cord lesion; no fracture or spondylosis; no evidence of ligamentous injury. (Cl. Ex. 16, p. 271).

28. Claimant also underwent a CT scan of the cervical spine on November 14, 2022 which demonstrated multilevel degenerative disc disease and degenerative central canal and neural foraminal narrowing.

29. On November 22, 2022 John Burris, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. As part of his examination, Dr. Burris reviewed Claimant's medical records, noting that despite Claimant denying any

prior back or neck injuries, a review of a 2020 physical therapy record for his lumbar spine documented a prior MVA in 2005 involving fractures of some bones in his back. Dr. Burris noted that the medical records contained no documentation of significant neck complaints until approximately two months after the March 22, 2022 MVA. On examination, Dr. Burris noted diffuse tenderness in the right paraspinal region without muscle spasm or trigger points and positive Spurling's on the right with reported radiation down the right arm. There was reported decrease in sensation in the thumb and index finger of the right hand. Dr. Burris gave an assessment of low back pain, neck pain and cervical radiculitis. He opined that Claimant's cervical spine condition is not causally related to the March 22, 2022 MVA, based on lack of involvement of the neck with the original injury, and a significant delay in the onset of neck symptoms.

30. Claimant returned to Dr. Rauzzino on December 5, 2022. Dr. Rauzzino reviewed Claimant's updated imaging, noting the most recent cervical MRI demonstrated disc protrusion at C4-C5 with central and foraminal stenosis and C5-C6 with central narrowing and severe right greater than left foraminal stenosis. He wrote,

> Based on my direct review of the MRI, I do not believe the component C5-C6 is actually a somewhat acute free fragment. It is a free fragment of disc. We reviewed the CT as well as the MRI and he does have a significant kyphosis at this level. I think based on his anatomy and the need adequately decompress the nerves, I think he would be best served with a two-level ACDF.

(Cl. Ex. 7, p. 104)

He further stated,

> On my examination, he continue to have signs, symptoms of a right greater than left cervical radiculopathy. He has a positive Spurling's on the right producing paresthesia in the right C6-C6 distribution. He continues to have numbness and tingling in the first 3 digits of his right hand. He has had diagnostic but not therapeutic injections and he would like to have definitive surgical treatment, in the far hands this would be a C4-C6 ACDF. This is how he would like to proceed.

(Id.).

31. Dr. Rauzzino submitted a request for authorization of C5-C7 ACDF on December 8, 2022.

32. Dr. Burris testified by pre-hearing deposition on January 5, 2023. Dr. Burris testified as Level II accredited expert in occupational medicine. Dr. Burris testified that Claimant denied to him any prior injuries or pain involving his neck, right arm and low back; however, prior medical records from 2020 documented left-sided low back pain with left-sided sciatica and a prior history of MVA in 2005 with some fractured bones in his back but complete recovery. Dr. Burris testified that Claimant's the findings on Claimant's cervical MRI were largely degenerative and preexisting. He explained that

bony changes are preexisting and disc changes are non-specific and commonly seen in degenerative conditions. Dr. Burris testified that it is very common to see degenerative changes in asymptomatic individuals.

33. Dr. Burris testified that there was no evidence in medical records from the date of injury through June 6, 2022 indicating Claimant suffered radicular symptoms from his cervical spine. He stated that it was highly unlikely three independent providers at Claimant's emergency department evaluation would fail to document cervical complaints and findings. Dr. Burris testified that the first positive Spurling's test was documented on June 14, 2022. He opined that, while possible the MVA resulted in a cervical injury, it was not probable, based on the significant delay in the onset of symptoms. Dr. Burris acknowledged that there were findings on his examination, as well as the examinations of Drs. Aschberger, Kawasaki and Rauzzino of protentional nerve root irritation as an indication for surgery. He deferred to Dr. Rauzzino's opinion as to whether the surgery would improve Claimant's condition, but maintained that the surgery is not causally related to the work injury.

34. On January 17, 2023 John Hughes, M.D. performed an IME at the request of Claimant. Claimant reported to Dr. Hughes that his lumbar spine began to improve during physical therapy but during this time he also had cervical spine pain. On examination, Dr. Hughes noted cervical paraspinous tenderness without palpable hypertonicity, positive right-sided Spurling's and guarded range of motion. There was also upper extremity right thenar muscular atrophy and diminished sensation in a right C6 distribution. Dr. Hughes concluded Claimant sustained a cervical spine sprain/strain injury as a result of the March 22, 2022 MVA, that only gradually became symptomatic with cervical spine pain and right upper extremity radiculopathy. He opined that it was reasonable to relate the high-energy rollover MVA with documented closed head injury with Claimant's emerging cervical spine disc herniation with right radiculopathy. He agreed with the findings of Dr. Rauzzino's December 5, 2022 report and opined that the recommended cervical surgery is reasonable, necessary and related to the March 22, 2022 MVA.

35. Dr. Hughes testified at both a pre-hearing deposition on March 9, 2023 as well as at hearing. Dr. Hughes testified as a Level II accredited expert in occupational medicine. He testified consistent with his IME report and continued to opine the March 22, 2022 MVA caused a cervical spine injury. Dr. Hughes acknowledged that Claimant's medical records dated March 31, 2022 through June 14, 2022 do not document cervical spine pain and that his diagnostic tests do not establish the definitive age or cause of Claimant's pathology. Nonetheless, he testified that the mechanism of injury, along with Claimant's objective pathology and symptoms, are consistent with trauma sustained in the work-related MVA. Dr. Hughes explained that a high-energy MVA necessitating a brain CT is sufficient to cause injury to the cervical spine. He testified that it was not impractical for Claimant to not experience immediate severe neck symptoms and to become more symptomatic over a short period of time. Dr. Hughes testified that the findings of Claimant's June 2022 and November 2022 cervical MRIs correlate with Claimant's symptoms. He further explained that Claimant's exam findings, including positive Spurling's results as documented by multiple physicians, are also consistent

with Claimant's MRI findings. Dr. Hughes testified that Claimant's injections were diagnostic. Dr. Hughes opined that the surgery recommended by Dr. Rauzzino is reasonably necessary to address Claimant's radiating pain, numbness and weakness.

36. Claimant testified at hearing that he struck his head on the driver's side window during the MVA. He testified that he experienced neck and back pain at the time, but that that the back pain was the most problematic. Claimant testified he told his providers of his neck complaints and ultimately went to his primary care physician because his providers were not addressing his neck and arm. He testified that he did not have any neck treatment or neck injuries prior to the work injury. Claimant further testified he experiences continued symptoms and functional limitations.

37. Dr. Burris testified by post-hearing deposition on March 23, 2023. He continued to opine that there is no objective evidence the March 22, 2022 MVA caused a cervical spine injury, based on the delay of documented neck complaints and findings in the records. Dr. Burris opined that Claimant the recommended surgery is necessary, but not causally related. He further testified that the Medical Treatment Guidelines recommend that a psychological evaluation is completed prior to surgery, which Claimant has not had.

38. The ALJ finds the opinions of Drs. Hughes, Aschberger, Rauzzino and Vanderkooi, as supported by the medical records and Claimant's credible testimony, more credible and persuasive than the opinion of Dr. Burris.

39. Claimant proved it is more probably true than not the C4-C6 ACDF requested by Dr. Rauzzino is reasonable, necessary and related medical care.

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).

Medical Treatment

The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

Respondents are liable for medical treatment that is causally related and reasonably necessary to relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S.; *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant proved it is more probably true than not the surgery recommended by Dr. Rauzzino is reasonably necessary and causally related medical treatment. Respondents argue that the work-related MVA did not result in any injury to Claimant's cervical spine, relying on the opinion of their IME physician Dr. Burris. Dr. Burris opined that no causal relationship exists between the work injury and Claimant's cervical complaints, based on what he considered to be significant delay in Claimant's documented neck complaints in the medical records. While, at different points in the emergency department records, providers document no cervical complaints or findings, Dr. Cripps specifically documented Claimant's reports of neck pain and cervical tenderness on examination. Claimant credibly testified that he experienced neck pain at

the time of his injury, although the primary symptoms at the time were in his low back. Subsequent records indicate a focus on Claimant's low back until June 2022. Dr. Hughes credibly opined that Claimant sustained a cervical spine sprain/strain injury as a result of the MVA, that gradually became symptomatic with cervical spine pain and right upper extremity radiculopathy. Dr. Hughes' opinion that Claimant's cervical condition is work-related is supported by the opinion of Dr. Vanderkooi, who also opined that Claimant's cervical condition is likely related to the MVA.

Claimant credibly testified that prior to the work injury he did not have any neck injury or treatment. While Dr. Huntress noted some pre-existing right thumb numbness, no evidence was offered indicating Claimant's pre-existing symptoms and limitations were similar to those post work injury. Since the work injury, Claimant has experienced a gradual onset of neck pain radiating into his right upper extremity. To the extent Claimant had pre-existing degenerative pathology, the evidence demonstrates it is more likely than not the MVA aggravated, accelerated or combined with Claimant's pre-existing condition to produce disability and the need for treatment. Thus, the totality of the evidence establishes that the recommended surgery is causally related medical treatment.

The preponderant evidence also establishes the recommended surgery is reasonably necessary to cure and relieve the effects of Claimant's cervical condition. There is extensive objective medical evidence of Claimant's cervical pathology and need for the recommended surgery, including exam findings, MRI findings and diagnostic injections. Dr. Rauzzino recommended the surgery based on Claimant's anatomy and need to adequately decompress the nerves. Dr. Hughes credibly opined the surgery would likely help in relieving Claimant's symptoms. While Dr. Burris disagrees the surgery is causally related, he acknowledges the necessity of the surgery. Accordingly, Claimant has met his burden to demonstrate the C4-C6 ACDF is also reasonable and necessary medical treatment.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for the C4-C6 ACDF surgical procedure requested by Dr. Rauzzino.

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: May 4, 2023

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. WC 5-127-145-003

ISSUE

1. Did Respondents establish by a preponderance of the evidence that they should be able to withdraw the General Admission of Liability (GAL)?

FINDINGS OF FACT

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

1. Claimant is a 62 year-old woman who has worked for Employer since approximately November 2, 2018, and continues to work for Employer as a cashier.

2. In June 2019, Claimant lived with a co-worker, [Redacted, hereinafter SS], a dispatcher for Employer. Claimant testified that SS[Redacted] owned the home, and Claimant rented a room from her. Two of Claimant's co-workers, [Redacted, hereinafter RS] and [Redacted, hereinafter TM], lived together two houses down from Claimant. TM[Redacted] was Claimant's manager.

3. Claimant testified that in 2019 she would make and sell burritos at work to supplement her income. On July 22, 2019, Claimant exchanged text messages with RS[Redacted]. He had ordered burritos earlier, but wanted two more. Claimant texted RS[Redacted] saying she would be over by 9:30 a.m. At 10:41, Claimant texted RS[Redacted] and said "[j]ust don't tell SS[Redacted] you paid me she'll be upset." (Ex. A). Claimant testified that SS[Redacted] did not want Claimant to charge her friends for burritos.

4. Claimant testified that while going to RS[Redacted] house to deliver the burritos, she fell on the walkway to the house, and landed on her knees. There is nothing in the e-mail exchange on July 22, 2019 between Claimant and RS[Redacted] regarding the fall. The only subsequent text on that date related to not telling SS[Redacted] that RS[Redacted] paid for the burritos. (Ex. A).

5. Claimant credibly testified that she did not have any scars or abrasions on her knees from her fall on July 22, 2019. Further, Claimant did not seek medical attention following the fall. There is no objective evidence in the record that Claimant injured herself, or that she had any difficulty walking following her fall on July 22, 2019.

6. On July 26, 2019, Claimant went to Aurora Family Practice Group, P.C. for a new patient visit, and Mark Nathanson, D.O. evaluated her. Claimant credibly testified that the main reason for her July 26, 2019, doctor's appointment was get her thyroid medication filled, since she recently got insurance. She further testified that she told the doctor she experienced cracking and popping in her knees. In the medical record Dr.

Nathanson noted that Claimant's gait was within normal limits. He also noted "R knee with effusion vs patellar edema." Dr. Nathanson ordered bilateral x-rays of Claimant's knees. (Ex. B). The radiology reports for both knees noted that Claimant had bilateral knee swelling and popping sensation over last five years, but the impression was normal for both knees. (Ex. C and D).

7. On August 2, 2019, Claimant returned to Dr. Nathanson for an annual examination. Claimant completed a "Well-Woman Exam" form, and under the section asking her to describe any concerns she had, Claimant wrote "my knee and my thyroid haven't taken med for it." She also noted in the "exercise" section that she stopped walking four miles at a time because of "her knee." Dr. Nathanson diagnosed Claimant with patellofermoral syndrome. He gave Claimant a steroid injection in her right knee. (Ex. E).

8. The ALJ finds that Claimant went to see Dr. Nathanson on July 26, 2019 to establish a physician-patient relationship and on August 2, 2019 to have an annual examination. The ALJ further finds that the doctor visits on July 26, 2019 and August 2, 2019, were not related to Claimant's fall on July 22, 2019.

9. Claimant testified that on August 15, 2019, she arrived at work and parked her car. She was walking through the gate to the valet when she fell and hit her left knee and left elbow on the curb. Claimant testified she was limping through the parking lot, and her general manager ordered an Uber and sent her to Concentra. The ALJ finds this testimony credible.

10. Claimant was evaluated by Michael Roberts, P.A. at Concentra. Claimant told Mr. Roberts that she tripped on poured concrete and landed on her left knee. She further reported never having a previous knee injury. Mr. Roberts diagnosed Claimant with a left knee contusion, and noted that she had a small abrasion on her left knee. He gave her an Ace wrap and crutches. She declined a referral for physical therapy at that time. Claimant's restrictions were that she "must use crutches/non weight bearing/should be sitting 90% of the time." (Ex. F.)

11. Claimant testified she was in so much pain on August 15, 2019, she forgot to tell Mr. Roberts about the injection in her right knee a few weeks prior. The ALJ finds this testimony credible.

12. On August 21, 2019, Claimant returned to Concentra for a follow up appointment. Claimant reported that the bruising on her left knee had worsened, as had the pain right below her kneecap. She told Devin Jacobs, P.A., that her right knee had increased pain and a lump due to putting more pressure on it. Mr. Jacobs noted in the medical record that Claimant's PCP gave Claimant an injection in her right knee at the "beginning of the month." Mr. Jacobs gave Claimant a referral for physical therapy. She was to continue using the Ace wrap and crutches. Her work restrictions continued. (Ex. G).

13. Claimant continued treatment with Concentra. On May 22, 2022, Respondents filed a GAL admitting to medical benefits, temporary total disability benefits, and temporary partial disability benefits. (Ex. 3)

14. Subsequent to the May 22, 2022 GAL, Respondents learned of a text message Claimant sent RS[Redacted] on August 15, 2019, the day of the incident at work. The text reads:

> I said I fall in the parking lot, hope you did tell TM[Redacted] that fall at your house? I'm at Concenta Bing checked ☹ hurt my left knee

(Ex. A).

15. Claimant testified that the August 15, 2019 text was mistakenly sent to RS[Redacted], but was intended for SS[Redacted]. She further testified that she was trying to tell her roommate, SS[Redacted], that she had fallen in the parking lot, but when she was picked up by the Uber immediately following her fall, Claimant put her phone in her purse, and was unaware of the text until it was brought to her attention. When asked what she meant by "your house", Claimant had no explanation. She further testified that she had never fallen at SS's[Redacted] house. Claimant explained she is simply "not that great" with texting. Claimant also testified that she needs new glasses and that may have caused the error.

16. The ALJ does not find Claimant's testimony regarding the August 15, 2019 text message to RS[Redacted] to be credible. The ALJ, however, does not find Claimant's August 15, 2019 text message, to be evidence that she did not fall at work on August 15, 2019.

17. As found, Claimant suffered a compensable injury on August 15, 2019, when she fell on her left knee in the parking lot at work. Claimant's failure to disclose the previous steroid injection in her right knee, at her initial Concentra visit, was not a material misrepresentation or concealment. Claimant did not materially misrepresent a workers' compensation claim resulting in Respondents filing an admission of liability.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in

the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The 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

An injury is compensable under the Act if incurred by an employee in the course and scope of employment. § 8-41-301(1)(b), C.R.S.; *Price v. Indus. Claim Appeals Office,* 919 P.2d 207 (Colo. 1996). The claimant must show a connection between the employment and the injury such that the injury has its origin in the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. *See Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999). To prove causation medical evidence is not necessary and the claimant's testimony, as well as the constellation of facts surrounding the claimant's injury, have sufficed to establish the requisite *nexus* between her injury and work. *See Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). If a pre-existing condition is stable but aggravated by an occupational injury the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Indus. Comm'n*, 736 P.2d 1262, 1263 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce a disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). Additionally, if the industrial injury aggravates, accelerates or combines with a pre-existing disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan*, 107 P.3d at 1001.

The ALJ found Claimant's testimony regarding her fall on August 15, 2019 at work, to be credible. Claimant's testimony concerning the work relatedness of her left knee injury is supported by the medical records. The evidence reflects that Claimant had a contusion on her left knee and she was restricted to using crutches. Claimant had a history of swelling and popping in her knees, but she was not required to use crutches or go to physical therapy prior to her August 15, 2019 injury. Although Claimant did not tell her treating providers at her first visit of the cortisone injection in her right knee in mid-

July, six days later at the August 21, 2019 visit she did make that representation. Additionally, the injection was in Claimant's right knee, and Claimant's original admitted injury involved her left knee. The medical records are consistent that Claimant's left knee required treatment in the form of crutches, physical therapy, and a leg sleeve following the August 15, 2019 injury. As found, Claimant suffered a compensable injury on August 15, 2019.

Withdrawal of a General Admission of Liability

Section 8-43-203(1)(c) of the Colorado Revised Statutes provides:

> The employer or, if insured, the employer's insurance carrier may not withdraw initial admission of liability on the issue of compensability filed pursuant to this subsection (1) if two years or more have elapsed since the date the initial admission of liability was filed with the division, except in cases of fraud.

Because admissions of liability may not ordinarily be withdrawn retroactively, the party seeking reopening bears the burden of proof by a preponderance of the evidence to establish the existence of fraud. § 8-43-201(1) C.R.S; *see Salisbury v. Prowers Cnty. School District*, WC 4-702-144 (ICAO June 4, 2012). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual determination for the ALJ. *In re Arcynski*, WC 4-156-147 (ICAO Dec. 15, 2005).

Here, Respondents seek to withdraw the May 22, 2022 GAL based upon fraud. To prove fraud or misrepresentation, Respondents must show: (1) a false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) knowledge on the part of one making the representation that it is false; (3) ignorance on the part of the one to whom the representation is more, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) making of the representation or concealment of the fact with the intent that it be acted upon; (5) action based on the representation or concealment resulting in damage. *In re Arczynksi, supra, citing Morrison v. Goodspeed*, 68 P.2d 458 (Colo. 1937).

As found, Claimant suffered a compensable injury on August 15, 2019. Although the circumstances surrounding Claimant's August 15, 2019 text message are confusing, and Claimant's testimony regarding the text message was not credible, the text message standing alone without any other collaborating evidence does not undermine the fact that Claimant has had extensive medical care, all of which Claimant's designated physicians have deemed to be related to her workplace injury of August 15, 2019. But for the one text message, no medical provider has questioned Claimant's injury, symptoms, or the need for treatment. As found, Claimant's failure to disclose the previous steroid injection at her first Concentra appointment is not material, and it was not a concealment of a material fact. Respondents have failed to demonstrate by the preponderance of the

evidence that Claimant knowingly made a false representation to Employer indicating she sustained work injuries to gain workers' compensation benefits.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she suffered an injury in the course and scope of her employment on August 15, 2019.

2. Respondents have failed to establish by a preponderance of the evidence that Claimant perpetrated a fraud.

3. Respondents' request to withdraw the General Admissions of Liability is denied.

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

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

DATED: May 4, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-797-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability ("TTD") benefits from August 28, 2022, ongoing until terminated pursuant to statute.

II. Whether Claimant made a proper showing justifying a change of physician.

STIPULATIONS

At hearing the ALJ approved the parties' stipulation to an average weekly wage ("AWW") of $680.00.

FINDINGS OF FACT

1. Claimant is 68 years of age. Claimant's regular job duties involved cleaning and picking up debris on construction sites and moving drywall.

2. Claimant sustained an admitted industrial injury on January 18, 2022. Claimant experienced pain in his low back when lifting and pulling a sheet of drywall.

3. Claimant reported the incident to his supervisor, who advised Claimant to go see a doctor of Claimant's choosing. Employer did not provide Claimant a list of designated providers.

4. The following day Claimant went to what he describes as a "Mexican store" and underwent some injections that provided him some benefit.

5. Claimant then sought treatment at Clinica Family Health ("Clinica") on January 20, 2022 with complaints of low back pain and decreased mobility and weakness in his legs. Claimant presented with a walker. On examination, Chelsea Batten, PA noted increase pain with all movement of the lower extremities as well as tenderness in the lumbar region. She gave an assessment of acute midline low back pain without sciatica and weakness of both lower limbs. PA Batten prescribed Claimant Tylenol and prednisone and referred him for a lumbar spine MRI and physical therapy.

6. Claimant underwent a lumbar spine MRI on January 20, 2022. Trent Paradis, M.D. provided the following impression:

1. Minimal to mild multilevel degenerative disc disease. No disc herniation or high-grade spinal canal or neuroforaminal narrowing.

2. Small right foraminal disc protrusion at L3-4 causes mild neuroforaminal narrowing but does not contact the nerve root.

3. Marrow edema in L5 pars interarticularis region and pedicles bilaterally, right greater than left, is a potential source of low back pain. This is likely due to chronic stress reaction. No discrete fracture is seen. There is also mild bilateral facet arthrosis at L5-S1.

(Cl. Ex. 7).

4. Claimant returned to Clinica on January 25, 2022 with complaints of worsening back pain and decreased mobility and tingling in his legs. Diane Asher, NP reviewed the January 20, 2022 lumbar MRI and documented the same assessment. On examination she noted decreased strength in the bilateral lower extremities, lumbar spine tenderness, decreased lumbar spine range of motion, and an antalgic gait. NP Asher prescribed Claimant Meloxicam for pain.

5. At a follow-up evaluation at Clinica on January 31, 2022 Claimant complained of mid and low back pain radiating into his bilateral thighs. He reported that his symptoms were aggravated by bending, daily activities, rolling over in bed, sitting, standing, twisting and walking. On examination, the provider noted an antalgic gait, muscle spasms in the thoracic and lumbar spine, thoracic tenderness, and pain in Claimant's right and left buttocks. Claimant underwent an injection of Toradol in his left buttock for pain and was prescribed Lidocaine patches for pain and Flexeril for muscle spasms.

6. Claimant began physical therapy at Therahand Physical Therapy on February 4, 2022. Andrew Klein, PT noted that Claimant presented with decreased muscle strength, decreased muscle flexibility, impaired gait, positive special test, and impaired posture. Claimant attended 14 physical therapy sessions between February 11, 2022 and May 18, 2022, at times reporting some improvement but continued symptoms.

7. On February 7, 2022 Claimant saw Jesus Santana PA-C at Clinica. Claimant reported some relief with the injections but persistent pain. Claimant was now wearing a back brace along with using a walker. On examination PA Santana noted an antalgic gait, and lumbar spine spasms and tenderness. His diagnosis was acute midline low back pain and bilateral sciatica. Claimant underwent a Toradol injection to his right buttock.

8. On February 21, 2022 Rachel Laaff, NP at Concentra noted Claimant was not improving with conservative treatment. She referred Claimant for a neurosurgical evaluation and prescribed Claimant Cymbalta for additional pain relief.

9. Claimant returned to Clinica on March 4, 2022 with continued symptoms. Claimant reported that the spoke with the neurosurgery department but elected not to proceed with an evaluation due to the cost and work. The provider noted Claimant was using a walker and belt brace for added support. Claimant underwent an injection to his left deltoid.

10. Claimant underwent an injection to his right deltoid on March 18, 2022 at Clinica.

11. On March 21, 2022 W. Rafer Leach, M.D. performed an Independent Medical Examination ("IME") at the request of Claimant. On examination of the lumbar spine Dr. Leach noted myospasm, positive facet examination, limited range of motion, a positive SI joint Fortin finger test, and diffuse gluteal spasm. Based on his interview with Claimant, review of records, and physical examination, Dr. Leach diagnosed Claimant with headaches; cervical thoracic, lumbar and gluteal myospasm; cervical axial pain with clinical facet syndrome; thoracic strain; lumbosacral axial pain concerning facet syndrome; nonspecific bilateral thoracolumbar radiculitis; sacroiliitis; adjustment disorder with depression and anxiety and repetitive sleep intrusion. Dr. Leach concluded that Claimant's symptoms and injuries were causally related to the January 18, 2022 work incident. He opined that Claimant had not reached maximum medical improvement ("MMI"), recommending additional treatment including, inter alia, 48 more sessions of physical therapy, lumbar flexion and extension x-rays to evaluate instability, and L4-5 and L5-S1 bilateral facet injections, possible medial branch blocks. Dr. Leach recommended the following work restrictions: maximum lifting, pushing, pulling and carrying of 10 pounds infrequently; no repetitive lifting, carrying, pushing or pulling; 15 minutes of position change per hour of static posture; and work limited to four hours per day, three days per week.

12. Claimant returned to NP Laaff on March 29, 2022 with continued low back pain radiating into bilateral lower extremities. NP Laaff noted Claimant did not have any significant improvement with treatment. Claimant underwent a repeat Toradol injection into his deltoid muscle.

13. On August 8, 2022 Dr. Leach issued a response to letter from Claimant's counsel regarding Claimant's work restrictions. Dr. Leach opined that the work restrictions he recommended in his March 2022 IME report applied as of the date of the injury and continued through such time as further medical care was implemented and Claimant's response to such care was evaluated. He opined Claimant had been medically unable to work his regular employment since the date of the work injury.

14. PA Santana reevaluated Claimant on September 27, 2022. Claimant continued to report low back pain. On examination PA Santana noted lumbar spine tenderness and reduced range of motion. He prescribed Claimant Naproxen and Tizanidine and referred him for more physical therapy.

15. On December 30, 2022 Claimant saw Pamela Guthrie M.D. at Clinica. Claimant reported continuing symptoms. He further reported that he remained unable to lift heavy items but that he could now walk. Claimant was referred for physical at North Boulder Physical Therapy.

16. Claimant began physical therapy at North Boulder Physical Therapy on January 4, 2023. Claimant reported pain with lifting, sleeping, walking a distance of more than one mile, carrying things, and performing household chores. He reported that he was unable to resume work, and that he was unable to walk well and experienced tension

throughout his back when standing and walking. Elizabeth Paige Dow, PT noted an antalgic gait, decreased lumbar spine range of motion, muscle guarding and tension in the lumbar paraspinals. Claimant attended 5 physical therapy sessions at North Boulder Physical Therapy from January 16, 2023 through February 13, 2023, reported some improvement in his symptoms and function.

17. Dr. Leach performed a follow-up IME on February 10, 2023 during which he reexamined Claimant and reviewed additional records. Claimant complained of severe pain in his low back radiating into his buttocks, hip region and lower extremities. Claimant reported that his low back symptoms were aggravated by prolonged sitting and standing, sleep, lifting, bending, sneezing, coughing, recreational activities, driving and traveling. He had mild improvement with medication. Dr. Leach noted that his physical examination was generally unchanged from the March 2022 exam. He continued with the same diagnosis as well as recommendations for treatment and restrictions in his March 2022 IME report.

18. Dr. Leach credibly testified at hearing on behalf of Claimant. He testified consistent with his IME report. He reiterated his opinion that Claimant suffered from a work-related injury and requires further treatment and restrictions. Dr. Leach testified that Claimant is unable to perform his regular work duties and is not at MMI. Dr. Leach testified that he did not examine Claimant as a treating doctor and was paid by Claimant for his IME.

19. Other than Dr. Leach's IME reports, the medical records do not address work restrictions.

20. Claimant credibly testified at hearing. Claimant testified he continues to experience constant low back pain as well as pain on his sides and his bilateral lower extremities. Claimant testified he has not worked since the date of the work injury due to the work injury. Claimant testified he is unable to perform his regular job duties. Claimant testified that he selected Clinica as his provider because he had no money. Claimant testified that Clinica did not refer him to Dr. Leach.

21. Claimant offered to testimony or other evidence as to why he is requesting a change in physician. Claimant did not indicate any particular reason for his request to change physicians nor indicate any specific dissatisfaction with his medical care at Clinica.

22. Claimant has not worked since the date of the work injury. From the date of injury through August 27, 2022 Employer continued paying Claimant his regular wages of $17.00 per hour for 40 hours per week. Claimant subsequently incurred wage loss due to the work injury.

23. The ALJ credits the testimony of Dr. Leach and Claimant, as supported by the medical records, and finds that Claimant proved it is more probably true than not he is entitled to TTD benefits from August 28, 2022, ongoing.

24. Claimant failed to make a proper showing to justify a change of physician.

CONCLUSIONS OF LAW

Generally

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

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

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

Temporary Total Disability Benefits

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

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. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME’s MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Respondents contend that Claimant failed to demonstrate entitlement to TTD benefits from August 28, 2022 and ongoing as Claimant’s treating physicians did not remove Claimant from work. That the records of Claimant’s treating providers do not specifically address work restrictions does not preclude Claimant from an award of TTD benefits based on the totality of the evidence.

A claimant is not required to present medical evidence to prove the work injury rendered him physically unable to perform his regular employment. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). A claimant’s testimony alone is sufficient to demonstrate a disability. (*Id*.). Claimant’s regular job duties of cleaning and moving items inherently required continuous lifting, carrying, bending, standing and walking. Claimant credibly testified, and consistently reported, that he was unable to perform his regular job duties as a result of the work injury. No evidence was offered indicating Claimant had issues performing his job duties prior to the work injury. The medical records document findings of pain, decreased range of motion, antalgic gait, and spams. Various records also document Claimant’s use of a walker and back brace. Dr. Leach credibly and persuasively opined that Claimant’s work-related condition has continued to render Claimant unable to perform his regular employment.

Claimant was unable to effectively and properly perform his regular employment due to the work injury. As a result, he has not worked since January 18, 2022. Claimant began to incur actual wage loss as a result of the disability on August 28, 2022 as Employer ceased paying him his regular wages as of that date. No evidence was offered demonstrating that Claimant has reached MMI, returned to regular or modified employment, or that the attending physician has given Claimant a written release to

return to regular or modified employment. Accordingly, the preponderant evidence demonstrates that Claimant is entitled to TTD benefits from August 28, 2022 and ongoing, until terminated by operation of law.

Change of Physician

Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* WC 4-597-412 (ICAO, July 24, 2008). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, WC 4-570-904 (ICAO, June 19, 2006). Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretion to determine whether the circumstances justify a change of physician. *Gutierrez Lopez v. Scott Contractors*, WC 4-872-923-01, (ICAO Nov. 19, 2014).

As found, Claimant failed to make a proper showing justifying his request to change physicians. Claimant offered no explanation regarding his request to change physicians. Claimant did not allege nor offer any evidence of even "mere dissatisfaction" with Clinica's treatment. It is not alleged there is any bias or incompetence on the part of Clinica. The ALJ is left to infer that Claimant would simply prefer that Dr. Leach act as his treating physician, which is insufficient in this case to establish a proper showing justifying a change in physician.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence he is entitled to TTD benefits from August 28, 2022, ongoing, until terminated by operation of law.

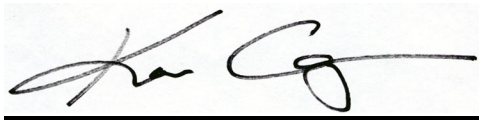
2. Claimant failed to make a proper showing justifying a change of physician. Claimant's request for a change of physician is denied and dismissed.

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

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

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

DATED: May 8, 2023



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. WC5-201-474-002

ISSUES

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

- Whether Respondents have proven by a preponderance of the evidence that Claimant is an independent contractor for Employer?

- If Claimant has proven that he suffered a compensable injury, whether Claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable, necessary and related to cure and relieve Claimant from the effects of his industrial injury and provided by a physician who was authorized to treat Claimant for his injury?

- If Claimant has proven that he suffered a compensable injury, whether Claimant has proven by a preponderance of the evidence that that he is entitled to temporary total disability ("TTD") benefits from September 27, 2021 to December 6, 2021?

- If Claimant has proven that he suffered a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability ("TPD") benefits from December 7, 2021 and ongoing?

- If Claimant has proven by a preponderance of the evidence that that he is entitled to temporary disability benefits, whether respondents proven by a preponderance of the evidence that the temporary disability benefits may be terminated by statute.

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

FINDINGS OF FACT

1. Claimant was hired by Employer to perform services associated with being a catering chef. Employer is a catering company operating in the Aspen area that caters to private events in the area. [Redacted, hereinafter KF], the owner for Employer, testified that Employer would cater events that included meals to clients' homes/residences, birthdays, weddings, bar mitzvahs and corporate events. KF[Redacted] testified that Employer has been in business for 25 years and has three employees, himself, [Redacted, hereinafter TJ], the executive chef, and [Redacted, hereinafter LM], the sous chef. Employer leases space at a building owned by the [Redacted, hereinafter FE] which includes a kitchen and refrigerators that are used by Employer.

2. Claimant testified he began working for Employer on or around August 2019. Claimant testified he was September 26, 2021 when he was descending stairs at the FE[Redacted] building and fell. Claimant testified he was loading a car with food to take to an event when he was injured. Claimant testified he had worked earlier that day on a catering event for Employer and then returned to the kitchen at the FE[Redacted] for another catering event for Employer when he fell. Claimant testified TJ[Redacted] was eventually called and took Claimant to the Aspen Valley Hospital Emergency Room ("ER") for treatment for his injuries. Claimant was diagnosed at the ER with a fracture of two process vertebra of his thoracic spine, a cervical strain and a facial laceration. Claimant was provided with work restrictions of no lifting greater than five pounds and no carrying, pushing/pulling or reaching overhead until cleared by orthopedics. The ALJ finds that the treatment obtained from the ER was reasonable emergency medical treatment that resulted from his September 26, 2021 injury.

3. Claimant testified at hearing that he was not referred to a physician by Employer to treat his injuries. Claimant subsequently sought treatment with Dr. Anderson at the Steadman Clinic based on the referral from the ER physician. Claimant had previously been treated by Dr. Khan-Farooqi with the Steadman Clinic in June 2021 for complaints involving his left foot.

4. Claimant was initially seen by Dr. Anderson on October 18, 2021. Dr. Anderson noted that Claimant reported that following his fall, his experience mid back, left knee and left wrist pain along with post-concussion symptoms. Claimant reported that after about one week, his mid back and head symptoms improved, but his left wrist and left knee pain worsened. Dr. Anderson performed x-rays of the lumbar spine and recommended a magnetic resonance image ("MRI") of the left wrist. Dr. Anderson recommended physical therapy.

5. Claimant testified that following the injury, Claimant requested that Employer file a workers' compensation claim, but was informed by KF[Redacted] that Claimant was not covered by workers' compensation insurance.

6. KF[Redacted] testified that Employer is a seasonal business with peak times occurring during ski season and in the summer. KF[Redacted] testified that Employer typically shuts down for approximately 6 weeks from mid-April to Memorial Day or early June along with from late September until early December.

7. KF[Redacted] indicated that it is standard in the catering industry in Aspen to hire independent contractors to help with catering. KF[Redacted] testified the number of independent contractors that Employer may need would *vary.*

8. KF[Redacted] testified that he had a conversation with Claimant about him being an independent contractor when he hired Claimant. KF[Redacted] testified Claimant did not express any concerns about being an independent contractor rather than an employee. KF[Redacted] testified Claimant was happy about the arrangement since he did have any withholdings taken out of his pay. Claimant signed a W-9 for Employer and

was sent a 1099 form for tax purposes. However, KF[Redacted] did not have Claimant sign a contract identifying himself as an independent contractor when Claimant was hired.

9. Claimant was not required to work exclusively for Employer as was free to work for other catering companies. Claimant worked for a separate entity at the [Redacted, hereinafter JF] in Snowmass over the Labor Day holiday in September 2021. Claimant testified that he had worked approximately 7-10 days for the separate company during this time frame.

10. KF[Redacted] testified that the catering business is dictated by supply and demand and Claimant did not have a set schedule for Employer. However, the invoices provided by Claimant demonstrate that Claimant was consistently working in excess of 30 hours per week for Employer in June, July and August of 2021. Claimant and KF[Redacted] agreed that Claimant would be assigned catering jobs to work and if Claimant was not available, he could reject the catering job.

11. Claimant was paid by Employer by submitted billing invoices to Employer. The invoices would indicate which catering job he worked on, how many hours he worked on the catering job, the hourly rate Employer allowed him to charge for the job, and reimbursement of any supplies he personally bought for the catering job. KF[Redacted] testified that people who work for Employer can submit their invoices however they choose and Employer does not require any specific format be used. Claimant created his invoices using a software program/application called "[Redacted, hereinafter SK]." Claimant was not provided with business cards from Employer, was not provided with letterhead and was not listed on Employer's website and did not have an email address associated with Employer.

12. Claimant testified that at times, he would be provided with a company credit card from [Redacted, hereinafter TJ] to purchase supplies, but would otherwise be reimbursed by invoice. Claimant testified that at times he would be reimbursed a fee for gas on occasion in cases in which he had to travel a significant distance for a client. This testimony was confirmed by KF[Redacted]. Employer did not provide Claimant with a company vehicle to deliver the food. Employer did not provide Claimant with health insurance or a company phone.

13. Claimant and KF[Redacted] both testified that Claimant was paid an hourly rate based on the job he was performing and the client he was performing the job for. For instance, Claimant would be paid $25 per hour for preparation work associated with the catering job and between $35 and $40 per hour for being on site at a catering event and cleaning up. Once Claimant submitted invoices, Claimant was paid by check made out to Claimant individually.

14. There was some testimony at hearing as to whether Claimant was required to use the recipes provided by Employer or if he could use his own recipes. KF[Redacted] testified that Claimant would be provided with project sheets. KF[Redacted] testified that the project sheets would be developed as a collaboration between himself, the office and the chef with the client also being involved. Claimant testified that he

would occasionally bring in his own food and provide it to co-workers with the idea that if the co-workers liked the food, it could be used for clients at a later time. There was additional testimony as to whether Claimant could change aspects of the recipes for projects provided by Employer. The ALJ finds that whether or not Claimant could make adjustments to the Employer's recipes is not outcome determinative to the finding of whether or not Claimant was an employee of Employer. Most importantly however, the testimony of KF[Redacted] establishes that the menu in question was primarily prepared by TJ[Redacted], the executive chef for Employer, and the client. Claimant would then be provided with the menu to prepare for the client. KF's[Redacted] testimony that Claimant could change the menu is found to be not credible. KF[Redacted] testified that Claimant could add "twists" to the menu or personal touches is not the same as changing the menu. While Claimant may have been able to add a personal touch to the menu, this is not sufficient to establish independence in how Claimant performed his work for Employer.

15. Claimant testified that Employer provided the ingredients for which the food was to be prepared, but if fresh ingredients were necessary, he would purchase the fresh ingredients and submit for reimbursement from Employer. Claimant used the kitchen provided by Employer including the stoves, pots, pans and utensils provided by Employer. Claimant testified that he did use his own set of knives and knife sharpener along with specific items such as an apple corer in preparing the food for Employer. KF[Redacted] testified that while typically food preparation was performed at Employer's kitchen at the FE[Redacted], Claimant could prepare food at his home. Claimant testified he only prepared food at his home on one occasion and that occurred when the power was out at Employer's kitchen. The ALJ finds Claimant's testimony credible with regard to the location where the food preparation occurred.

16. Claimant testified his work as a chef was overseen by Employer. However, Claimant was not provided with specific training as a chef. Claimant was provided by Employer a checklist for the event which included the location, information regarding food allergies, menu options, and how much staffing was needed. However in providing the necessary staffing, Employer was responsible for providing individuals to serve the food and drinks at the events. Testimony was presented at the hearing that Claimant could request specific staff work events that Claimant was assigned, but no credible evidence was presented that Claimant actually requested specific staff to work events that he was assigned.

17. With regard to the catering event Claimant was working on when he was injured, Claimant noted that this was a family that had specifically requested that he prepare food for the family and the food was to be delivered to the home where the family was staying. KF[Redacted] acknowledged that even though Claimant was specifically requested as the chef for the family, Claimant would not be able to perform the services of catering to the family because Claimant would not be allowed to steal clients from Employer.

18. Due to the fact that there was no contract for hire that identified Claimant as an independent contractor pursuant to Section 8-40-202(b)(III), the burden of proof to

establish independence pursuant to Section 8-40-202(b)(II). Section 8-40-202(2)(b)(II) provides in pertinent part that in order to prove independence it must be shown that the person for whom services are performed does not:

- Require the individual to work exclusively for the person for whom services are pertormed; except that the individual may choose to work exclusively for such person for a finite period of specified in the document;

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

- Pay a salary or at an hourly rate instead of a fixed or contract rate;

- Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

- Provide more than minimal training for the individual;

- Provide tools or benefits to the individual; except that materials and equipment may besupplied;

- Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

- Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

- Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

19. In this case, Claimant was not required to work exclusively for Employer and Claimant was not provided training by Employer. Likewise, Claimant was provided with a mutually agreed upon work hours that were effectively dictated by the client (notably the time Claimant was required to be at the event).

20. Factors that demonstrate that Claimant was not independent from Employer include the fact that Claimant was paid individually and was paid an hourly rate, as opposed to a contract rate. Additionally, testimony demonstrated that after Claimant's injury, Claimant sought to have the FE[Redacted] cover the cost of his medical expenses and wrote a letter seeking compensation from the FE[Redacted] for the injury as the injury had occurred on the FE[Redacted] premises. This resulted in the FE[Redacted] advising Employer that they did not want Claimant on the premises, and Claimant was effectively

terminated by Employer. This demonstrates that Employer maintained the right to terminate Claimant's performance without Claimant violating the terms of his service agreement.

21. Moreover, Employer provided Claimant with the prep kitchen at the FE[Redacted] where Claimant performed his prep work. This is the area where the injury occurred and where Employer kept most of the ingredients used by Claimant to prepare the meals to be provided at the catered events.

22. Based on weighing the 9 factors in determining whether Claimant was engaged in an independent occupation, the ALJ finds that Respondents have failed to prove by a preponderance of the evidence that Claimant was free from the direction and control of Employer in performing the duties assigned to Claimant by Employer.

23. The ALJ would also note that testimony presented by Claimant and KF[Redacted] at the hearing established that the Claimant was not allowed to do projects for clients of Employer, even if requested by the client, without putting the project through Employer's business. Claimant's work in this regard had to be performed under Employer's business and could not be performed directly for the client by Claimant.

24. While Claimant was allowed to work other projects for other catering companies, specifically the Labor Day concert testified to by Claimant and KF[Redacted], the ALJ finds that this is no different than any other employee of a company who may be allowed to set a schedule that allowed the employee to work at an event that the employee sought to work at. Notably, no credible evidence was presented at hearing that Claimant's work at the Labor Day concert event was performed under a subcontractor business maintained by Claimant, nor was any credible evidence presented with regard to the nature of the work performed by Claimant at the Labor Day concert event that would indicate the work completed by Claimant was performed as an independent contractor as opposed to an employee.

25. Following Claimant's injury, Claimant was off of work through December 7, 2021 at which time he continued to work for Employer. Claimant was eventually terminated by Employer after authoring a letter to the FE[Redacted] requesting a payment of $10,000 to settle any potential liability against FE[Redacted] as a result of the fall that occurred on their premises. Claimant testified that KF[Redacted] issued an email to Claimant that terminated Claimant's employment. This testimony is consistent with KF's[Redacted] testimony that when the FE[Redacted] advised KF[Redacted] that they did not want Claimant on the premises, KF[Redacted] was trying to be respectful of the request of his landlord.

26. KF[Redacted] testified that Employer is a seasonal business and that they would have been shut down for the autumn and did not have work during the time after Claimant's injury and prior to December 7, 2021. While this may be the case, Employer's seasonal operations do not provide a basis for denial of temporary disability benefits where Claimant was taken off of work by the ER physician based on the five pound work restrictions set forth in the ER.

27. The ALJ credits Claimant's testimony and finds that Claimant has established by a preponderance of the evidence that he is entitled to an award of TTD benefits for the period of September 27, 2021 through December 7, 2021 when Claimant returned to work for Employer.

28. Because Claimant was never released to work without restrictions by a treating physician, Claimant is entitled to an award of temporary partial disability benefits beginning December 7, 2021.

29. For the period between June 22, 2021 through September 26, 2021 when Claimant was injured, Claimant's invoices reflect that Claimant was paid $15,152.50 in hourly wages. This 96 day period of time results in a daily wage of $157.84 which equates to an AWW of $1,104.88.

30. Following Claimant's injury, Claimant sought treatment with Dr. Anderson Dr. Armstrong and Dr. Khan-Farooqi. Most notably, Claimant had treated with Dr. Khan-Farooqi prior to his work injury for a left toe injury which was diagnosed as a left great toe bunion on June 18, 2021. Dr. Khan-Farooqi noted during the June evaluation that Claimant may need aspiration or steroid injections in the future. Dr. Khan-Farooqi noted that Claimant had a history of gout.

31. Following Claimant's injury, Claimant returned to Dr. Khan-Farooqi on November 3, 2021. Dr. Khan-Farooqi noted Claimant had ongoing turf toe and left foot pain and noted Claimant feel down the stairs on September 26 which resulted in multiple injuries and aggravated his left bunion. Dr. Khan-Farooqi noted there was increased pain and swelling on the first metatarsophalangeal joint ("MTPJ") medially and dorsally. Dr. Khan-Farooqi noted in his report that the increased pain and swelling occurred after a high energy fall onto his right side. Dr. Khan-Farooqi recommended an MRI of the left foot to look for turf toe injury given the swelling and crease valgus deformity. Dr. Khan-Farooqi obtained x-rays of the left foot and noted that they showed bipartitie medial sesamoid versus a fracture medial sesamoid.

32. Claimant returned to Dr. Khan-Farooqi on January 21, 2022. Dr. Khan-Farooqi diagnosed Claimant wlth a symptomatic turf toe and arthritic MTPJ. Dr. Khan-Farooqi recommended physical therapy and noted that injections or possible surgery may be necessary.

33. Claimant underwent a second MRI at the request of Dr. Armstrong on April 15, 2022. Dr. Armstrong recommended Claimant undergo osteophyte excision based on the MRI results. Claimant returned to Dr. Khan-Farooqi on May 3, 2022 after being evaluated by Dr. Armstrong. Dr. Khan-Farooqi noted Claimant reported a failure to improve despite maximal physical therapy, chiropractic care, rest, orthotics, injections and home exercise. Dr. Khan-Farooqi recommended surgery.

34. Claimant eventually underwent surgery under the auspices of Dr. Khan-Farooqi on July 15, 2022.

35. Respondents obtained an independent medical evaluation ("IME") with Dr. Messenbaugh on July 1, 2022. Dr. Messenbaugh reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Messenbaugh opined that as a result of Claimant's fall he had a laceration of his left forehead, a strain of his lower back that had resolved, transverse process fractures involving the T3 and T4 level, a left wrist strain and a left shoulder and left knee contusion that had resolved. Dr. Messenbaugh opined that Claimant had not sustained an injury to his left great toe as a result of the September 26, 2021 accident. Dr. Messenbaugh opined Claimant was at MMI with no permanent impairment.

36. Dr. Messenbaugh further opined that Claimant's surgery involving his left great toe was not at all related to his fall of September 26, 2021.

37. Claimant was also evaluated at Aspen Medical Care by Dr. Bryan C. Gieszl on April 14, 2022 for a "new workers' comp injury" that occurred September 26, 2021. Dr. Gieszl eventually referred Claimant to be treated by Dr. Armstrong. There is a lack of information contained in the records as to how Claimant came to be treated by Dr. Gieszl and Claimant's testimony fails to establish that Dr. Gieszt was within the chain of referrals for medical treatment related to Claimant's injury. Therefore, the ALJ concludes that the treatment provided by Dr. Gieszl and Dr. Armstrong are not within the chain of referrals and are not "authorized" medical treatment.

38. Claimant testified at hearing that his pain in his left big toe was much more severe after his work injury. The ALJ credits the testimony of Claimant at hearing along with the reports from Dr. Khan-Farooqi and finds that Claimant has proven that it is more probable than not that Claimant's fall on September 26, 2021 aggravated accelerated or combined with Claimant's pre-existing condition to cause the need for medical treatment with Dr. Khan-Farooqi beginning November 3, 2021. The ALJ further finds that Dr. Khan-Farooqi is within the chain of authorized referrals as he was a referral from Dr. Anderson, who was the physician Claimant was referred to by the ER.

39. The ALJ further notes that because the Employer did not provide Claimant with a list of treating physicians at any time following his injury, the choice of treating physician was waived and Claimant chose to treat with Dr. Anderson and the Stedman Clinic. The ALJ finds the treatment provided by Dr. Anderson, Dr. Khan-Farooqi and the Stedman Clinic to be reasonable and necessary to cure and relieve Claimant from the effects of his work injury.

40. The ALJ therefore finds that Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer and Respondents are liable for the cost of the medical treatment provided by Dr. Anderson, Dr. Khan-Farooqi and the Stedman Clinic. The ALJ further finds that Claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits for the period of September 27, 2021 through December 6, 2021 based on an AWW of $1,104.88. Claimant has further proven that he is entitled to an award of TPD benefits from December 7, 2021 through ongoing based on an AWW of $1,104,88.

41. With regard to Respondents' argument that there is a statutory cut off for TTD benefits, the ALJ notes that Jade Golden, PA-C with Dr. Gieszl's office filled out a report dated April 15, 2022 which checked a box indicating that Claimant was at MMI. However, Claimant was under the care of Dr. Khan-Farooqi for the compensable foot injury for which Dr. Khan-Farooqi subsequently performed surgery. PA-C Golden specifically notes in the report that the MMI was for "head injury, right shoulder, thoracic spine, left knee only" and reported Claimant was still being evaluated for left foot and wrist. Therefore, the ALJ does not find that this report provides a basis to terminated temporary disability benefits.

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 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).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8- 43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

4. Section 8-40-202(2)(a), C.R.S., provides that an individual performing services for another is deemed to be an employee:

> [U)nless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

5. Section 8-40-202(2)(b)(II), *supra,* then sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. *See Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office,* 859 P.2d 278 (Colo. App. 1993). The nine factors include:

> (1) whether the person for whom services are performed does not require the individual to work exclusively for the person for whom services are performed;
> (2) whether the person for whom services are performed does not establish a quality standard for the individual;
> (3) whether the person for whom services are performed does not pay a salary or at an hourly rate instead of a fixed or contract rate;
> (4) whether the person for whom services are performed does not terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets expectations of the contract;
> (5) whether the person for whom services are performed does not provide more than minimal training for the individual;
> (6) whether the person for whom services are performed does not provide tools or benefits to the individual, except that materials and equipment may be supplied;
> (7) whether the person for whom services are performed does not dictate the time of performance;
> (8) whether the person for whom services are performed does not pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and
> (9) whether the person for whom services are performed does not combine the business operation of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

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

7. As found, no document existed as to the requirements to prove independence. Because no document exists to establish the requirements set forth at Section 8-40-202(2)(b)(II), it is Respondents' burden of proof by a preponderance of the evidence that Claimant's work for Employer was performed as an independent contractor. As found, based on the evidence presented at hearing, the ALJ finds that

Respondents have failed to establish that claimant was an independent contractor with regard to the work performed as a chef.

8. In *Industrial Claim Appeals Office v. Softrock Geological Services, Inc.,* 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court noted that whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed is a question of fact that can only be resolved by analyzing several factors and whether the individual worked for another is not dispositive of whether the individual was engaged in an independent business. *See Softrock, supra.* The Colorado Supreme Court held that the determination must be based on a totality of the circumstances test that evaluates the dynamics of the relationship between the putative employee and the employer. The Court in *Softrock* further held that while the nine fact test may be relevant to determining whether the individual is an independent contractor, the test does not provide an exhaustive list of factors that may be considered.

9. In considering other factors outside of the nine factors set forth by Section 8-40-202(2)(b)(II), C.R.S., the ALJ finds no other factors establish that Claimant was performing work as an Independent Contractor as opposed to an employee.

10. Notably, in this case, Claimant was paid an hourly rate that was set by Employer for the work performed by Claimant which varied depending on the work Claimant was performing for Employer. Claimant was not paid at a contract rate per job. Claimant was paid personally by Employer and was not paid to a business entity. Claimant was provided with a menu by Employer and was then responsible for preparing the meal or meals in accordance with the instructions by Employer. As found, any personal touches Claimant may have been able to add to the menu is insufficient to establish independence in order to determine Claimant was not an employee of Employer.

11. Based on the facts presented in this case, including that Claimant was paid an hourly rate, the money was paid to Claimant personally as opposed to a business, the Employer provided Claimant with the kitchen to perform the prep work, the injury occurred at the building where the kitchen was located while Claimant was performing work for Employer, Claimant was provided with contact sheets and advised of the date and time to provide services to the clients.

12. The ALJ finds and concludes that Respondents have failed to prove by a preponderance of the evidence that Claimant was free from direction and control in the performance of the duties of his employment.

13. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not

change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office,* 931 P.2d 570 (Colo. App. 1996).

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

15. As found, Respondents failed to refer Claimant to an authorized treating provider by Respondents after his work injury. Therefore, the Claimant then has the right to select the physician to treat with for the injuries sustained in the accident.

16. As found, the treatment Claimant received was authorized emergency medical treatment that resulted from Claimant's compensable work injury. As found, Dr. Anderson was selected by Claimant as the physician to treat Claimant for his injury. As found, Dr. Anderson subsequently referred Claimant to Dr. Armstrong and Dr. Khan-Farooqi for his injury.

17. As found, Claimant has proven by a preponderance of the evidence that the treatment with Dr. Anderson, Dr. Armstrong and Dr. Khan-Farooqi was reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the industrial injury. As found, although Dr. Khan-Farooqi had treated Claimant prior to his work injury for ongoing turf toe and left foot pain, Dr. Khan-Farooqi also noted that Claimant's fall at work resulted in multiple injuries and aggravated Claimant's left bunion resulting in increased pain and swelling on the first MTPJ medially and dorsally. As found, the ALJ credits the medical reports of Dr. Khan-Farooqi's and finds Claimant has proven by a preponderance of the evidence that the treatment provided by Dr. Khan- Farooqi was reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the industrial injury.

18. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra,* requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume

his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.,* 964 P.2d 595 (Colo.App. 1998).

19. As found, Claimant has proven by a preponderance of the evidence that he sustained an injury resulting in a disability that lasted for longer than three days after he was hospitalized following his fall at work on September 26, 2021. The mere fact that Employer was a seasonal business that did not operate during the autumn months until the beginning of ski season is not a defense to a claim for temporary disability benefits where Claimant's injury results in a disability lasting for longer than three days.

20. As found, Claimant returned to work for Employer on December 7, 2021 earning less wages than he was earning at the time of his industrial injury. During this time, Claimant was still receiving medical treatment for his work injury and had not yet been released to return to work without restrictions. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary partial disability benefits beginning December 7, 2021 and continuing until terminated by law or statute.

21. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). As found, based on the evidence presented at hearing, the ALJ finds that Claimant has established an AWW of $1,104.88.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury, including the medical treatment provided by the ER, Dr. Anderson, Dr. Armstrong and Dr. Khan-Farooqi.

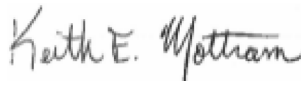
2. Respondents shall pay Claimant TTD benefits for the period of September 27, 2021 through December 6, 2021 based on an AWW of $1,104.88.

3. Respondents shall pay Claimant TPD benefits for the period of December 7, 2021 through ongoing based on an AWW of $1,104.88.

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

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

DATED: May 8, 2023



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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on September 3, 2022.

2. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for his termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits after September 3, 2022.

3. Whether Respondents have established by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on September 3, 2022 and his non-medical benefits should thus be reduced by fifty percent.

FINDINGS OF FACT

1. Employer is a retail and pharmacy store that sells a variety of items to customers. On April 4, 2020 Claimant began working for Employer as a Customer Service Associate (CSA). His primary job duties involved operating a cash register.

2. Claimant acknowledged that during the course of his employment with Employer he received training involving workplace violence, safety, and dealing with shoplifters. Although Claimant explained that he has not personally interacted directly with shoplifters, he has witnessed numerous shoplifting incidents on a daily basis. He remarked that sometimes coworkers permitted the shoplifters to leave, other times shoplifters were told to pay for their items and occasionally coworkers have gone outside the store and became involved in physical altercations with shoplifters. Claimant was unaware whether coworkers had received warnings or been terminated for their actions with shoplifters.

3. Claimant testified that on September 3, 2022 his shift lasted from 2:00 p.m. until 10:00 or 10:30 p.m. He was working with supervisor [Redacted, hereinafter NF]. NF[Redacted] told Claimant there was a shoplifter in the store. Claimant then noticed that NF[Redacted] was talking to the shoplifter near the front of the store and they began to struggle over a shopping cart filled with merchandise. When Claimant saw the shoplifter swinging at NF[Redacted], he left his register. As Claimant approached, the suspect exited the store. Claimant then recounted that NF[Redacted] told him to get the shoplifter's vehicle license plate number.

4. Claimant exited the store and attempted to take a picture of the shoplifter's license plate number with his phone but was unsuccessful. He acknowledged that he had

never previously been asked, nor heard that anyone else had ever been asked, to obtain a license plate number of a shoplifter's vehicle. Claimant then picked up and threw two rocks at the suspect's truck but missed. He testified he threw the rocks because he could not get a good description of the suspect and wanted to break the vehicle's headlight so the police would have an easier time identifying the shoplifter. Claimant noticed the shoplifter's truck coming in his direction and sought to leave the area. However, he slipped and the truck drove onto the sidewalk. The vehicle then struck Claimant in front of Employer's store. NF[Redacted] called 9-1-1 for assistance. Paramedics took Claimant by ambulance to St. Anthony's North Hospital, where he was admitted and remained for treatment that included multiple surgeries.

5. On the following day or September 4, 2022 Store Manager [Redacted, hereinafter MW] visited Claimant in the hospital. MW[Redacted] told Claimant he had been fired for the shoplifter altercation and NF[Redacted] had already resigned her position.

6. On cross-examination Respondents' played excerpts from surveillance video of the September 3, 2022 shoplifting incident. The video showed Claimant working behind the cash register and then moving to help MH[Redacted] as she was engaged in an altercation with a suspected shoplifter. Claimant then followed the shoplifter outside the store. Claimant was outside the store with the suspect for just four seconds, allegedly attempting to take pictures of the shoplifter's vehicle, before he determined he was unable to take the pictures. He then picked up two rocks and threw them at the suspect's truck, but missed. The video depicts Claimant in the middle of the parking lot approaching the suspect's vehicle and throwing rocks at the truck prior to being struck by the vehicle.

7. Claimant acknowledged that Employer had a policy prohibiting employees from touching or attempting to apprehend suspected shoplifters. He also recognized that he had received training regarding workplace violence and handling confrontational situations. In fact, the record reveals that in 2020 and 2021 Claimant completed numerous trainings. The materials related to Employer's workplace violence policy, shoplifting deterrence, responding to shoplifting incidents, and handling confrontational situations. Claimant was required to obtain passing scores during training quizzes in order to continue employment.

8. MW[Redacted] also testified at the hearing in this matter. He explained that his duties as Employer's Store Manager involve overseeing all operations of the establishment including merchandizing, hiring and training. Although MW[Redacted] asked MH[Redacted] to complete a statement about the September 3, 2022 shoplifting incident, she simply resigned her position and provided no specific details about the event. MH[Redacted] generally explained that she became involved in a tussle with the suspect after her glasses were knocked off. MW[Redacted] noted that MH[Redacted]never mentioned she told Claimant to exit the store to take a picture of the shoplifter's license plate.

9. MW[Redacted] also testified about Employer's policies involving shoplifting, workplace violence and handling confrontation. The general purpose of the policies was

to keep employees safe. Employees were never trained employees to physically engage with shoplifters. The only reason for a physical confrontation with a suspected shoplifted was if the situation was unavoidable and involved purely self-defense. Notably, MW[Redacted] emphasized that employees are always told that it is a policy violation to leave the store to pursue a suspect. Workplace violence policies were designed to de-escalate situations and keep employees safe. MW[Redacted] explained that Employer never intended for employees to fight, throw objects, or act physically aggressive towards customers or shoplifters.

10. MW[Redacted] also discussed the implementation of Employer's policies regarding confrontational situations, workplace violence and safety. He detailed that employees receive training on Employer's shoplifting and workplace violence policies at the outset of their employment and then undergo refresher training on an annual basis. Employer specifically downloads trainings into employee accounts that include deadlines for completion. There are also periodic, brief meetings on important topics, including shoplifting guidelines, in order to refresh employees. MW[Redacted] remarked that the policies were enforced by telling employees that any violation could result in disciplinary action up to and including termination. In fact, termination for both MH[Redacted] and Claimant was recommended after the September 3, 2022 incident, but MH[Redacted] quit her position. Importantly, MW[Redacted] stated that Claimant was not acting within his job duties and violated Employer's policies by throwing objects at the shoplifter outside the store on September 3, 2022. He testified that Claimant's act of throwing of rocks at the suspect's vehicle did not provide any benefit to Employer. Claimant should have stopped at the exit and let the suspect leave the store.

11. Employer's policies include a "Preventing and Handling Shoplifting SoftStop Reference Guide." The first line of defense to shoplifting includes the following: (1) greeting every customer; (2) making eye contact with customers; (3) offering assistance to customers; (4) keeping stores neat, displays full, and trash off floor; (5) keeping aisles properly faced to easily notice discrepancies; and (6) using the designated security code over the intercom to alert management of a shoplifter. Notably, the policies specify that it is especially important to remember:

> …no employee is allowed to physically touch suspected shoplifters;
>
> …no employee is allowed to leave the store premises during the apprehension of a shoplifter;
>
> …if the shoplifter refuses or resists, let him or her leave the premises, and then call 911;
>
> …while waiting for the police to arrive, a witness must be with the shoplifter the entire time.

The training also involves 46 slides of hypotheticals and asks employees how to appropriately respond to shoplifting incidents. The slides include multiple choice responses requiring employees to choose the correct answers.

12. Respondents' also introduced Employer's Combined Shoplifting Policy and Training (Shoplifting Policy) into evidence. The Shoplifting Policy specifies that an employee should not place himself between a suspected shoplifter and the exit door. Moreover, an employee is prohibited from following an individual who is carrying stolen merchandise out the door in an attempt to obtain a license plate number. Employer also produced policies involving "Guidance for shoplifting Prevention and Response." Pursuant to Employer's training, if a suspected shoplifter refuses to give up merchandise, employees are directed to allow the suspect to leave the premises. One question specifically inquires, "If an individual walks out the door with stolen merchandise you should follow the person and try to get their license plate number." The correct answer is "False."

13. Among the Standard Operating Procedures for Handling Confrontational Situations are rules stating that employees are not to block or stand in the entryway, not touch or try to apprehend an individual, and "do not leave the store to obtain information about the individual such as a license plate number. If the individual attempts to exit the store, allow him/her to leave as quickly as possible to help ensure the safety of everyone." Notably, the Standard Operating Procedures specify that employees are not to attempt to stop the individual and "do not leave the store in an attempt to follow after him/her. Let the individual leave and report the situation to law enforcement when they arrive." Moreover, Employer's "Guidance for Shoplifting Prevention and Response" within the Workplace Violence Policy is designed to deter and handle shoplifting. Employees are trained that inappropriate behavior includes "creating unsafe working conditions by engaging in physical aggression or other dangerous or offensive behavior, including but not limited to fighting, throwing objects, and horseplay." The Policy Against Workplace Violence was Employer's "overarching policy regarding workplace violence. It describes the requirements for appropriate behavior at work and for keeping the workplace safe."

14. Claimant has failed to demonstrate it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer on September 3, 2022. Initially, Claimant worked for Employer as a CSA or cashier. While working behind the cash register on September 3, 2022 Claimant saw his supervisor MH[Redacted] engaged in an altercation with a suspected shoplifter. As Claimant left the register area and approached the altercation, the shoplifter exited the store. Although Claimant stated that MH[Redacted] then asked him to exit the store to obtain the suspect's license plate number, his testimony was not corroborated and is in direct conflict with Employer's store policies. Moreover, MW[Redacted] noted that MH[Redacted] never mentioned that she told Claimant to exit the store to take a picture of the shoplifter's license plate before abruptly resigning after the incident. Nevertheless, Claimant then followed the shoplifter outside. Surveillance video shows Claimant in Employer's parking lot approaching the suspect's vehicle and throwing rocks at the truck. The shoplifter subsequently struck Claimant with his vehicle.

15. Many of Employer's policies permit employees to approach or interact with suspected shoplifter's to deter shoplifting and de-escalate confrontational situations inside Employer's store. Employees are encouraged to greet, make eye contact and offer assistance. The directives in Employer's trainings reveal they were designed to regulate

the conduct of employees while performing their job duties and address appropriate behavior in dealing with potential shoplifters inside Employer's store.

16. However, employees are strictly prohibited from leaving store premises to confront shoplifters or obtain license plate information. Claimant acknowledged that he received training and was required to pass quizzes relating to Employer's workplace violence policy, handling confrontational situations, and shoplifting deterrence policy during his employment. Employer specifically forbid employees from leaving the store during a shoplifting incident. In fact, Employer's SoftStop Reference Guide specifies that "no employee is allowed to leave the store premises during the apprehension of a shoplifter." Moreover, Employer's Standard Operating Procedures direct employees to "not leave the store to obtain information about the individual such as a license plate number. If the individual attempts to exit the store, allow him/her to leave as quickly as possible to help ensure the safety of everyone." An employee is simply prohibited from following an individual who is carrying stolen merchandise out the door in an attempt to obtain a license plate number. As MW[Redacted] explained, nothing in Claimant's job duties as a CSA allowed him to exit the store to pursue a shoplifter and throw objects.

17. By exiting Employer's store, walking into the middle of the parking lot and throwing rocks at the shoplifter's vehicle, Claimant removed himself from the employment relationship. Employer's detailed training and instructions regarding exiting the store and obtaining a license plate number limited Claimant's sphere of employment by creating a restriction on the scope of Claimant's job. Employer's directives were specific and reflected a clear intent to limit the sphere of the employment relationship. The training and directives evidenced an intent to cease the employment relationship for a violation. Claimant's actions of exiting Employer's store on September 3, 2022 to obtain a license plate number and throw rocks at a suspected shoplifter's vehicle directly contravened Employer's directives and exceeded the realm of his job duties. By acting outside the scope of employment Claimant severed the causal relationship between his job function and injuries.

18. The present case is distinguishable from *Sewald v. Safeway, Inc.*, WC 5-188-401 (ICAO, Dec. 21, 2022). In *Sewald*, the injury occurred when an employee encountered a shoplifter inside the store, reached for his shopping cart and fell when the shoplifter pulled the cart away. The ALJ in *Sewald* explained that the employer provided the claimant with training about interacting with suspected shoplifters, but the directives did not evidence an intent to cease the employment relationship for a violation. Instead, the directives in the employer's shoplifting guidelines and training were intended to regulate the claimant's conduct while performing her duties and not to limit the scope of her employment. However, the present case is distinguishable from *Sewald* and provides a bright-line rule for defining the "sphere of employment." Critically, Employer's policies about exiting the premises after a shoplifter are designed to prohibit interaction and promote safety. Once the suspected shoplifter has left the store, employees are not encouraged to approach or interact with the shoplifter, but rather must refrain from pursuit. By the time a suspect has exited the store, deterrence has failed and employees are no longer performing their job duties by pursuing the shoplifter outside.

19. As illustrated in 2 A. Larson, *Workmen's Compensation Law* § 33.02 (2013) cited in *Sewald*, there is a distinction between an employer's instruction sufficient to remove an employee's activity from the realm of employment and an instruction only directed at the "method" of carrying out a work function. Specifically, "rules and prohibitions may define the ultimate 'thing' which the Claimant is employed to do, or they may describe the methods which he may or may not employ in accomplishing that ultimate thing." Here, some of Employer's training encourages interaction in dealing with suspected shoplifters. They are designed to regulate employees' conduct while performing job duties. However, leaving the store to pursue a shoplifter and throwing rocks at a vehicle removed Claimant's activity from the realm of his employment as a CSA. Claimant's actions in pursuing a shoplifter were not encompassed within his duties to discourage or limit shoplifting inside Employer's store. Rather than prescribing the method in which Claimant was to perform his job, Employer's policies and training prohibiting the pursuit of shoplifter's outside the store limited Claimant's sphere of employment. Claimant simply acted outside the realm of his employment on September 3, 2022.

20. The directives about not pursuing shoplifters outside the store reflect Employer's intent to cause the cessation of employment even on a temporary basis. By exiting Employer's store, walking into the middle of the parking lot and throwing rocks at the shoplifter's vehicle, Claimant removed himself from the employment relationship. As MW[Redacted] stated, Claimant was not acting within his job duties and violated Employer's policies by throwing objects at the shoplifter outside the store on September 3, 2022. Claimant should have stopped at the exit and let the suspect leave the store. Employer's detailed policies and training, store video, and MW's[Redacted] credible testimony demonstrate that Claimant's injuries while outside Employer's store and throwing rocks at a suspect shoplifter's vehicle occurred outside the sphere of employment. Therefore, Claimant's violation of Employer's instructions governing the sphere of employment severed the causal relationship between his employment and his injuries. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. 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. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).; *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

7. As a general rule, an employer has the right to issue directives concerning what an employee may do, and when she may do it. *In re Eelorriaga*, WC 5-047-389-01 (ICAO, June 19, 2018). In such circumstances the employer's instructions are said to limit

the “sphere” of the employment. *Id.* The employee’s violation of the employer’s instructions governing the “sphere” of employment severs the causal relationship between the employment and the injury, rendering the injury non-compensable. *Bill Lawley Ford v. Miller*, 672 P.2d 1031, 1032 (Colo. App. 1983); *see Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007). Conversely, the violation of rules and directives relating only to the employee's conduct within the sphere of employment do not remove injuries from the realm of compensability. *Bill Lawley Ford* 672 P.2d at 1032. Importantly, the direction “may limit the sphere of the employment relationship, or it may simply regulate the employee’s conduct while he is engaged in such employment.” *Ramsdell v. Horn*, 781 P.2d 150, 152 Colo. App. 1989).

8. There are several factors to be considered in discerning whether a direction has limited the sphere of employment as opposed to only regulating the employees’ conduct. *Nielson v. PXC Denver*, W.C. No. 4-241-772 (ICAO Mar. 5, 1996). The factors include the circumstances under which the directive was given, what the employer intended to prohibit, and the manner in which the claimant interpreted the order. *Id.* The distinction between an employer’s instruction that is sufficient to remove an employee’s activity from the realm of employment and one that is only directed at the “method” of completing a work function is illustrated in 2 A. Larson, *Workmen's Compensation Law* § 33.02 (2013):

> We have here to do with a simple distinction: that between “thing” and “method.” Rules and prohibitions may define the ultimate “thing” which the claimant is employed to do, or they may describe the methods which he may or may not employ in accomplishing that ultimate “thing.” The only tricky feature of this distinction is that it can, by a play upon words, be converted into a contradiction of itself. For example, it seems clear enough that if the claimant’s main job is to lift flour sacks, the raising of the flour sacks is the “thing” for which he is employed. If, in violation of instruction, he rigs up a rope hoist to do the job, it should be clear enough that his departure is merely from the method prescribed.

See Sewald v. Safeway, Inc., WC 5-188-401 (ICAO, Dec. 21, 2022).

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on September 3, 2022. Initially, Claimant worked for Employer as a CSA or cashier. While working behind the cash register on September 3, 2022 Claimant saw his supervisor MH[Redacted] engaged in an altercation with a suspected shoplifter. As Claimant left the register area and approached the altercation, the shoplifter exited the store. Although Claimant stated that MH[Redacted] then asked him to exit the store to obtain the suspect’s license plate number, his testimony was not corroborated and is in direct conflict with Employer’s store policies. Moreover, MW[Redacted] noted that MH[Redacted] never mentioned that she told Claimant to exit the store to take a picture of the shoplifter’s license plate before abruptly resigning after the incident.

Nevertheless, Claimant then followed the shoplifter outside. Surveillance video shows Claimant in Employer's parking lot approaching the suspect's vehicle and throwing rocks at the truck. The shoplifter subsequently struck Claimant with his vehicle.

10. As found, many of Employer's policies permit employees to approach or interact with suspected shoplifter's to deter shoplifting and de-escalate confrontational situations inside Employer's store. Employees are encouraged to greet, make eye contact and offer assistance. The directives in Employer's trainings reveal they were designed to regulate the conduct of employees while performing their job duties and address appropriate behavior in dealing with potential shoplifters inside Employer's store.

11. As found, however, employees are strictly prohibited from leaving store premises to confront shoplifters or obtain license plate information. Claimant acknowledged that he received training and was required to pass quizzes relating to Employer's workplace violence policy, handling confrontational situations, and shoplifting deterrence policy during his employment. Employer specifically forbid employees from leaving the store during a shoplifting incident. In fact, Employer's SoftStop Reference Guide specifies that "no employee is allowed to leave the store premises during the apprehension of a shoplifter." Moreover, Employer's Standard Operating Procedures direct employees to "not leave the store to obtain information about the individual such as a license plate number. If the individual attempts to exit the store, allow him/her to leave as quickly as possible to help ensure the safety of everyone." An employee is simply prohibited from following an individual who is carrying stolen merchandise out the door in an attempt to obtain a license plate number. As MW[Redacted] explained, nothing in Claimant's job duties as a CSA allowed him to exit the store to pursue a shoplifter and throw objects.

12. As found, by exiting Employer's store, walking into the middle of the parking lot and throwing rocks at the shoplifter's vehicle, Claimant removed himself from the employment relationship. Employer's detailed training and instructions regarding exiting the store and obtaining a license plate number limited Claimant's sphere of employment by creating a restriction on the scope of Claimant's job. Employer's directives were specific and reflected a clear intent to limit the sphere of the employment relationship. The training and directives evidenced an intent to cease the employment relationship for a violation. Claimant's actions of exiting Employer's store on September 3, 2022 to obtain a license plate number and throw rocks at a suspected shoplifter's vehicle directly contravened Employer's directives and exceeded the realm of his job duties. By acting outside the scope of employment Claimant severed the causal relationship between his job function and injuries.

13. As found, the present case is distinguishable from *Sewald v. Safeway, Inc.*, WC 5-188-401 (ICAO, Dec. 21, 2022). In *Sewald*, the injury occurred when an employee encountered a shoplifter inside the store, reached for his shopping cart and fell when the shoplifter pulled the cart away. The ALJ in *Sewald* explained that the employer provided the claimant with training about interacting with suspected shoplifters, but the directives did not evidence an intent to cease the employment relationship for a violation. Instead,

the directives in the employer's shoplifting guidelines and training were intended to regulate the claimant's conduct while performing her duties and not to limit the scope of her employment. However, the present case is distinguishable from *Sewald* and provides a bright-line rule for defining the "sphere of employment." Critically, Employer's policies about exiting the premises after a shoplifter are designed to prohibit interaction and promote safety. Once the suspected shoplifter has left the store, employees are not encouraged to approach or interact with the shoplifter, but rather must refrain from pursuit. By the time a suspect has exited the store, deterrence has failed and employees are no longer performing their job duties by pursuing the shoplifter outside.

14. As found, as illustrated in 2 A. Larson, *Workmen's Compensation Law* § 33.02 (2013) cited in *Sewald*, there is a distinction between an employer's instruction sufficient to remove an employee's activity from the realm of employment and an instruction only directed at the "method" of carrying out a work function. Specifically, "rules and prohibitions may define the ultimate 'thing' which the Claimant is employed to do, or they may describe the methods which he may or may not employ in accomplishing that ultimate thing." Here, some of Employer's training encourages interaction in dealing with suspected shoplifters. They are designed to regulate employees' conduct while performing job duties. However, leaving the store to pursue a shoplifter and throwing rocks at a vehicle removed Claimant's activity from the realm of his employment as a CSA. Claimant's actions in pursuing a shoplifter were not encompassed within his duties to discourage or limit shoplifting inside Employer's store. Rather than prescribing the method in which Claimant was to perform his job, Employer's policies and training prohibiting the pursuit of shoplifter's outside the store limited Claimant's sphere of employment. Claimant simply acted outside the realm of his employment on September 3, 2022.

15. As found, the directives about not pursuing shoplifters outside the store reflect Employer's intent to cause the cessation of employment even on a temporary basis. By exiting Employer's store, walking into the middle of the parking lot and throwing rocks at the shoplifter's vehicle, Claimant removed himself from the employment relationship. As MW[Redacted] stated, Claimant was not acting within his job duties and violated Employer's policies by throwing objects at the shoplifter outside the store on September 3, 2022. Claimant should have stopped at the exit and let the suspect leave the store. Employer's detailed policies and training, store video, and MW's[Redacted] credible testimony demonstrate that Claimant's injuries while outside Employer's store and throwing rocks at a suspect shoplifter's vehicle occurred outside the sphere of employment. Therefore, Claimant's violation of Employer's instructions governing the sphere of employment severed the causal relationship between his employment and his injuries. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed. *See Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007) (where ALJ determined that the sphere of employment was limited by the employer's direction to either go home or wait for scaffolding to be repaired and claimant was told not to perform his duties, the claimant's subsequent injuries were not compensable). *Compare Sewald v. Safeway, Inc.*, WC 5-188-401 (ICAO, Dec. 21, 2022) (concluding that, because Employer's direction to employees not to grab or step in front

of a suspected shoplifter's cart was aimed at the method for stopping shoplifter activity, it did not represent an intent to cease the employment relationship); *In re Claim of Eelorriaga*, W.C. No. 5-047-389-001 (ICAO, June 19, 2018) (because the employer's directive prohibiting phone calls while driving constituted an effort to control the claimant's method of carrying out her duties and not a regulation concerning the sphere of employment, her injuries were compensable).

ORDER

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

1. Claimant did not suffer compensable injuries during the course and scope of his employment with Employer on September 3, 2022.

2. It is unnecessary to address whether Claimant was responsible for his termination from employment or committed a safety rule violation.

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: May 8, 2023.

DIGITAL SIGNATURE.

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-213-534-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury at work on July 27, 2022.

2. If Claimant proved he suffered a compensable work injury, did he prove by a preponderance of the evidence that he is entitled to reasonable, necessary and related medical benefits as a result of the alleged injury on July 27, 2022?

3. If Claimant proved he suffered a compensable work injury, did he prove by a preponderance of the evidence that he is entitled to temporary total disability benefits commencing July 28, 2022 and continuing?

FINDINGS OF FACT

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

1. Claimant is a 55 year-old male who worked as a day laborer for Employer. Claimant began working for Employer on July 21, 2022. Employer assigned Claimant to work at [Redacted, hereinafter PW], starting July 21, 2022. PW[Redacted] is a manufacturer of tape products.

2. Claimant's supervisor at PW[Redacted] was [Redacted, hereinafter MS]. MS[Redacted] was responsible for assigning daily tasks to temporary employees, including Claimant. MS[Redacted] testified that some temporary workers were assigned to perform production duties inside the warehouse. Other workers were assigned to work outside, primarily working on tree removal for a fence project. Generally, the temporary employees working outside would cut down trees and throw the branches away.

3. Claimant was assigned to work outside on July 22, 2022. That day, he picked up logs and branches, and threw them into the dumpster.

4. On July 27, 2022, Claimant was assigned to work outside again. This day, however, Claimant and other temporary workers were directed to clear out materials in the back of the warehouse yard. Claimant testified that the yard was full of broken pallets and large rolls of plastic. He further testified that MS[Redacted] was operating a forklift outside to move the heavy broken pallets and rolls of plastic. MS[Redacted] initially testified that he did not "think" there were any large materials out back that needed removing. On cross examination, Claimant showed MS[Redacted] pictures of the property, and this refreshed MS's[Redacted] recollection. (Ex. 3). MS[Redacted] testified that he was indeed operating a forklift outside on July 27, 2022. At some point, MS[Redacted] was needed elsewhere, so he turned the operation of the forklift over to

his brother. Claimant testified that MS's[Redacted] brother was unable to separate the plastic rolls and pallets with the forklift. Claimant tried to assist by sitting on top of the materials and pushing them with his legs to try to separate them. Claimant testified that while doing this, he felt a sensation in his low back and right leg. Claimant continued to work the rest of the day. According to the daily work slips, Claimant began work at 6:00 a.m. that day, and worked 10 hours. (Ex. D).

5. MS[Redacted] testified that on July 27, 2022, Claimant approached him about speaking with "HR" because he was having issues with another employee. He also told MS[Redacted] he would not be available on July 28, 2022, but would return on July 29, 2022. This is consistent with Claimant's testimony that he told MS[Redacted] he would not be back at work until July 29, 2022. Claimant's July 27, 2022, work slip also noted Claimant needed a day sub on July 28, 2022, but he would return on July 29, 2022. (Ex. D).

6. Even though Claimant spoke with MS[Redacted] on July 27, 2022, he did not tell him that he allegedly injured his back working that day. MS[Redacted] testified that there is a procedure in place for reporting injuries. Had Claimant reported any injury to him, he would have recorded this in the comment section of the daily ticket and he would have reported the injury to his safety manager. The ALJ finds that Claimant did not report his alleged injury to MS[Redacted] on July 27, 2022.

7. There is no objective evidence in the record that Claimant contacted Employer on July 27, 2022, to report the alleged work-related injury to his back.

8. Employer's "Job Site Safety" guidelines are set forth in the Employee Handbook. The handbook states Employees are required to wear safety equipment, and to ask the supervisor if additional equipment is needed to perform the job safely. (Ex. 9). Claimant testified he was not provided any safety gear while working at PW[Redacted]. MS[Redacted] confirmed that Claimant was not provided any safety gear because safety gear was not necessary. According to the daily work slips, the only equipment that was necessary to perform the work was a pair of steel toe boots. (Ex. D). There is no objective evidence in the record that Claimant asked MS[Redacted] or anyone at PW[Redacted] for any additional safety equipment at any time while he worked there.

9. The ALJ finds MS's[Redacted] testimony credible, and finds that safety equipment was not necessary, or required, to perform the work at PW[Redacted] that Claimant was assigned to do.

10. [Redacted, hereinafter is JA] is a Machine Operator and line lead at PW[Redacted]. JA[Redacted] testified her duties included organizing workers in the morning, and operating a production machine throughout the day. JA[Redacted] testified that she was responsible for monitoring the work being performed outside, and periodically checking up on the temporary workers.

11. JA[Redacted] testified that she provided supervision and an explanation of duties to Claimant on July 27, 2022. She testified that the temporary employees were cleaning

the back area, removing branches and trees to make room for a new fence. JA[Redacted] testified that she checked on the crew periodically to see if they needed anything and that everyone was okay. JA[Redacted] also testified that Claimant did not tell her about any back pain or injury, and he did not ask her for Aspirin for his back.

12. The ALJ does not find JA's[Redacted] testimony to be credible. As found, on July 27, 2022, Claimant was moving pallets and large rolls of plastic in the back of the warehouse yard, he was not removing branches and trees that day.

13. Claimant testified that about 11:30 a.m., he spoke to "[Redacted, hereinafter AA]" and told her that his back was killing him, and asked if she had any Advil. Claimant questioned JA[Redacted] about him asking her, not AA[Redacted], for Aspirin on July 27, 2022. Although it was unclear who Claimant spoke to, the ALJ credits Claimant's testimony and finds that he asked a female employee at PW[Redacted] for Advil or Aspirin some time on July 27, 2022.

14. Claimant testified that the following day, July 28, 2022, he developed pain from his low back up to his neck with tingling in both legs and feet, and extreme urinary incontinence.

15. Claimant did not return to work at PW[Redacted]. The last day he worked there was July 27, 2022. Claimant testified that he did not like the job and it was "horrible." The ALJ finds that Claimant did not return to work at PW[Redacted] because he no longer wanted to work there.

16. Claimant did not report the alleged July 27, 2022 injury until August 17, 2022. On the "Employee's Report of Injury Form," Claimant marked "yes" to the question "[w]as the supervisor notified about injury." (Ex. C). This is contrary to both Claimant's testimony and MS's[Redacted] testimony. Claimant further wrote that his lower back was injured at 12:00 "while on top of the material I was pushing with my legs to assist forklift driver so the material wouldn't tip over." Claimant selected Concentra as his designated provider.

17. Claimant testified that between July 27, 2022 and August 17, 2022, he stayed home, and this is why it took him a while to report the injury. Claimant further testified he thought his back would improve.

18. There is no objective evidence in the record that Claimant was unable to work because of his alleged back injury.

19. A year prior, in 2021, Claimant injured his back while working out. Claimant testified he was doing squats when he injured himself. In the medical records, the injury is described as the result of Claimant using the leg press machine. The ALJ finds Claimant injured his back in 2021 while working out.

20. Claimant testified that on August 17, 2022, he saw to Ron Rasis, PA at Concentra Medical Center. According to the medical records[1], Claimant told Mr. Rasis that he was injured from repeatedly lifting tree branches and logs, and throwing debris, including large sections of a tree, over a fence. Claimant testified that he did not describe the other mechanism of injury involving the forklift and pushing materials with his legs to Mr. Rasis.

21. Concentra referred Claimant to physical therapy. Claimant completed five of the six physical therapy sessions. Claimant testified that he wanted an x-ray, but Mr. Rasis informed him it was not necessary. Claimant also wanted a cortisone shot, but Mr. Rasis did not feel this was necessary either. Claimant's last visit to Concentra was in August 2022.

22. F. Mark Paz, M.D., conducted an Independent Medical Examination (IME) of Claimant at Respondent's request on November 23, 2022. (Ex. A). As part of the IME, Dr. Paz testified that he examined Claimant, collected a direct history, and reviewed available medical records regarding this claim. Dr. Paz did not take an MRI of Claimant's back. The ALJ finds that Dr. Paz was not required to order an MRI as that was not a part of the IME.

23. Dr. Paz testified that Claimant reported low back pain, mid back pain, neck pain and lower extremity pain, all of which he related to a work incident on July 27, 2022, where Claimant was pushing a "large container" with his legs. Claimant reported developing acute pain that day. Dr. Paz testified that Claimant's description of the mechanism of injury, was inconsistent with the Concentra records and Claimant's reported symptoms. Dr. Paz credibly testified that according to the Concentra records, Claimant developed pain after moving branches and logs, but the pain did not include radicular symptoms or pain in the upper back and neck. Dr. Paz testified that Claimant asserted all the symptoms he described at the IME and documented on the pain diagram were present on the date of injury. (Ex. A) Dr. Paz testified that when Claimant first sought treatment, he only reported low back pain, which Dr. Paz concluded was myofascial. Claimant did not report radicular symptoms until August 29, 2022, well after his initial report of injury.

24. Dr. Paz reviewed the radiology reports admitted into evidence on behalf of Claimant. On June 9, 2021, Claimant had an x-ray of his lumbar spine for his low back pain. And on June 11, 2021, he had an MRI of his lumbar spine. (Ex. 1 pp 27-29). Dr. Paz testified that the imaging showed advanced age-related degenerative changes in Claimant's lumbar spine. He further testified that the imaging also showed a right-sided cyst attached to the facet of the lumbar spine that pushed against the right L5 nerve root. The MRI noted that the imaging was ordered to address low back pain and radicular symptoms.

25. Claimant testified he recovered from his gym injury in 2021 after receiving injections. Dr. Paz testified that the medical records and findings were consistent with Claimant's described mechanism of injury in 2021. He further testified that any injections

[1] Claimant's Concentra records were not offered as exhibits or admitted into evidence. The records were summarized, however, by F. Mark Paz, M.D.

Claimant received were palliative, so the objective degenerative changes of his spine would not go away following injections, but would continue to advance with age.

26. Dr. Paz testified that there are no objective findings in the Concentra records to support Claimant's claim of an acute low back injury at work. He testified that Claimant's symptoms, particularly in the upper back and neck, were not consistent with the mechanism of injury Claimant reported. Dr. Paz further testified it is not medically probable that Claimant experienced an aggravation or acceleration of his low back symptoms from his 2021 non-work injury because Claimant did not report the same radicular symptoms at the outset of his treatment. Dr. Paz credibly testified that the 2021 MRI describes the source of Claimant's ongoing radicular symptoms as the natural progression of his degenerative condition, not the result of Claimant's work at PW[Redacted]. Dr. Paz concluded that Claimant likely had myofascial pain, which does not involve the lumbar spine. The ALJ finds Dr. Paz's opinion to be credible and persuasive.

27. The ALJ credits Claimant's testimony that on July 27, 2022, he was working outside, clearing large pallets and rolls of plastic, and at one point he pushed a heavy object with his legs to try to move it. There is no objective evidence in the record, however, to prove Claimant suffered an injury within the course and scope of his employment.

CONCLUSIONS OF LAW

Generally

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

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

Bodensieck v. Indus. Claim Appeals Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of, or natural progression of, a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question

of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 P.2d at 786; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant's description of his alleged injury was inconsistent. Claimant testified that he injured his back on July 27, 2022 while pushing heavy materials with his legs. But when Claimant went to Concentra on August 17, 2022, he reported that he injured his back by moving branches and logs. This is contrary to Claimant's testimony, and the description of mechanism of injury Claimant provided to Dr. Paz. Claimant also failed to report any alleged injury to his supervisor, MS[Redacted], even though he spoke with MS[Redacted] on July 27, 2022 to discuss an "HR" issue and to tell him he would not be at work on July 28, 2022. Yet, when Claimant reported his injury on August 17, 2022, he asserted that he told his supervisor about his injury. Claimant's description of his alleged injury is inconsistent, and not credible.

Furthermore, Claimant presented no objective evidence from either the Authorized Treating Provider, or his own personal physician to demonstrate he suffered a work-related incident that caused an injury within the course and scope of his employment. Claimant provided radiology reports from 2021 of his lumbar spine. (Ex. 1 pp 27-29). As found, these radiology reports demonstrate that Claimant has a pre-existing degenerative condition. Dr. Paz credibly testified that the imaging showed advanced age-related degenerative changes in Claimant's lumbar spine. He further testified that the imaging also showed a right-sided cyst attached to the facet of Claimant's lumbar spine that pushed against the right L5 nerve root. According to the MRI, the imaging was ordered to address low back pain and radicular symptoms. Dr. Paz testified that the 2021 MRI indicates that Claimant's radicular symptoms are due to a pre-existing condition. Dr. Paz credibly testified that Claimant's pre-existing condition was not aggravated or accelerated by any work incident, because had it been, the radicular symptoms would have been present immediately on July 27, 2022, which they were not. When Claimant reported his alleged injury on August 17, 2022, he only reported lower back pain, not radicular symptoms. As found, Dr. Paz's testimony is credible and persuasive. Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury.

Medical Treatment

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The question of whether the need for treatment is causally-related to an industrial injury is one of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Claimant is seeking an MRI of his back and cortisone shots. As found, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable industrial injury, so Respondents are not liable for any medical treatment.

Temporary Total Disability Benefits

Claimant has the burden of proving entitlement to temporary total disability benefits in the first place. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Temporary total disability benefits are payable if Claimant proves a causal connection between his industrial injury and the temporary loss of wages. As found, Claimant did not suffer a compensable injury, so he is not entitled to temporary total disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work injury.

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

3. Claimant's request for temporary total disability benefits 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: May 8, 2023

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

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on November 1, 2022 on issues that included medical benefits that are authorized and reasonably necessary, and penalties as follows:

> Medical benefits ordered by Administrative Law Judge Nemechek March 3, 2022, and July 6, 2022. Failure to pay Claimant and medical providers pursuant to 7/6/2022 ICAO Order, attached, and failure to make any meaningful attempt to arrange payment. $1000 per day since 8/26/2022. Section 8-43-401 (2)(a), CRS Respondents owe 8% of the amount of wrongfully withheld benefits. Respondents have unilaterally changed PTD benefits payment scheduled without Division or Claimant approval. Respondents owe 8% interest on all late direct deposit payments. Section 8-43-401 (2)(a).

Respondent filed a Response to November 1, 2022 Application for Hearing on December 1, 2022 listing as issues reasonably necessary, authorized and related medical benefits. Respondent also listed an affirmative defense to Claimant's alleged penalties as follows:

> C.R.S § 8-43-304(4) in Claimant has not stated with specificity the grounds on which the penalty is being asserted, therefore, pursuant to C.R.S. § 8-43-304(4), Respondents reserve the right to cure any alleged violation, if any, within 20 days of Claimant specifying the violation; statute of limitations

Respondent also listed under other issues:

> Relatedness; pre-existing injury and/or condition; idiopathic injury and/or condition; Respondents deny any change of authorized treating physician; Respondents deny that the PTD benefits payment schedule has been changed, payments are issued biweekly and have been so issued since September 22, 2020, as such the one-year statute of limitation has run on penalties pursuant to C.R.S. § 8-43-304(5); Respondents properly denied medical treatment consistent with Rule 16; Credits; Offsets; Overpayments; Upon further investigation and discovery of this matter, Respondents may agree to withdraw or add affirmative defenses.

Claimant's exhibits 1 through 8 were admitted into evidence. Also admitted over Respondent's objection were Claimant's Exhibit 9, Exhibit 10 bates 0001-0003 and 0006 (for purposes of a timeline and date documents were exchanged not for the truth of the matter asserted in the body of the email), Claimant's Exhibits 12 through 15, 17 and 18. This ALJ will take judicial notice of Exhibit 16 as part of the Act. Respondent's exhibits A through C and E were admitted into evidence.

On March 30, 2023[1] this ALJ issued an Order noting that the issues for hearing were to be bifurcated and that this ALJ would issue a separate Findings of Fact, Conclusions of Law and Order regarding the issue of authorization of medical benefits in this matter. The parties were granted through April 6, 2023 to provide briefs, post-hearing position statements or proposed orders with regard to the bifurcated authorization of medical benefits issue.

On April 13, 2023 this ALJ issued a Summary Order on the bifurcated issue of authorization of medical benefits determining that selection of authorized provider had passed to Claimant and Claimant selected Dr. Ryan Bozzell. The order was served to the parties on the same day. The Order specified that the parties were required to submit a request for a full order within ten working days of the date of service. Neither party requested a full order pursuant to Section 8-43-215 (1), C.R.S., so the Order issued on April 13, 2023 is final. Claimant's authorized treating provider (ATP) in this matter is now Dr. Bozzell, and any providers within the chain of referral he refers Claimant to are authorized with regard to Claimant's orthopedic, pulmonary and urological problems related to this claim.

STIPULATIONS OF THE PARTIES

At the time of the hearing on March 29, 2023 Claimant withdrew the penalty with regard to late indemnity benefits. This is considered a stipulation of the parties. Therefore both parties agreed to withdraw exhibits related to this issue, Claimant's Exhibit 11 and Respondent's Exhibit D.

Further, Claimant offered to stipulate to the admission of Respondent's Exhibit E, which would not normally be admitted under the Act automatically or without laying a foundation and would be considered hearsay, with the following conditions:

A. That the exhibit be utilized only as a per unit or per line example of fair costs of the items Claimant itemized in Exhibit No. 17, not to represent the total owed to Claimant and only be utilized to calculate the expenses Claimant has had in the past, not for future costs.

B. That Claimant be allowed to testify about her usage of the items enumerated in Claimant's Exhibit 17, including how much she is currently using the items listed and how much she used them in the past as well as how she will be using them in the future.

C. That Claimant will, from the March 29, 2023 hearing forward, obtain receipts of all supplies purchased and submit them to Respondent for payment.

D. That the bills paid by BC[Redacted] be paid in full by virtue of Sec. 8-42-101(6)(a) & (b), C.R.S.

E. That Respondent provide the items listed that Claimant requires and are reasonably necessary or accept the receipt of the costs from Claimant in the

[1] The order was mistakenly dated December 30, 2023 instead of March 30, 2023.

future, reimbursing Claimant the full value of what Claimant has paid out of pocket pursuant to Sec. 8-42-101(6)(b).

This ALJ accepted that Exhibit E is not a document that would normally be admitted into evidence, without the laying of foundation, and notes that Claimant's conditions are reasonable. Respondent neither acquiesced nor provided sufficient arguments supporting an objection to the stipulation.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Respondent failed to comply with ALJ Nemechek's March 2, 2023 Findings of Fact, Conclusions of Law and Order following closure of the appeal process by July 27, 2022.

II. If Respondent failed to comply with the Order, what are the reasonably necessary and related maintenance medical benefits that Claimant or any insurers owed?

III. If Respondent failed to comply with the Order, whether Claimant proved by a preponderance of the evidence that she is owed eight percent (8%) interest on all benefits past due and owing pursuant to Sec. 8-43-401, C.R.S.

IV. If Respondent failed to comply with ALJ Nemechek's March 2, 2022 Order to pay Claimant and medical providers within a reasonable time, whether Claimant proved by a preponderance of the evidence if a penalty is owed pursuant to Sec. 8-43-304 and 8-43-305, C.R.S. and the appropriate penalty, considering the *Demi* test.

FINDINGS OF FACT

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

1. This matter is an adjudicated permanent total disability claim where Claimant was injured in the course and scope of her employment with Employer on July 23, 2015.[2] Claimant was working as an assistant produce manager for Respondent-Employer when she was injured while pulling a pallet of heavy bags of potatoes. The pallet began moving very fast and Claimant was thrown into a set of double doors. Claimant then fell on her back and left hip. Claimant initially received conservative medical treatment care, including physical therapy, injections, and medications. However, she continued to experience pain and urinary incontinence, which worsened over time.

2. Claimant is currently 58 years old and has trouble with mobility, function, and urinary incontinence, in addition to low back pain, left lower extremity radicular problems, breathing problems and chronic pain.

[2] Claimant testified that she had been injured on July 24, 2015 but all three of the prior orders issued by other ALJs as well as pleadings submitted all cite to July 23, 2015 as the date of the injury.

3. ALJ Kimberly Turnbow issued Findings of Fact, Conclusions of Law and Order on June 26, 2017 ordering further neurosurgical evaluation with Scott P. Falci, M.D. Claimant underwent surgery for her low back in 2017 under Dr. Falci. During the surgery her lungs collapsed. Subsequent to the surgery, Claimant developed problems breathing as a consequence of the lung collapse. Claimant also had urinary incontinence as a consequence of her low back injury. ALJ Turnbow specifically found that

> The ALJ is concerned about the possibility of continuing progressive worsening of the urinary incontinence and left leg weakness conditions, and possible right leg weakness and even bowel incontinence as described by Dr. Falci. This ALJ finds and concludes that all reasonable conservative treatment and diagnostics have been exhausted, and is that Claimant's conditions are significant and require urgent care. The ALJ notes that Claimant's description of her urinary incontinence was credible and compelling.

4. ALJ Turnbow ordered that:

> Respondents shall pay for a repeat neurosurgical consultation with Dr. Falci and, if he offers a spinal untethering surgery, Respondents shall pay for all reasonable and related pre-operative, operative, and postoperative expenses, according to the Colorado Fee Schedule, that are related to such surgery.

5. Following ALJ Turnbow's decision, Claimant did, in fact, follow up with Dr. Falci and he performed the untethering surgery. She stated that the low back surgery, while it did not solve all her problems with her lumbar spine or her urinary incontinence, and added additional pulmonary issues, the surgery helped her to stand up straight, when she had been bent over due to the pain for a long time. She explained that the surgery was necessary to stop the progression of nerve damage in the spine, going into her lower extremities and bladder problems.

6. On June 11, 2020 ALJ Glen B. Goldman issued Findings of Fact, Conclusions of Law and Order awarding permanent total disability benefits, and stated that "Respondents shall provide Claimant maintenance medical benefits for her back injury and urinary incontinence." ALJ Goldman noted that Claimant required the following supplies:

. Incontinence pads, extra heavy, two bags per week, since August 2015.
· Periodic visits with Dr. Paulsen who has assumed direct care.
· Wipes, which she has bought herself.
· Urinary pads for the bed, which she has bought on her own.
· Self-Catheterization supplies.
· Oxygen and oxygen supplies.
· Cane which she bought.
· Grabber which she has bought.
· Large ball, small ball, one and 3-pound weights, balancing pad, recumbent bike recommended by her physical therapist.

7. ALJ Goldman noted that "[D]uring her testimony, Claimant asked for a bathroom break, cried several times, and changed chairs because of discomfort." This ALJ noted similar behavior during her March 29, 2023 hearing, as Claimant was uncomfortable, would frequently shift, tear up during testimony and discussion of her claim, and required breaks.

8. In addition to making a finding that Claimant was permanently and totally disabled, ALJ Goldman found that:

> 58. Claimant's urinary incontinence and need for medical treatment for such condition was caused by her work injury when she suffered a contusion to her sacral nerve.
>
> 59. Claimant requires maintenance medical treatment to relieve her from the effects of her work injury and to maintain MMI.
>
> 60. Claimant requires maintenance medical treatment for her back injury and urinary incontinence.

9. On August 25, 2020, Respondent filed a Final Admission of Liability ("FAL") in which it admitted for reasonable necessary and related medical benefits for Claimant's back injury and urinary incontinence pursuant to ALJ Goldman's Order.

10. ALJ Timothy L. Nemechek issued a Summary Order on November 26, 2021 ordering as follows:

> 1. Claimant established by a preponderance of the evidence that she is entitled to maintenance medical benefits under the Colorado Workers' Compensation Act.
>
> 2. Respondents shall provide medical benefits to Claimant required to treat the effects of her work injury and to maintain MMI, pursuant to the Colorado Workers' Compensation Medical Fee schedule. Specifically, Respondent shall pay for the following:
>
> - All medical supplies related to Claimant's urinary incontinence (including catheters, small and large wipes).
> - Oxygen concentrator (reimbursement for expenses previously incurred).
> - CPAP machine and supplies (including cannula, tubing mask/headgear).
> - The walking cane, 4-wheel walker, wheelchair.
> - Exercise equipment (large and small exercise balls, 1 and 3 pound weights, treadmill, exercise bands, balancing pad, and recumbent bike), [reimbursement for expenses previously incurred].
>
> 3. Claimant's request for a one-year gym membership is denied and dismissed.[3]

11. These findings were supported by a letter issued by Dr. Paulsen dated August 26, 2020 which noted that Claimant would require the following items and that Respondent had denied liability for the medical supplies by letter dated October 6, 2020:

> I. Urinary Incontinence Supplies:
> 1. Urinary pads – 2 bags/week
> 2. Wipes – 10 bags/year
> 3. Cloth urinary pads for bed – 8 pads/year

[3] This was denied because Claimant was no longer in the Granby, Colorado area and had moved to New Mexico.

II. Mobility Items:

4. Cane
5. 4 wheel walker
6. Wheelchair
7. Grabber

III. Exercise equipment including:

8. Large exercise ball
9. Small exercise ball
10. One and three pound weights
11. Treadmill
12. Exercise bands
13. Balancing pad
14. Recumbent bike
15. Suction handrails for bathroom
16. Pool therapy access
17. Annual pass to Durango Rec. Center

12. ALJ Nemechek noted that "Counsel for Respondent stipulated to pay for the co-pays of (sic.) incurred by Claimant for urinary incontinence pads totaling $360.00. This Stipulation was accepted by the Court and is made part of this Order." However, Claimant stated that none of the items she listed on the request for reimbursement were part of any reimbursement. Claimant stated that did not receive the $360.00. Further, in examining the medical benefits payment log, no check was issued to Claimant following the date the stipulation was made on November 10, 2020 to the last payment to medical providers on February 28, 2022.

13. ALJ Nemechek specified Dr. Paulsen's testimony that Claimant required supplies for urinary incontinence, assistive devices for mobility and oxygen supplies was persuasive. Further, ALJ Nemechek found Claimant's testimony, that she requires the supplies, persuasive.

14. The hearings before ALJ Nemechek, took place on November 10, 2020. At that time Claimant testified that she had moved to New Mexico. The move was specifically noted in both the Summary Order and the Findings of Fact, Conclusions of Law and Order that was issued by ALJ Nemechek on March 2, 2022. This Order was consistent with his prior Summary Order in listing Respondent's same responsibilities to pay.

15. The process for the hearing before ALJ Nemechek likely started no later than August 2020, as a hearing is generally set between 80 to 100 days. Claimant stated that she had been waiting before this to receive payments without response. She stated that she had been excited to receive ALJ Nemechek's order with the hope that she would get the care and equipment she needed but after the order was issued nothing happened. She felt disappointed and disheartened when nothing happened. She felt emotionally drained by the process and was depressed, though she had good days and bad days. The same was true of her physical abilities, that she has good and bad days. She has had to take money out of her limited grocery budget to get needed supplies that are indispensable, like pads and wipes. Claimant was noted to breakdown on multiple

occasions, and explaining what happened with her hopes of getting some resolution for medical care and reimbursement for items that she required was one of those occasions.

16. Respondent appealed the decision of ALJ Nemechek and a Final Order was issued by the Industrial Claim Appeals Office (ICAO) on July 6, 2022 affirming ALJ Nemechek's decision of March 2, 2022. ICAO noted that Respondent had 21 days to file a Notice of Appeal to the Colorado Court of Appeals. Pursuant to Sec. 8-43-301(10), C.R.S., after July 27, 2022, the right to appeal was closed and the order was final.

17. The Application for Hearing dated November 1, 2022 before this ALJ listed Claimant's address in Farmington, New Mexico and was sent to Respondent's. In Respondent's Response to Application for hearing dated December 1, 2022, Respondent listed Claimant's address in Farmington, New Mexico.

18. At the current hearing Claimant stated that she moved from Granby, Colorado to Farmington, New Mexico, a little over two and one half years ago. She lived in Granby for approximately eight to nine years, where she had worked for Employer. She testified that she was planning to live in Farmington for the foreseeable future. She moved because most of her family lived in New Mexico and she wanted to live at a lower elevation. She explained that she had been using the oxygen machine almost all the time when she lived in Granby and the lower elevation helped her breath easier.

19. But while in Colorado Claimant suffered from pulmonary issues following her 2017 surgery requiring her to use both a CPA machine and an oxygen machine from that time until she moved to New Mexico. She currently continues using her CPA machine nightly but not her oxygen machine as the lower altitude has help significantly. She does, however, continue to keep track of what her oxygen levels are, in case she has to start using the oxygen machine again.

20. After Claimant moved, starting in approximately May 2021, after she last saw Dr. Paulson, she was no longer able to continue with her Colorado treating provider, because Dr. Paulson declined to do telemedicine, especially to prescribe medications long distance or have Claimant travel from New Mexico to Colorado simply to see her treater. Claimant stated that she required a physician that could make the appropriate referrals, including to an orthopedic specialist, an urologist as well as a pulmonologist, to continue appropriate maintenance care.

21. Claimant has been seeing her personal treating provider, Dr. Ryan Bozzell, a family doctor, in Farmington, New Mexico for her conditions, including for her low back and bladder incontinence problems but because he was not designated by Respondent as an authorized medical provider for the workers' compensation claim, Claimant had only seen him in a limited capacity for this claim. Claimant has other conditions which Dr. Bozzell has also addressed, including her rheumatoid arthritis and her ankylosing spondylitis. She has been on Medicare and Medicaid since approximately July 2020, when she moved to New Mexico. Dr. Bozzell is approximately ten minutes from where she has lived for over two years. She has been seeing him for approximately one year. He has been paid by Medicaid and Medicare.

22. This ALJ issued a Summary Order on April 13, 2023 that determined the selection of authorized provider had passed to Claimant and Claimant selected Dr. Ryan

Bozzell. Dr. Bozzell is now Claimant's authorized treating physician as the period to appeal that order has expired making the order final.

23. Since Claimant's July 23, 2015 work related injury to the present, Claimant has had bladder problems and incontinence. This was determined related by ALJ Turbow in her June 26, 2017 order. She specifically stated that "ALJ finds credible and persuasive Dr. Falci's theory that a stretched spinal cord suffered in her fall at work in conjunction with Claimant's low-lying conus explains why Claimant suffers from urinary incontinence and left leg weakness." Claimant has been using pads, cloth wipes, bed pads, cleansing wipes and antibacterial hand wash since that time or shortly thereafter. Further, following the surgery of 2017, claimant had to use catheters and urine bags for approximately 10 months. As found these are all reasonably necessary as previously found by ALJ Nemechek. Respondent is liable for these medical benefits and costs that are reasonably necessary and related to the claim. Claimant's estimate of usage and length of time of use is credible and are laid out below.

24. This ALJ found the price on the receipt Claimant submitted from Walmart as the actual cost Claimant incurred for maximum absorbency pads, which is what Claimant actually uses. (See ALJ Goldman Order of June 2020 listing "[I]ncontinence pads, extra heavy, two bags per week," and Dr. Paulson's letter of August 26, 2020 cited in ALJ Nemechek's Order.) This ALJ also determines that the antibacterial soap was critical to avoid infections and to remain sanitary in light of Claimant having to deal with dirty pads, wipes and accidents caused by the incontinence, including changing wet bedding and clothing. While Claimant may have used this product before her surgery in 2017, she credibly testified that she started using it regularly after her 2015 accident.

25. Claimant purchased a cane for walking, which cost her approximately $20.00, but has since purchased two others. She also bought a four wheel walker from a garage sale for approximately $25.00. Both of these items are shown in the pictures within Claimant's Exhibits. Claimant did not obtain receipts for these items and the costs were approximated. Claimant stated she required the use of these items to allow her to be as functional as possible. Claimant stated that she uses the cane in her home, and the walker when she leaves the house. Her left leg frequently gives out and is notstable so she needs the wheel chair to prevent any further falls. Both the cane and the four wheel walker (not the aluminum two wheel one listed by [Redacted, hereinafter OM) were determined to be reasonably necessary medical benefits related to Claimants injury by ALJ Nemechek. As found, the canes and the walker should be reimbursed to Claimant.

26. It has become more and more difficult for Claimant to get around and she requires a wheel chair that has the outer large wheels so she can operate the chair herself and not have to rely on others to push her around in the chair. When there is a family outing that requires too much walking, she cannot participate because of her inability to be on her feet for long. She showed a picture of the kind of wheel chair she required

(Empower lightweight wheelchair)[4] that was priced at $319.98. As found, this chair is reasonably necessary and related to the July 23, 2015 work injury.[5]

27. Claimant continued to be out of pocket for the cost, which were not covered by her personal insurance, of the oxygen concentrator, which is a large machine that holds 2 liters of oxygen, and CPAP machine. She paid a portion of the oxygen machine, purse and CPAP machine but some of the cost were paid by her prior insurance, BC[Redacted]. She paid $2,185.00, for the oxygen machine and oxygen purse, which have not been reimbursed. She did not contact BCBS to find out how much the insurer paid because they discontinued her insurance since July 2020 and she was no longer a member. In addition, she required the cannulas, used to place the oxygen into her nose, the headset and mask since approximately 2017. This was mentioned by ALJ Goldman in June 2020. She also had a small portable oxygen purse. She used the oxygen concentrator from the time she had her surgery in 2017 continuously while in Granby, CO. She has been able to taper off of the oxygen since moving to New Mexico due to the lower altitude. The oxygen machine, purse and CPAP machine as well as all the necessary supplies are reasonably necessary and related to the 2015 work injury.

28. Claimant continues to use the CPAP machine, which is a machine that provides forced air (but not concentrated oxygen). It helps her breath while sleeping at night. The CPAP machine requires supplies as well, including cannula, mask, headgear, tubing, filters, replacement water chambers and a CPAP cleaner. She has purchased the equipment on her own, except for the CPAP cleaner, which she does not have as she could not afford to purchase the cleaner, which cost $264.99 at Walgreens. The cleaner sanitizes the supplies including the headgear, cannula, and tubing. This is required to keep bacteria and germs from forming on the equipment and supplies. She explained that she runs the risk of infection without the sanitizer and has been operating the machine without cleaning it properly since 2017, sucking whatever forms on the supplies into her lungs. While ALJ Nemechek specifically stated Respondent shall pay for "CPAP machine and supplies (including cannula, tubing/headgear)" he did not specifically address the equipment necessary to keep the CPAP supplies clean. Claimant testified that the cleaner is recommended for use every day. As found, Claimant requires this machine to keep her CPAP equipment clean and sterile for use and avoid any further risks of infections or bacterial overgrowth. This durable equipment is a reasonably necessary medical benefit and related to the July 23, 2015 work injury.

29. Claimant testified that her inability to care for herself as recommended by her prior provider has affected her emotionally and financially. Following the long process of trial and appeal, she continued to be somewhat skeptical that she would have resolution of the issues and finally obtain the funds to purchase those items she has been unable to obtain due to failure of the insurance to provide her with any options. As found, Respondent's failure to take any steps to provide either the equipment itself or the payment for the cost of the equipment is inexcusable.

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[4] There was also a picture of a "Transport chair," which is one that a patient cannot move herself. Claimant credibly testified that this chair was not suitable for her as she would be dependent on others to push her. ALJ Nemechek also found it reasonably necessary and related to the injury.

[5] While there was mention of an electric chair, Claimant stated that she did not require one at this time.

30. Claimant continued to have to make the trip to Denver to see Dr. Paulson, until approximately May 2021, when she had her last appointment in person. Claimant advised that she was informed by Dr. Paulson it was too far for Claimant to be travelling for maintenance care from Farmington, New Mexico to Denver, Colorado. Further, he declined to provide virtual appointments. Lastly, he did not provide a referral to a medical provider in Farmington, New Mexico. It is clear that Respondent provided consistent payments for medical care including for prescription medication by TS[Redacted] through May 7, 2021. Following this date there were only three more payments to TS[Redacted], two for a November 12, 2021 date of service and one for February 11, 2022. No other payments were shown on the payment log and there is no indication that the payment log is incomplete.

31. Claimant stated that she had worked long hours with the assistance of her sister to write all the expenses she had incurred since her injury that had not been paid. She initially submitted spreadsheet to Respondent by early December, 2022.[6] Further, on January 13, 2023 Claimant submitted some receipts and again, prior to trial, Claimant found, after a three to four hour in her storage, several other receipts which were sent to Respondent.

32. Respondent was responsible for the costs of reasonably necessary and related maintenance medical care as previously established by orders issued by ALJ Goldman and Nemechek. Claimant noted that she required additional assistance even when she was treating with the medical providers, which included the alternating use of over the counter Tylenol and ibuprofen. Further, to assist her with pain relief, Claimant obtained Theraworx, a topical pain relief foam. As found Claimant's use of these three products was and is reasonably necessary and related to her July 23, 2015 work related injury.

33. Claimant has been unable to purchase the recumbent bike ordered by ALJ Nemechek because she could not afford the purchase price of $469.99. Given ALJ Nemechek's denial of a gym membership, it was critical for her to receive the exercise equipment needed to maintain her functional abilities, to allow her to lose some weight, and help control pain and depression. She also has to keep up her strength as she needs to be able to keep as mobile as possible for as long as possible. Further, the balancing pad would help her as well. These also were items ordered by ALJ Nemechek to be paid by Respondent and continue to be reasonably necessary and related to the claim.

34. Claimant further paid for the exercise balls, weights, a treadmill, exercise bands, also photographed in the exhibits and listed on her spreadsheet. Claimant paid for this equipment out of her own pocket and requested that Respondent reimburse her, pursuant to ALJ Nemechek's order, without response. For these items alone she is still owed approximately appropriate $342.88.

35. On March 3, 2023 Respondent obtained some of the pricing through OM[Redacted] for multiple of the items which Claimant purchased. The OM[Redacted] pricing was submitted as a spreadsheet of the items with prices. After considering the pricing that OM[Redacted]

[6] As Claimant was unable to pinpoint the exact date, this ALJ will infer it was no later than December 31, 2022.

recalculated, Claimant re-drafted a second spreadsheet which more accurately reflected her expenses.[7]

36. As found, Respondent knew or should have known that Claimant would require continuing medical care.

37. As found, Respondent knew or should have known that they were responsible to pay for the ordered medical benefits listed by ALJ Nemechek. This put the onus on Respondent to comply with the order. There was an order stating that "Respondents shall pay" for the items listed. As further found, the order does not specify that Claimant has to make a claim as she had already made a claim and it was discussed by ALJ Nemechek and ordered.

38. As found, by combining the information that was persuasive and credible from both the Claimant's and OM's[Redacted] spreadsheets as well as considering Claimant's testimony and other receipts in the record, this ALJ makes the reasonable choice to determine the actual cost of past due benefits that Respondent was ordered to pay.

39. This ALJ issued a Summary Order dated April 13, 2023, finding that Respondent knew or should have known that Claimant moved to Farmington, New Mexico as of at least November 10, 2020 tough likely around May 2020. Respondent knew that Claimant required ongoing medical care for her low back, respiratory conditions and her urinary incontinence. Yet, when Claimant moved, they did not designate a provider nor did they pay for any further medical care other than the occasional prescription.

40. As found, Respondent were aware and had notice of the itemized list of medical benefits Claimant required by July 27, 2022 when the appeal process terminated and ALJ Nemechek's order became final. Respondent had knowledge of the items Claimant was requesting as they featured prominently in both ALJ Goldman's and ALJ Nemechek's Final Orders which were found as reasonably necessary medical benefits related to the claim. Respondent failed to comply with ALJ Nemechek's Order to pay the reasonable, necessary and authorized medical care.

41. Respondent shall pay Claimant as follows:

Bladder & Incontinence Supplies

Item description	Price per unit	Amount	Total price
EQUATE OPTION PADS, DISCREET BLADDER PROTECTION LONG LENGTH, MAXIMUM ABSORBENCY; BAG OF 72	$14.34	368	$ 5,277.12
CARDINAL HEALTH DISP DRY WASHCLOTH, 9" X 13.5", WHITE CS/500 (MFR# AT907)	$ 13.10	85	$ 1,113.50
FIBERLINKS TEXTILES INC AMERICARE ULTRA	$13.50	14	$ 189.00

[7] With the exception of the "Handicap Features for her Household," which have not been requested and

were not at issue at this hearing, and reserved for future determination.

WATERPROOF SHEET PROTECTOR WITH HANDLES 34" X 36" TWIN SIZE (MFR# A12605/H)				
BARD ALL PURPOSE RED RUBBER URETHRAL CATHETER 16FR, CASE/100 (MFR# 9416)	$ 82.30	10	$	823.00
URINARY DRAIN BAG MCKESSON ANTI-REFLUX VALVE STERILE 2000ML, VINYL, CS/20 (MFR# 37-2802)	$40.95	10	$	409.50
MEDLINE ALOETOUCH QUILTED PERSONAL CLEANSING WIPES 8 X 12, PK/48 (MFR# MSC263625)	$ 3.58	20	$	71.60
DIAL ANTIBACTERIAL W/ MOISTURIZERS, SCENTED, 7.5OZ (MFR# 2461275)	$ 2.95	144	$	424.80
		Total		**$8,308.52**

Mobility Aids

		Amount	Total price	
CARDINAL HEALTH ADJUSTABLE OFFSET PUSH BUTTON CANE, BLACK (MFR# CNE0014)	$ 22.50	3	$	67.50
FOUR WHEEL WALKER	$25.00	1	$	25.00
MEDLINE EMPOWER LIGHTWEIGHT WHEELCHAIR UP TO 300 LBS. WEIGHT CAPACITY	$319.99	1	$	319.99
CANE HEAVY DUTY REPLACEMENT TIPS	$16.35	14	$	228.90
		Total	**$**	**641.39**

Oxygen Supplies

Item description	Price	Amount	Total Price	
CPAP TUBING	$ 47.13	20	$	942.60
CPAP MASK	$ 115.21	10	$	1,152.10
CPAP HEADGEAR	$ 30.26	10	$	302.60
CPAP FILTERS (EACH FILTER)	$ 2.64	30	$	79.20
CPAP CLEANER	$ 316.14	1	$	316.14
REPLACEMENT WATER CHAMBER	$30.99	10	$	309.90
PORTION PAID BY CLAIMANT OF PURCHASED CPAP MACHINE AND OXYGEN CONCENTRATORS	$2,185.00	1	$	2,185.00
PULSE OXIMERT FINGER TIP	$29.97	1	$	29.97
				$5,317.51

Other Miscellaneous Supplies

Item description	Price			
Large Ball	$24.99	1	$	24.99
Small Ball Set	$27.99	1	$	27.99
Weights - bar bells	$49.95	1	$	49.95
Used Treadmill	$200.00	1	$	200.00
Exercise Bands	$39.95	1	$	39.95
Recumbent Bike	$469.99	1	$	469.99
Balancing Pad	$159.99	1	$	159.99
Ibuprofen (OTC)	$13.70	42	$	575.40
Tylenonl (OTC)	$8.99	28	$	251.72
THERAWORX TOPICAL PAIN RELIEF SPRAY (MFG# AZVTWR08SPH)	$24.50	28	$	686.00
				$2,485.98

Cum. Total	**$**	**16,753.40**

42. Respondent shall pay Claimant the total amount of $ 16,753.40 for those benefits as established by the chart above.

43. Respondent shall pay past due medical benefits to [Redacted, hereinafter BC] for any out of pocket reasonably necessary medical care they may have paid for problems with incontinence and oxygen or lung issues suffered by Claimant related to her July 23, 2015 work injury.

44. Further, as found, Respondent failed to comply with ALJ Nemechek's order, which merits an additional penalty due to the violation of the order to pay. This penalty is deemed to be from July 27, 2022 and continuing until the funds are paid by Respondent to Claimant.

45. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

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

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

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

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

B. Failure to Comply with ALJ Order

Claimant alleges that Respondent failed to comply with ALJ Nemechek's Summary Order on November 26, 2021 and subsequent Findings of Fact, Conclusions of Law and Order of March 2, 2022 wherein he ordered Respondent to pay for, in compliance with the Colorado Workers' Compensation Fee Schedule, certain items he found were reasonably necessary and related to the injury. These items included, but were not limited to, medical supplies related to Claimant's urinary incontinence, oxygen concentrator, CPAP machine and supplies, walking cane, 4-wheel walker, wheelchair, and specific exercise equipment. Some of the items Claimant had already purchased, some had been partially paid by her personal insurance, some of the items required an ongoing recurring purchase and some of the items had not been purchased due to the costly nature of the items.

What is clear is that Respondent neither paid for nor made arrangements to pay for what Claimant paid for, what she could not pay for and/or failed to make arrangements for Claimant's receipt of the items prescribed. Nothing in ALJ Nemechek's order could be confused. He specifically stated that Claimant had established she was entitled to maintenance medical benefits and that "Respondent shall pay for the following items." The use of "shall" here is interpreted as mandatory. Nothing in ALJ Nemechek's order indicated that they only needed to pay for the items if Claimant produced a receipt that Respondent accepted as accurate or reasonable. Nothing in the order noted that Claimant had to purchase the items and then produce the receipts. Neither did the order indicated that Respondent was able to reject the price or value of what Claimant had purchased. In fact, pursuant to Sec. 8-42-101(6)(b) Claimant must be reimbursed the full amount of what she paid.

No persuasive evidence was provided by either party as to the cost of the items listed pursuant to the Colorado Workers' Compensation Fee Schedule or what items were not listed on the Fee Schedule. It is not up to this ALJ to provide those costs and rule on what medical services or items are on the Fee Schedule. However, Claimant either provided a receipt, an estimate of the cost of the item or agreed to the number identified by Respondent on the OM[Redacted] listing, which Respondent tendered as an exhibit of potential costs of the item. Respondent did not state or assert that those per item cost listed on the OM[Redacted] document were in compliance with the Fee Schedule either. However, what is clear from the evidence is that ALJ Nemechek ordered Respondent to pay for items which were reasonably needed to maintain Claimant at MMI and ordered Respondent to pay. Nothing in the evidence indicated that any of the items listed by Claimant in her spreadsheet had actually been paid for previously. In fact, the only statement that indicated that Respondent had paid pursuant to a stipulation of the parties which specifically stated "Counsel for Respondent stipulated to pay for the co-pays of (sic.) incurred by Claimant for urinary incontinence pads totaling $360.00. This Stipulation was accepted by the Court and is made part of this Order." However, Claimant credibly testified that she had not been paid pursuant to the stipulation and Employer's log does not show a payment.

What is patently clear to this ALJ is that Respondent failed to comply with ALJ Nemechek's order once it became final. They did not make the arrangements necessary for Claimant to receive the items or the promised payment. They did not send any inquiries of what Claimant would prefer to happen or make arrangements with Claimant

to pay for the items. They did not provide persuasive evidence that they were in the process of acquiring the items to send to Claimant through a vendor, which is commonly done within the workers' compensation system in cases like these, where Claimant has an ongoing disability that requires frequent refills, like medications, incontinence pads, or equipment. What is clear, is that, pursuant to ALJ Nemechek's order, Respondent had, at the very least, a list of Claimant's ongoing medical need requirements as authored by ATP Paulsen since August 26, 2020. It is inconceivable that Respondent had the list of these items by no later than the hearing of November 10, 2020 and, still, Respondent provided little evidence that they had taken any affirmative steps to procure the items or pay for the items. Therefore, they cannot credibly assert that they had no knowledge of them or not enough time to provide them. This pattern of behavior is a blatant disregard for the Workers' Compensation System and to the Act as it showed that Respondent, had indeed, not given any importance to the ALJ's findings and his order. Claimant has shown by a preponderance of the evidence that Respondent failed to comply with ALJ Nemechek's order when it became final.

C. Reasonably necessary and related medical benefits

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). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000). Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Commission, supra*. When the respondents contest liability for a particular

benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.*

ALJ Nemechek found that multiple items were reasonably necessary and related to the July 23, 2015 work injury. This ALJ also finds those items are reasonably necessary and related to the July 23, 2015 work injury. That includes:

- All medical supplies related to Claimant's urinary incontinence (including catheters, small and large wipes).
- Oxygen concentrator (reimbursement for expenses previously incurred).
- CPAP machine and supplies (including cannula, tubing mask/headgear).
- The walking cane, 4-wheel walker, wheelchair.
- Exercise equipment (large and small exercise balls, 1 and 3 pound weights, treadmill, exercise bands, balancing pad, and recumbent bike), [reimbursement for expenses previously incurred].

This ALJ also determines that the antibacterial soap was critical to avoid infections and to remain sanitary in light of Claimant having to deal with incontinence and is reasonably necessary and related to the July 23, 2015 work injury.

While ALJ Nemechek specifically stated Respondent shall pay for "CPAP machine and supplies (including cannula, tubing/headgear)" he did not specifically address the equipment necessary to keep the CPAP supplies clean. Claimant testified that the cleaner is recommended for use every day. As found, Claimant requires this machine to keep her CPAP equipment clean and sterile for use and avoid any further risks of infections or bacterial overgrowth. This durable equipment is a reasonably necessary medical benefit and related to the July 23, 2015 work injury.

Claimant continued to be out of pocket for the cost, which were not covered by her personal insurance, for the oxygen concentrator, OxyGo (small portable oxygen purse) and CPAP machine in the amount of $2,185.00. She paid a portion but some of the costs were paid by her prior insurance, BC[Redacted]. In addition, Claimant required the cannulas, the headset and mask since approximately 2017. This was mentioned by ALJ Goldman in June 2020. The oxygen machine, purse and CPAP machine as well as all the necessary supplies are reasonably necessary and related to the 2015 work injury. Claimant has shown by a preponderance of the evidence that both Claimant and BC[Redacted] should be paid for the costs listed above.

Claimant credibly and persuasively testified that she required additional assistance to control pain levels, even when she was treating with the medical providers, which included the alternating use of over the counter Tylenol and ibuprofen. Further, to assist her with pain relief, Claimant obtained Theraworx, a topical pain relief foam. As found Claimant has shown it is more likely than not that her of these three products was and is reasonably necessary and related to her July 23, 2015 work related injury.

Claimant purchased some exercise equipment that ALJ Nemechek already found reasonably necessary and related to her injury. What Claimant has not been able to afford on her own is the recumbent bike ordered by ALJ Nemechek because she could not afford the purchase price of $469.99. As found, the exercise equipment needed to

maintain her functional abilities listed in the chart above including the recumbent bike are reasonably necessary and related to the injury.

Claimant has shown by a preponderance of the evidence that Respondent owes Claimant the amount of $ 16,753.40 for those benefits as established by the chart above, which will not be replicated here. Further, Claimant has shown she has continuing needs for ongoing supplies, both due to the incontinence as well as for use of the CPAP machine. Respondent is liable for both past benefits set out in the chart above and ongoing benefits, which Respondent shall send to Claimant through a vendor or Respondent shall pay Claimant at the rate established in the chart.[8]

D. Interest Penalties on Past Due Benefits

Sec. 8-43-401(2)(a), C.R.S. states as follows:

> After all appeals have been exhausted … all … employers shall pay benefits within thirty days after any benefits are due. If any … self-insured employer knowingly delays payment of medical benefits for more than thirty days …, such … employer shall pay a penalty of eight percent of the amount of wrongfully withheld benefits....

Claimant alleges that Respondent owe eight percent interests on all benefits not paid when due, specifically citing to the items that ALJ Nemechek listed as reasonably necessary medical benefits in his final order of March 2, 2022. However, in looking at case law, the Court in *Pena v. ICAO*, 117 P.3d 84 (Colo. App. 2005) provides some guidance. In that case, the Court stated that the ALJ appropriately denied penalties under Sec. 8-43-401(2)(a) for failure to pay benefits timely because Claimant did not submit evidence of medical bills that were not timely paid. *Id.* at p. 90.

Like in the *Pena* case, here, there was no requirement for prior authorization and the insurer did not treat the order as a request for prior authorization by contesting it in accordance with rules that apply to prior authorizations. Further, it is not a situation in which Claimant received treatment, the provider submitted a bill for the treatment, payment was due, and Respondent delayed payment of that medical benefit for more than thirty days after the due date or stopped payment. Sec. 8-43-401(2)(a) does not apply as it does not specifically provide a penalty for Respondent's actions following receipt of the ALJ's decision and Respondent's failure to provide medical benefits in accordance with the order. Claimant established that Respondent failed to comply with the Order issued by ALJ Nemechek and failed to provide the medical benefits Claimant was entitled to pursuant to the Order. The appropriate penalty is pursuant to Sec. 8-43-304, C.R.S. Therefore, Claimant's request for penalties under Sec. 8-43-401(2)(a) is denied.

E. Penalties Due for Violation of an Order

[8] The amounts may be subject to change and either party may request a change in the costs set out in the chart incorporated in this order or challenge the continuing reasonable, necessity of the supplies.

Under Sec. 8-43-304(1), C.R.S. (2022), penalties of up to one thousand dollars per day may be imposed against a party who: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails, neglects, or refuses to obey any lawful order. *Pena v. Indus. Claim Appeals Office,* 117 P.3d 84, 87 (Colo. App. 2004). Further, Sec. 8-43-305, C.R.S. states that "Every day during which any employer … fails to comply with any lawful order of an administrative law judge, … shall constitute a separate and distinct violation thereof."

To determine whether penalties should be imposed under Sec. 8-43-304(1), C.R.S. there is a two-step process, first requiring the ALJ to determine if the employer's conduct violated the Act, a rule, or an order. If a violation occurred, the ALJ must then determine whether the party's actions were objectively reasonable. An ALJ may impose a penalty under Sec. 8-43-304(1) if it is shown that the employer failed to take an action that a reasonable employer would have taken to comply with the order. The employer's conduct is measured by an objective standard of reasonableness. *Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965, 967 (Colo. App. 2003). Different divisions of the Colorado Court of Appeals have reached different conclusions regarding the measure of "objectively reasonable" conduct. Some divisions have concluded that the relevant inquiry is whether the conduct was based upon a rational argument in law or fact, while others have concluded that the question is merely whether the conduct was unreasonable. *See Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97, 100 (Colo. App. 2005) [discussing the two lines of cases]; *Diversified Veterans Corporate Ctr. v. Hewuse,* 942 P.2d 1312, 1313 (Colo.App.1997).

The ALJ also has wide discretion in determining the amount of any penalty. *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014 (Colo. App. 2012). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The penalty should be sufficient to discourage future violations, but should not be constitutionally excessive or "grossly disproportionate" to the violation found. *Colorado Dept. of Labor & Employment v. Dami*, 442 P.3d 94 (Colo. 2019). When assessing proportionality, the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses." *Id*. at 103. The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Actual prejudice or harm to the claimant is relevant but is not dispositive, particularly where the violation is not explained by the evidence. *Strombitski v. Man Made Pizza, Inc*., W.C. No. 4-403-661 (July 25, 2005).

Here, Claimant alleges Respondent failed to comply with ALJ Nemechek's Summary Order dated November 26, 2021 and subsequent Findings of Fact, Conclusions

of Law and Order dated March 2, 2022, wherein the ALJ ordered Respondent to pay, in compliance with the Colorado Workers' Compensation Fee Schedule, for certain items he found were reasonably necessary and related to the injury. This ALJ acknowledges Respondent's right to appeal in this matter and the fact that the ALJ's order was not final until all appeals were abandoned on July 27, 2022. Here, this ALJ was persuaded there was a violation of the Order issued by ALJ Nemechek. Specifically, ALJ Nemechek issued an order that stated that Respondent "shall provide medical benefits to Claimant required to treat the effects of her work injury and to maintain MMI, pursuant to the Colorado Workers Compensation Medical Fee schedule" and that "Respondents shall pay" Claimant for specific items, which he listed in his order.

Respondent argues that they did not pay because Claimant had not provided receipts for the items she was purchasing. However, nothing in the order stated that was required of Claimant, only that "Respondents will be required to reimburse Claimant for said equipment." And even if it implied that some form or proof was necessary, the Claimant's statement alone in sufficient to establish what she paid and what should have been reimbursed to Claimant. Stated another way, Claimant was not required by the ALJ's order to provide a receipt in order to receive reimbursement. The onus here was on Respondent, not Claimant, to make the payment in accordance with the Colorado Workers' Compensation Fee schedule. Respondent's "negligence in failing to take the action a reasonable carrier would take should result in the imposition of penalties..." See *Diversified, supra*, at p. 1313. As found, Respondent failed to take any credible or persuasive steps to even investigate the costs of the items until March 2, 2023 when they obtained the OM[Redacted] listing of items priced. Nothing in counsel's statements or in the evidence presented at hearing clarifying the OM[Redacted] pricing stated that the OM[Redacted] pricing was consistent with the Colorado Fee Schedule. While Claimant's statements clarifying her actual costs of what she had paid for certain items that were not provided by Respondent, was helpful in determining what Claimant is owed, this was not a critical element in determining the reprehensibility of Respondent's failure to comply with ALJ Nemechek's order. Respondent provided no reasonable or appropriate explanation for violating the Order and Respondent's neglect was not objectively reasonable.

Respondent knew what the Summary Order issued by ALJ Nemechek on November 26, 2021[9] stated. They knew what ALJ Nemechek stated in his order of March 2, 2022. Yet they waited until a year later to take any steps whatsoever to investigate the costs. And even when they obtained the OM[Redacted] pricing, still they paid nothing. Had this been a bill that was being disputed by a medical provider, they would have paid what they believed the Medical Fee schedule said and fought about the reasonable costs or discrepancy at a later time. The same would happen if Respondent had received a demand for mileage reimbursement. A reasonable Respondent would have paid what was undisputed and fought over the disputed mileage at a later time. Here, as found, Respondent failed to take any action that a reasonable Respondent would have taken to comply with the order and Respondent failed to act even when they received Claimant's spreadsheet or when they received the OM[Redacted] pricing estimate, by not paying Claimant anything even by the date of the hearing. A reasonable Employer would have paid

[9] Mailed on November 29, 2021.

something, even if it was less than what Claimant paid. Respondent's conduct was objectively unreasonable.

Respondent also argued that Claimant, in fact, obtained some of the equipment and supplies she needed and was not deprived of the needed medical benefits. This argument seems egregious. Claimant credibly testified that she had to set aside funds she would normally use for other household needs, like needed groceries, in order to get some of those supplies she needed. She is forced by that added expense to just sit at home and wait since any extra money has gone towards paying for products and supplies that should be paid for by Employer as part of her ongoing medical benefits. Further, Claimant was not able to obtain some of the essential supplies she does need, such as the CPAP cleaner that keeps the supplies sanitized and lowers her risk of infections or transferring germs into her lungs. Respondent was not the one to supply the funding, Claimant had to do so to her own detriment. This one simple thing, Respondent's failure to pay pursuant to the order, is in violation of the very principles of the Workers' Compensation Act, "to assure the quick and efficient delivery of disability and medical benefits to injured workers." Sec. 8-40-102(1), *supra.* Therefore, Respondent's conduct was objectively unreasonable.

Also as found, Respondent knew or should have known that Claimant required maintenance medical benefits to maintain her at MMI pursuant to both ALJ Goldman's and ALJ Nemechek's orders. The payment log showed that Respondent was consistently making payments for medical care through the time she was no longer able to see Dr. Paulsen. Since then, there were only three payments made to [Redacted, hereinafter TS].[10] However, this showed Claimant consistently required medical care which Respondent stopped providing and/or paying. Claimant cannot be faulted by the fact that she was attempting to handle her medical conditions in any manner she could. Respondent even made a stipulation to make a payment of $360.00 and Respondent did not pay this agreed upon amount. This ALJ finds that Respondent acted reprehensibly in failing to act at all after Claimant moved to New Mexico, first to designate a provider, then not paying the stipulated amount of $360.00 and lastly to provide the maintenance care she required. The Workers' Compensation Act does not prohibit a Claimant from moving from the state of the injury. In this matter, Claimant acted in a reasonable manner given her circumstances, especially considering her continual need for oxygen in Colorado, which she was actually able to ween off of after the move, with the exception of the nightly forced air treatment provided by the CPAP machine. As found, Respondent's conduct was objectively unreasonable.

Next, this ALJ considers the appropriate amount of the penalty to "punish the violator and deter future misconduct." Case law instructs that when assessing proportionality, the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty." The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. Here, the ALJ considers that the failure to act and pay Claimant in accordance with the ALJ's Order significantly limited Claimant's ability to obtain the maintenance care she required to

[10] It is not clear from the log whether the payments were made for medical services before she no longer had access to Dr. Paulson or after, but this ALJ is inferring that it was after. This ALJ also is assuming that the TS[Redacted] benefits was for prescription medications.

maintain MMI, including additional equipment ordered to maintain her functionality. The original Summary Order was issued in November 2021, so Respondent knew or should have known what benefits Claimant was due, and any further delays past the final order of July of 2022 is reprehensible. This has been an extremely stressful situation for Claimant and caused Claimant depression related to Respondent's failure to pay. Respondent failed to provide evidence regarding Respondent's ability to pay, so consideration of this factor is limited. However, this ALJ takes notice that the employer and its' parent company is a large chain store under multiple names and has stores in at least 10 states in the nation when considering their ability to pay. Respondent knew or should have known that the *Dami* test would be applied and they had the opportunity to put on evidence in defense of the penalties issue including ability to pay. This ALJ finds that Respondent not only acted reprehensibly but acted in a manner that showed total lack of regard to the Act and to the ALJ's order and failed to put on a defense to the issue despite the opportunity to do so.

Therefore, it is found and concluded that Claimant proved that Respondent acted objectively unreasonable in this matter. *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999). Claimant proved by a preponderance of the evidence that a penalty is due. As found, Respondent shall pay $150.00 per day for each day's failure to comply with ALJ Nemechek's March 2, 2022 order beginning from the date the Order became final on July 27, 2022 to the present and continuing until paid. As found, from July 27, 2022 to the date of the hearing of March 29, 2023 a 245 day period, penalties owed are $36,750.00. Thereafter, Respondent shall continue to owe ongoing penalties per day until the benefits are paid. As found, this is a penalty that is reasonable (only 15% of the maximum allowed), and not grossly disproportionate to the violation in light of the reprehensible act of Respondent in failing to make any payments in accordance with the order. While this ALJ views Respondent's actions as extremely and objectively unreasonable and reprehensible in failing to act and should merit a $1,000.00 a day penalty for their non-actions, when comparing similarly placed parties in other cases, this ALJ determined that the $150.00 per day may be viewed by any reviewing panel or court as "not disproportionate" to the harm caused to Claimant and Respondent's complete disregard of the order issued and a sufficient penalty to punish Respondent and deter future misconduct. As found, there is no evidence indicating Respondent is unable to pay a penalty that is proportionate to its offense. Based on the degree of reprehensibility of Respondent's conduct, the harm suffered by Claimant, and penalties assessed in comparable cases, the ALJ concludes that a penalty of $150.00 per day is appropriate. The amount of the penalty is more than proportionate to the harm to Claimant and Respondent's disregard for the order issued by the ALJ as well as to punish Respondent and deter this conduct in the future.

ORDER

IT IS THEREFORE ORDERED:

1. Respondent failed to comply with ALJ Nemechek's order of March 2, 2022.

2. Respondent shall pay the past due $ 16,753.40 for the reasonably necessary and related medical benefits itemized in the above chart.

3. Claimant's request for interest on the past due amounts pursuant to Sec. 8-43-401(2)(a) is *denied* and *dismissed*.

4. Respondent shall pay a penalty for failure to comply with ALJ Nemechek's order of March 2, 2022 in the aggregate amount of $36,750.00, and continuing thereafter at the rate of a $150.00 per day until Respondent issues payment to Claimant for the $ 16,753.40 for ordered reasonably necessary and related medical benefits based on the chart shown above. Of the penalties, seventy five percent of the fine shall be apportioned to Claimant and twenty five percent of the fine shall be apportioned to the Colorado Uninsured Employer Fund.

5. Respondent shall either arrange for delivery of the monthly items Claimant requires which have previously been found to be reasonably necessary and related to the July 23, 2015 injury or send a payment based on the chart above on a monthly basis for Claimant's future supplies.

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

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

DATED this 9th day of May, 2023.

Elsa Martinez Tenreiro

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he suffered a whole person impairment to his right shoulder?
- If Claimant did not prove whole person impairment to his right shoulder, what is the proper scheduled rating based on a preponderance of the evidence?
- Did Respondents prove the DIME process is incomplete?
- Did Respondents overcome the DIME's whole person rating(s) by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant works for Employer as journeyman gas fitter, installing and servicing natural gas lines. He has done this work for Employer for seven years. The job is physically demanding and requires heavy lifting, digging, and awkward postures.

2. Claimant suffered admitted injuries to his low back and right shoulder on February 12, 2020. He was walking across a snow-covered area and stepped on a PVC pipe buried in the snow, which caused him to lose his balance and fall onto his right arm and back.

3. Claimant's case is complicated by a pre-injury history of low back and right shoulder issues. He had a two-level lumbar fusion in 2001. The surgery was largely successful, but he was left with chronic left leg radiculitis. The lumbar fusion was the result of a personal health condition and not associated with any work-related injury.

4. On December 23, 2009, Claimant injured his right shoulder while working for [Redacted, hereinafter CT]. He underwent a right shoulder arthroscopy with biceps tenolysis in late-March 2010. Claimant also injured his right hip in the December 2009 accident and had a total hip arthroplasty. Claimant was put at MMI on March 31, 2011, with a combined 13% whole person rating for both injuries. The MMI report is not in the record and no evidence was offered at the hearing to show what portion of the 13% rating, if any, was attributable to the right shoulder.[1]

5. After the February 12, 2020 accident, Claimant treated at Advanced Urgent Care. He was referred to Dr. Michael Hewitt for his shoulder and Dr. Karen Knight for his back.

[1] Some portion of the overall 13% rating was probably for the hip arthroplasty, which is typically assigned at least 20% lower extremity/8% whole person under Table 45 of the *AMA Guides*.

6. Claimant's initial evaluation with Dr. Knight took place on November 30, 2020. He described back pain radiating to the right buttock, with associated numbness and tingling. Recent imaging studies showed postsurgical changes from the prior fusion at L4-S1, and multilevel degenerative disc disease with central stenosis. Dr. Knight recommended lumbar epidural steroid injections (ESIs).

7. Dr. Hewitt performed a right shoulder arthroscopy on December 30, 2020. Dr. Hewitt repaired a supraspinatus tear and debrided the superior labrum.

8. Advanced Urgent Care closed its clinic and Claimant's care was transferred to Dr. Matthew Lugliani at Colorado Occupational Partners. Claimant's first saw Dr. Lugliani on March 9, 2021. He reported ongoing right shoulder and low back pain. The shoulder was tender to palpation, but there was no tenderness or other abnormality on examination of the trapezius, AC joint, or scapula. Dr. Lugliani agreed with Dr. Knight's recommendation for lumbar ESIs.

9. The record contains only two pain diagrams completed by Claimant, dated January 14, 2021 and March 9, 2021. The diagrams are barely legible but appear to show pain limited to the superior aspect of the right shoulder and low back. There is no persuasive indication of neck, trapezius, or scapular pain.

10. At a three-month surgical follow up appointment on March 24, 2021, Dr. Hewitt noted Claimant was making "excellent progress" with PT and taking no pain medication. Examination of the shoulder showed reduced range of motion and strength, but "minimal pain" and "no focal shoulder tenderness."

11. Claimant attended PT from January to early May 2021. On April 7, 2021, the therapist noted Claimant could not perform heavier household chores and yard work, but "all other ADLs have returned to normal." On May 5, 2021, the therapist documented, "Shoulder is not impacting any ADL function." Claimant had his final PT appointment on May 10, 2021. Claimant reported, "overall, shoulder is treating him well. Began 'light duty' work today. Back has been bothering him a bunch." Claimant was seeing chiropractor and a massage therapist for his ongoing low back symptoms. Shoulder strength was normal with all movements. Lumbar range of motion was reduced in all planes. The report makes no mention of any neck, trapezius, or scapular symptoms.

12. Claimant received chiropractic treatment from Dr. Zachary Jipp in April through July 2021. The treatment was primarily focused on Claimant's back. Dr. Jipp's records contain no persuasive evidence of any scapular, trapezius, or neck symptoms related to Claimant's shoulder injury.

13. Claimant also received massage therapy from April through June 2021. The therapist typically worked on Claimant's entire back including his "traps," "lats," and thoracolumbar paraspinal muscles. The therapist repeatedly observed hypertonicity on palpation of Claimant's low back, buttocks, and upper legs. However, there are no similar clinical findings related to the trapezius or latissimus dorsi, such as spasm, trigger points, or tenderness.

14. Dr. Knight eventually performed ESIs at L3-4 and L4-5 in August 2021. The injections resolved Claimant's lower extremity radicular symptoms and reduced his low back pain. At the last documented appointment with Dr. Knight on September 24, 2021, Claimant reported "good days and bad days" but was generally doing well. Lumbar range of motion was limited. Dr. Knight released Claimant to follow up as needed if his back pain worsened.

15. Dr. Lugliani put Claimant at MMI on October 27, 2021. Claimant had "minimal pain" and estimated 95% improvement since the injury. He was working full duty without difficulty. Examination of Claimant's right shoulder showed well-healed surgical sites and no tenderness to palpation. Shoulder and lumbar ranges of motion were reduced in all planes. Dr. Lugliani assigned a 6% upper extremity rating for the right shoulder, which converts to 4% whole person. He also provided a 16% whole person lumbar rating, consisting of 5% under Table 53 and 12% for range of motion. Dr. Lugliani opined, "while apportionment may be indicated in this case, we have no previous medical records to evaluate. Patient does have a history of lumbar fusion." Regarding medical maintenance, Dr. Lugliani recommended one year of follow-up with pain management and repeat injections for flareups. He released Claimant to full duty with no formal restrictions, but stated "patient is aware of his limitations and will interact with them."

16. Claimant saw Dr. Brian Beatty for a DIME on July 20, 2022. Dr. Beatty documented a thorough record review, including extensive pre-injury records. The records include a March 31, 2011 report from the December 2009 injury claim documenting a 13% combined whole person rating for Claimant's right hip and right shoulder. Dr. Beatty provided no breakdown of the rating. Claimant reported he was working regular duty but having some difficulty with shoulder pain with overhead work and reaching away from his body. He also had ongoing low back pain. Claimant was not interested in additional injections because the first set had not produced sustained benefit. Examination of Claimant's low back showed tenderness but no apparent spasms. Lower extremity strength and sensation were normal. The lateral aspect of the right shoulder was tender to palpation. There is no mention of any proximal symptoms or limitations, such as neck, trapezius, or scapular pain. Lumbar and shoulder motion were limited in all planes. The lumbar ROM measurements were internally consistent and valid per the *AMA Guides'* reproducibility criteria.

17. Dr. Beatty agreed Claimant reached MMI on October 27, 2021. He assigned a 21% whole person rating, based on 5% under Table 53 combined with 17% for ROM. He also assigned a 9% upper extremity rating for the right shoulder, which coverts to 5% whole person. Dr. Beatty commented,

> [T]here was a significant difference between my range of motion measurements and Dr. Lugliani's range of motion measurements and therefore I would like to bring the patient back to repeat the range of motion measurements.

18. Dr. Beatty opined apportionment of the low back rating was not appropriate because the prior lumbar fusion was not work-related and "was not independently

disabling at the time of this injury." He opined Claimant required no work restrictions and no maintenance care.

19. After receiving Dr. Beatty's DIME report, the DIME Unit issued an "Incomplete Notice" dated August 12, 2022. Specifically, the Notice indicated Dr. Beatty had (1) miscalculated the percentage rating for lumbar flexion under Table 60, and (2) added the lumbar and shoulder ratings rather than combining the ratings. The Notice made no mention of a follow-up evaluation for repeat ROM measurements.

20. Dr. Beatty issued an amended report correcting the errors identified by the DIME Unit. The corrected final rating was 27% whole person, including 23% for the lumbar spine and 5% whole person for the right shoulder. The amended report was otherwise identical to the first report.

21. On August 19, 2022, the DIME Unit issued a Notice entitled "DIME PROCESS CONCLUDED." The Notice stated, "The Division Independent Medical Examination Unit is in receipt of the sufficient DIME report. The DIME process is now concluded."

22. Respondents filed an Application for Hearing on September 8, 2022 on the issue of PPD to challenge Dr. Beatty's ratings.

23. Dr. John Raschbacher performed a record review for Respondents and testified at the hearing. Dr. Raschbacher opined that Dr. Beatty "wasn't done" with the DIME, and that Claimant should return for repeat range of motion measurements. Dr. Raschbacher testified that the Division's Form WC201 requires the DIME to "Address any impairment rating differences between providers." Dr. Raschbacher explained that the language from the Division indicates this it is a mandatory requirement. Dr. Raschbacher noted that Dr. Beatty tried to address the rating differences, as evidenced by his request for Claimant to return for repeat measurements. He testified, "Dr. Beatty said basically he wasn't finished. [Claimant] should come back. Those are the instructions per the DIME unit." Dr. Raschbacher concluded, "[Dr. Beatty] didn't make an error. . . . Look to the DIME unit for the error."

24. Dr. Raschbacher opined the difference in ROM measurements is not a validity issue, but rather a disparity issue, which must be addressed by the DIME. Additionally, Dr. Raschbacher testified the ROM measurements must "make sense" medically. He went on to question whether Claimant's range of motion measurements were medically appropriate or an accurate depiction of his function.

25. Dr. Raschbacher's opinions that the DIME Unit "erred," and that Dr. Beatty's ROM measurements do not "make sense" are not persuasive.

26. Respondents failed to prove by a preponderance of the evidence that repeat ROM measurements are needed to "complete" the DIME.

27. Respondents failed to overcome the DIME's 23% whole person lumbar rating by clear and convincing evidence.

28. Claimant failed to prove he suffered impairment whole person impairment to his right shoulder.

29. The preponderance of persuasive evidence shows Claimant suffered a 6% scheduled right upper extremity impairment.

30. Respondents failed to prove Claimant's shoulder or lumbar ratings should be apportioned. There is no persuasive evidence to prove the specific rating Claimant received for his previous work-related right shoulder injury. The previous lumbar spine impairment was not work-related and not "independently disabling" at the time of the February 12, 2020 work accident.

CONCLUSIONS OF LAW

A. The DIME is "complete"

Section 8-42-107.2(4)(a)(II) requires the Division to review all DIME reports and determine whether the report contains "any deficiencies." Consistent with this provision, WCRP 11-5(E)[2] provides that "Services rendered by a DIME physician shall conclude upon acceptance by the Division of the final DIME report."

After receiving Dr. Beatty's amended report, the DIME Unit notified the parties the report was "sufficient" and "this DIME process is now concluded." Under the plain language of Rule 11-5(E), the DIME's "services" ended at that time, and the DIME was "complete." Respondents failed to show any "deficiency" that obliged the Division to keep the DIME open and arrange for a follow-up evaluation. Dr. Beatty rated all involved body parts using the proper tables in the *AMA Guides*. He completed all required worksheets and applied the right "math" (*i.e.*, adding or combining components where appropriate). And his rating was based on valid ROM measurements obtained during the DIME. Given the absence of any express provision in the Act, Rules, Level II Curriculum, or Rating Tips requiring a repeat evaluation when the DIME has obtained valid measurements, the decision to accept the DIME report was a reasonable exercise of the Division's discretionary authority to manage the DIME process. Respondents failed to prove by a preponderance of the evidence that the DIME process is "incomplete" pending repeat ROM measurements.

B. Burdens and standards of proof

The DIME assigned ratings for Claimant's lumbar spine and right shoulder. The lumbar spine rating is unquestionably a whole person impairment, which is binding unless overcome by clear and convincing evidence. But the shoulder rating a whole person or scheduled impairment, which has implications for the burden and standard of proof.

Whether a claimant sustained a scheduled or non-scheduled impairment is a threshold question of fact for determination by the ALJ. The heightened burden of proof

[2] Rule 11-5 was amended effective March 2, 2023, and this provision is now found at 11-5(F). No substantive change was made to the text.

that attends a DIME rating applies only if the claimant establishes by a preponderance that the injury caused functional impairment not found on the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the DIME's rating. *Webb v. Circuit City Stores, Inc*. W.C. No. 4-467-005 (August 16, 2002). Although the DIME's opinions may be relevant to this determination, they are not entitled to any special weight on this threshold issue. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) (DIME provisions do not apply to the scheduled ratings).

In light of the foregoing principles, the ALJ has allocated the burdens of proof in the following manner: (1) Respondents must overcome the DIME's lumbar rating by clear and convincing evidence; (2) Claimant must prove by a preponderance of the evidence he sustained whole person impairment to his right shoulder; (3) if Claimant has whole person impairment to his shoulder, Respondents must overcome the DIME rating by clear and convincing evidence; (4) if Respondents overcome the DIME whole person rating, the proper rating is a factual question based on a preponderance of the evidence; (5) if Claimant does not have a whole person impairment, then Claimant must prove the proper shoulder rating by a preponderance of the evidence.

C. Claimant's right shoulder is a scheduled impairment

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). 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). 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).

As found, Claimant failed to prove his injury caused functional impairment beyond the right arm. Claimant's testimony regarding referred pain from his shoulder to his trapezius and neck is not substantiated by other persuasive evidence. Dr. Failinger

documented some proximal findings in his IME, but that was before the surgery performed by Dr. Hewitt. No treating or examining provider documented similar complaints after surgery. Claimant successfully returned to his physically demanding job and requires only minor self-modifications for a handful of tasks. While Claimant may still experience transient trapezius or neck, there is no persuasive evidence those symptoms give rise to permanent functional impairment affecting parts of his body not listed on the schedule.

D. Claimant has a 6% upper extremity impairment to his right shoulder

Permanent impairment ratings must be "based on" the *AMA Guides to the Evaluation of Permanent Impairment* (3d ed. rev. 1991) ("AMA Guides"). Section 8-42-101(3.7). Where, as here, the claimant suffers a purely scheduled impairment, the claimant must prove entitlement to a rating by a preponderance of the evidence. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

MMI is the dividing line between temporary disability and permanent impairment. Section 8-40-201(11.5). Ideally, permanency would be measured and determined on the date of MMI. However, the practical realities of the workers' compensation system make that impossible in many cases. *E.g., Lopez v. Redi Services*, W.C. No. 5-118-981 & 5-135-641 (October 27, 2021). Nevertheless, as a general proposition, and all other factors being equal, measurements taken contemporaneous with MMI probably provide a more accurate assessment of a claimant's impairment at the time of MMI, as opposed to measurements taken many months later.

The preponderance of persuasive evidence shows Dr. Lugliani's 6% upper extremity rating is the most appropriate under the circumstances. Dr. Lugliani completed his rating the same day he put Claimant at MMI. There is no persuasive evidence of any flaw in Dr. Lugliani's measurement methodology, or that Claimant's condition was not fairly representative of his general level of function. The measurements appear valid on their face, and there is no persuasive suggestion of any inconsistency with the *AMA Guides*. Dr. Lugliani selected the proper percentages from the rating tables and completed the worksheets correctly. In the absence of any persuasive reason to prefer a later assessment (such as presumptive weight given a DIME's whole person rating), the measurements taken on the date of MMI are probably the best representation of Claimant's impairment.

E. Respondents failed to overcome the DIME's 23% lumbar rating

A DIME's whole person impairment rating is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing burden also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62

P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc.*, W.C. No. 4-842-550-01 (March 18, 2016).

As found, Respondents failed to overcome the DIME's 23% lumbar rating by clear and convincing evidence. Respondents pointed to no technical flaw in Dr. Beatty's rating methodology or his application of the rating tables and other guidelines. Indeed, Dr. Raschbacher conceded that Dr. Beatty "didn't make an error." Respondents' primary argument is that repeat ROM measurements are necessary to "resolve" a perceived "discrepancy" between Dr. Beatty's rating and the lower rating assigned by Dr. Lugliani. Respondents cited no statue or Rule reflecting this purported "requirement." The only authority Dr. Rasbacher cited is the DIME report template promulgated by the Division (Form WC201).

Dr. Raschbacher's opinion that repeat range of motion measurements were required is not persuasive. A DIME is typically a self-contained, one-time evaluation. In most cases, the rating is based on data obtained at the DIME appointment. However, the *AMA Guides* and Impairment Rating Tips contemplate repeat measurements in limited circumstances, none of which are present here. The *AMA Guides* provide that, "if acute spasm . . . is observed by the examiner . . . the patient must be reexamined in a few days or weeks after the spasm has resolved." *AMA Guides*, § 3.3a, p. 78. The Impairment Rating Tips state that "to invalidate spinal range of motion measurements, due to internal or straight leg validity, or for physiologic reasons, claimants must have two visits". Desk Aid #11 – Impairment Rating Tips (July 2020), p.6 (underlining in original). There is no mention of repeating measurements in any other context.

Dr. Beatty's lumbar ROM measurements are "valid" because they satisfy the *AMA Guides*' "reproducibility" criteria and the straight leg raise test. Dr. Beatty found no muscle spasm or acute flare that would necessitate deferring the ROM measurements to another day. Nor did he opine Claimant was malingering, exaggerating, or otherwise gave less than full effort during ROM testing. There is no indication Dr. Beatty considered the measurements "nonphysiologic." The only alleged "discrepancy" is that the DIME measurements show less motion than those obtained by Dr. Lugliani. The Respondents have pointed to no authority that *requires* repeat ROM measurements where, as here, the DIME obtains valid measurements that are simply different than those obtained by the ATP. Indeed, the hope of obtaining a different rating than given by the ATP is one of the primary reasons parties request DIMEs. Respondents failed to prove Dr. Beatty's 23% spinal rating was highly probably incorrect.

F. Respondents failed to prove apportionment is appropriate

Once the rating physician determines a claimant has a work-related permanent impairment, the question of how to account for any pre-existing impairment is answered § 8-42-104(5) (the "apportionment statute").[3] The current iteration of the apportionment

[3] There have been several iterations of the apportionment statute since 1991. From July 1, 1991 to June 30, 1999, apportionment of PPD was codified in § 8-42-104(2). From July 1, 1999 to June 30, 2008,

statute distinguishes work-related and nonwork-related prior impairments. Sections 8-42-104(5)(a) and (b). If the prior impairment was work-related, the current rating must be reduced by a previous rating involving "the same body part" that resulted in "an award or settlement." In such a case, the prior rating "as established by the award or settlement" is subtracted from the rating for the current injury. Section 8-42-104(5)(a). In cases of prior nonwork-related impairment, the statute only allows apportionment if the prior impairment was "independently disabling" at the time of the subsequent injury. Because application of the apportionment statute hinges on legal issues rather than medical factors, apportionment under § 8-42-104(5) is a factual question for the ALJ's determination under the preponderance standard. *Public Service Co. v. Industrial Claim Appeals Office*, 40 P.3d 68, 71 (Colo. App. 2001).

Respondents failed to prove Claimant's lumbar or shoulder ratings should be apportioned. Although the previous right shoulder impairment resulted in an "award" in a prior workers' compensation claim, there is no persuasive evidence to prove the specific rating. The prior shoulder rating was not offered at the hearing, and the only evidence is the notation in Dr. Beatty's report that Claimant received a combined 13% whole person rating for the right hip and right shoulder. Accordingly, there is no basis to discern the prior impairment "established by the prior award or settlement" as required by § 8-42-104(5)(a).

Additionally, Respondents failed to prove the medical impairment from Claimant's 2001 nonwork-related lumbar fusion was "independently disabling" at the time of the February 12, 2020 accident. The phrase "independently disabling in § 8-42-104(5)(b) invokes the analysis set forth in *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). *Askew* held that "medical impairment" is not synonymous with "disability." Impairment is "an alteration of an individual's health status that is assessed by medical means," whereas disability is assessed by "nonmedical means," and pertains to "an individual's capacity to meet personal, social, or occupational demands." The court held that, "Impairment gives rise to disability only when the medical condition limits the individual's capacity to meet the demands of life's activities." *Id*. at 1337. Dr. Beatty's opinion that Claimant's lumbar spine was not disabling before February 2020 is credible and supported by persuasive evidence in the record. Claimant maintained a physically demanding job without limitation or difficulty for almost two decades after his back surgery. Nor is there any persuasive evidence to show limitation in the performance of avocational activities.

ORDER

It is therefore ordered that:

1. Respondents' request to return Claimant to the DIME for repeat range of motion testing is denied and dismissed.

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apportionment of PPD was codified in § 8-42-104(2)(b). Effective July 1, 2008, apportionment of PPD is governed by § 8-42-104(5).

2. Respondents' request to overcome the DIME's 23% whole person lumbar rating is denied and dismissed.

3. Claimant's request whole person impairment to the right shoulder is denied and dismissed.

4. Insurer shall pay Claimant PPD benefits based on a 23% whole person lumbar rating and a 6% scheduled right upper extremity rating.

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

6. Claimant's request for PPD based on a 9% upper extremity rating is denied and dismissed.

7. Respondents request for apportionment of Claimant's lumbar spine and or shoulder rating is denied and dismissed.

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

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

DATED: May 9, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-215-058-001

ISSUES

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

2. If Claimant established a compensable injury, whether Claimant established by a preponderance an entitlement to medical benefits.

3. If Claimant established a compensable injury, determination of Claimant's authorized treating physician.

FINDINGS OF FACT

1. Claimant works for Employer as a delivery truck driver, delivering seafood products to grocery stores and other customers. Claimant alleges that on August 17, 2022, while making a delivery to a grocery store in Colorado Springs, he sustained an injury to his lower back.

2. Claimant testified that while in the process of making a delivery, he was sorting through boxes of products located in his truck, he moved a box on the floor of the truck using his foot and felt and pain in his lower back, hip, tailbone, and thigh.

3. Claimant has a history of injuries and conditions to his lower back that predate the August 17, 2022 incident. On January 10, 2014, Claimant sustained a work-related injury to his lower back. Claimant's authorized treating provider (ATP) for that injury was John Sacha, M.D., who opined that Claimant had discogenic lower back pain from this injury. He placed Claimant at maximum medical improvement (MMI) for that injury on July 23, 2014, and assigned a whole person impairment of 11% due to his injury. However, he also noted that Claimant had a non-work-related condition -- diffuse idiopathic skeletal hyperostosis ("DISH") -- which also contributed to Claimant's loss of lumbar range of motion. Consequently, Dr. Sacha ultimately assigned Claimant with a 5% whole person impairment for his work-related lumbar radiculopathy. (Ex. 6)

4. Claimant returned to Dr. Sacha on September 25, 2019 reporting he had a flare of pain in his lower back and right buttock after riding in a truck that bounced. Dr. Sacha opined that Claimant sustained a minor aggravation of his pre-existing work-related lumbar discogenic pain, but remained at MMI. (Ex. 6). Claimant's symptoms continued for several months, and he received a lumbar epidural steroid injection (LESI) on November 21, 2019. (Ex. F).

5. On December 10, 2019, Dr. Sacha examined Claimant and noted he received excellent relief from the LESI, and was nearly back to his baseline pain level. (Ex. G).

6. Claimant next saw Dr. Sacha on February 3, 2020, when he reported minimal back pain. Dr. Sacha noted some lumbar spasms, and pain with straight leg raise, and diagnosed Claimant with lumbosacral radiculopathy. Dr. Sacha discharged Claimant with instructions to comply with a home exercise program, and to return on an as-needed basis. (Ex. 6)

7. Claimant returned to Dr. Sacha on October 16, 2020, noting a "slight flare" of pain in his low back and buttocks. Dr. Sacha documented an equivocal straight leg raise test, lumbar paraspinal spasms, and diminished thoracic and lumbar range of motion. He provided Decadron and recommended Claimant return in one year. (Ex. 6)

8. Claimant's next documented lower back examination was on February 22, 2022, when he saw Dr. Sacha. At that time, Claimant reported low back pain (right greater than left), right hip pain, bilateral buttocks pain, and bilateral shoulder pain. No radiating pain was documented. Claimant reported that his pain had been worse over the previous six months. He recommended x-rays of Claimant's lumbar spine and hips to evaluate a diagnosis of ankylosing spondylitis of the lumbosacral region. (Ex. J).

9. Dr. Sacha saw Claimant again on March 8, 2022. At that visit, Dr. Sacha indicated Claimant's x-rays demonstrated "ongoing worsening of his spinal osteophyte bridging" and mild osteoarthritic changes in the bilateral hips. These findings were attributable to Claimant's DISH or ankylosing spondylitis diagnoses. On examination, he noted pain with straight leg and neural tension testing. He also indicated Claimant's back and buttock pain was reproduced with extension and rotation to the right. Dr. Sacha recommended Claimant undergo medial branch blocks for his lumbar spine, and a steroid injection for his hips. (Ex. K & L).

10. On April 14, 2022, Dr. Sacha performed medial branch blocks on the right side at L3-4, L4-5, L5-S1 and S1-S2, and bilateral hip injections. (Ex. M). On April 26, 2022, Claimant reported improvement in his lower back and hips. Dr. Sacha recommended proceeding with a radiofrequency ablation, but Claimant decided not to undergo the procedure noting that he had significant reduction in his hip pain with the injections. (Ex. N).

11. Claimant's next documented medical treatment was on August 17, 2022, when he saw Gary Childers, M.D. at Aviation & Occupational Medicine. Claimant reported that when he was unloading his truck that morning, he turned to the right exit his truck and had a sharp pain from the right side of his tailbone radiating to the right lateral hip through the posterior thigh. Claimant advised Dr. Childers of his 2014 injury and his treatment with Dr. Sacha and that Dr. Sacha had performed lumbar injections in April 2022. Dr. Childers examined Claimant, finding a positive straight leg test on the right without radiation, and tenderness in the lower back, buttock, flank, and right hip. X-rays were negative for acute findings. He diagnosed Claimant with a sprain of the lumbar spine and pelvis and radiculopathy. He further opined that Claimant's condition was more likely than not work-related. Dr. Childers placed claimant on modified duty, and referred him to Dr. Sacha. (Ex. 9).

12. Claimant followed up with Dr. Childers on August 19, 2022, with no significant changes. (Ex. 9).

13. On August 22, 2022, Claimant saw Jennifer Voag, P.A. and/or Michael Ladwig, M.D.,[1] at Aviation & Occupational Medicine, and reported continued burning and stabbing pain and tingling in his right hamstring that stopped at the knee. Claimant advised Ms. Voag of his April injections, and indicated he had no symptoms until the August 17, 2022 injury. Claimant requested to see a different specialist than Dr. Sacha. Ms. Voag ordered a lumbar MRI to rule out internal derangement as a cause of his radicular symptoms, and referred Claimant to Nicholas Olsen, D.O, for evaluation. (Ex. 9).

14. An MRI was performed on August 25, 2022, and was interpreted as showing progressive degenerative changes combined with congenitally short pedicles and dorsal epidural lipomatosis resulting in high-grade spinal stenosis at L2-5. The MRI also showed "progressive disc bulges" at each level with facet arthropathy at L2-3 through L4-5. (Ex. R).

15. On August 29, 2022, Claimant saw Dr. Olsen. Claimant described the mechanism of injury to Dr. Olsen as occurring when was turning to the right, while unloading his delivery truck, without lifting anything. Claimant reported pain in his right lower back, and right buttock radiating toward the thigh. Dr. Olsen found negative straight leg raises for radicular pain, and increased right lower back pain with facet loading. He diagnosed Claimant as sustaining a lumbar sprain/strain injury on August 17, 2022. Dr. Olsen also opined that Claimant did not sustain a work-related injury and that "it was more likely that his symptoms have returned after his successful injection in April." He indicated that "a simple turn to the right and having the onset of severe pain is not characteristic of an injury. It is more likely that his symptoms have returned after his successful injection in April." Dr. Olsen opined that he was unable to identify a specific work injury that "would qualify as a distinct and separate work injury." He recommended Claimant return to Dr. Sacha for treatment including repeating the April 2022 injection, under his commercial insurance and outside the workers' compensation system. (Ex. 10).

16. On September 6, 2022, Claimant saw Ms. Voag and/or Dr. Ladwig again but was no examined. Dr. Ladwig discharged Claimant from his care based on Dr. Olsen's opinion that Claimant's condition was not work-related and recommendation that Claimant return to Dr. Sacha "for continued management of his pain outside the workers' comp system." Dr. Ladwig placed Claimant at maximum medical improvement (MMI) with no maintenance care, and provided no further care to Claimant for his August 17, 2022 injury. (Ex. 9).

17. Claimant returned to Dr. Sacha on September 20, 2022, reporting pain in his low back, buttock, and thigh, all on the right side. Claimant's description of the mechanism of injury was consistent with his testimony at hearing, but different than his reports to other physicians. Dr. Sacha opined that Claimant's leg symptoms were new, and that he had

[1] The record is unclear whether Claimant saw Dr. Ladwig at this visit. Claimant testified he saw Ms. Voag several times and saw Dr. Ladwig twice.

not had any for more than one year. He recommended that Claimant have a one-time lumbar epidural on the right at L4-5, and if the result was diagnostic, he believed it would be a work-related injury and aggravation of his pre-existing problem. He opined that if the steroid injection was not diagnostic, then the problem would not be work-related, and presumably a result of his DISH diagnosis. He also provided Claimant with an oral steroid, Decadron. (Ex. 11).

18. Claimant returned to Dr. Sacha on October 4, 2022, who noted Claimant received some temporary relief from the oral steroid. Dr. Sacha indicated he had reviewed Claimant's medical records from Dr. Olsen and opined that Claimant sustained a work-related injury that was discogenic or radicular in nature, or, at a minimum, a flare up of a preexisting problem. As of October 4, 2022, Claimant had not undergone the lumbar epidural injection Dr. Sacha recommended on September 20, 2022. (Ex. 11).

19. Claimant testified that he underwent a transforaminal injection on the right side at the L4-L5 level on October 27, 2022. He testified that the injection resulted in some lasting relief, although it took a few days. No medical record of the October 2022 injections was offered or admitted into evidence.

20. On December 16, 2022, Claimant saw Lawrence Lesnak, D.O., for an independent medical examination at Respondents' request. Dr. Lesnak opined that Claimant did not engage in any activity on August 17, 2022 that would have caused an injury to his lumbar spine or pelvis, or aggravation of any preexisting pathology. He stated "there is no medical evidence to support that [Claimant] has any medical diagnosis or sustained any type of injury whatsoever that would in any way pertain to his reported occupational incident of 08/17/2022." He opined Claimant's did not have any objective evidence of injury and that his subjective symptoms were "merely symptoms from his ongoing chronic symptomatic lumbar spine/pelvic pathology that has apparently been present since 01/2014." He opined that any medical treatment Claimant received would be unrelated to his work incident on August 17, 2022. (Ex. U). Dr. Lesnak testified at hearing and was admitted as an expert in physical medicine and rehabilitation. His testimony was consistent with his December 16, 2022 report.

21. Dr. Lesnak's statement that Claimant had "ongoing" lumbar symptoms since January 2014 is incorrect. The medical records demonstrate that Claimant did not have "ongoing" symptoms, but did have periodic exacerbations. Claimant had no documented treatment from June 2014 through September 2019, or from October 2020 until February 2022. Following the medial branch blocks in April 2022, Claimant did not have any documented treatment or symptoms until August 17, 2022. The records demonstrate Claimant's symptoms were not "ongoing" on August 17, 2022. Moreover, Claimant's admitted medical records do not document any pain radiating into his right thigh prior to August 17, 2022. The ALJ finds that Dr. Lesnak's opinion is neither credible nor persuasive.

22. Dr. Olsen testified through deposition and was admitted as an expert in physical medicine and rehabilitation. Dr. Olsen testified that when examined on August 26, 2022, Claimant had "a lumbar sprain/strain/maybe muscular." He also testified that Claimant did

not sustain a work-related injury on August 17, 2022. Dr. Olsen indicated Claimant had no clinical symptoms of a lumbar radiculopathy when he examined him, based on his review of records, it is more likely Claimant's post-August 17, 2022 pain was from his hip than from his back, although he did not evaluate Claimant's hip at his examination. Dr. Olsen testified that DISH is a condition of the thoracic, and not the lumbar spine, and that Claimant has congenital stenosis of his lumbar spine, independent of DISH. With respect to the Claimant's MRI, Dr. Olsen testified that a comparison of prior MRIs would be necessary to determine whether Claimant's lumbar spine pathology had progressed, or if he had new pathology after August 17, 2022. Dr. Olsen opined that Claimant's symptoms had been waxing and waning for years, and the waxing and waning of symptoms was consistent with Claimant's MRI.

23. Dr. Sacha testified through deposition in lieu of live testimony and was admitted as an expert in physical medicine and rehabilitation. Dr. Sacha testified that Claimant had discogenic pain and also facet-based pain before August 17, 2022. He testified that Claimant's original discogenic pain was related to his 2014 injury, and the facet-based pain was related to his DISH diagnosis. Dr. Sacha testified that by the time he saw Claimant in 2021, his pain was not discogenic, and was facet-based, and that Claimant had no evidence of discogenic pain after 2021. He testified that the medial branch blocks in April 2022 were to address facet-based pain caused by DISH. He indicated that when he examined Claimant in September 2022, Claimant's pain was predominantly discogenic pain, which he believed was related to the August 17, 2022 injury. Dr. Sacha indicated that the Claimant's relief from the October 2022 L4-5 injections demonstrated that the Claimant's pain was discogenic in nature, and not related to his DISH diagnosis.

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. *Univ. 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).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury arising from the course of his employment with Employer on August 17, 2022. The evidence demonstrates that, although Claimant has preexisting back conditions, he was symptom-free for approximately four months before August 17, 2022, and had not seen a health care provider for back pain since April 2022. Moreover, when Claimant saw Dr. Childers, and thereafter, he reported pain radiating into his right thigh, which he had not previously reported. Regardless of the later inconsistencies in Claimant's description of the mechanism of injury, Dr. Childers initially found Claimant's injury to be work-related, based on Claimant's report of sustained an injury while turning to the right. Dr. Olsen also opined that Claimant sustained a lumbar sprain/strain on August 17, 2022. He also opined, that Claimant sustained no work-related injury, but offered no cogent, credible explanation for this inconsistency. Dr. Ladwig did not express any independent opinion that Claimant's injury was not work-related, and instead reiterated Dr. Olsen's opinion. Dr. Olsen and Dr. Lesnak each determined that the mechanism of twisting or turning was insufficient to cause an injury or aggravation of a preexisting condition. The ALJ does not find these opinions credible or persuasive. As found, Claimant has a history of lower back and hip pain that was prone to exacerbation. Claimant was not experiencing ongoing symptoms in the months before August 17, 2022, when the symptoms returned while Claimant was performing work for Employer. Dr. Olsen's and Dr. Lesnak's opinions imply that on August 17, 2022, Claimant's then-asymptomatic preexisting conditions became symptomatic by coincidence, and independent of any work-related activity. The ALJ does not find these opinions persuasive.

The ALJ finds it more likely than not that Claimant's work-related activities caused an aggravation of his preexisting conditions. As such, Claimant has established that it is more likely than not he sustained 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 sustained a compensable injury, he is entitled to reasonable and necessary authorized medical treatment to cure or relieve the effects of his injury.

Authorized Treating Physician

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). “The insurer’s right to select the treating physician contemplates the insurer will appoint a physician willing to treat the claimant based on the physician’s best medical judgment. *Dover v. Ameriserve Food Distrib.*, WC No. 4-451-332 (ICAO Sept. 27, 2002). “Consequently, if the designated treating physician refuses to provide medical treatment for non-medical reasons, the insurer must designate a new treating physician or the right of selection passes to the claimant,” and the physician selected by the claimant is authorized. *Id*., *see also Garcia v. McDonald’s Corp.*, WC No. 4-862-853-01 (ICAO Jan. 2, 2014); *Davis v. Interstate Brand Corp.*, WC No. 4-291-678 (ICAO May 17, 1999). The insurer’s obligation to appoint a new treating physician arises forthwith upon notice that the previously designated physician has refused to treat. *Dover, supra*. Whether the ATP has refused to treat the claimant for non-medical reasons is a question of fact for the ALJ. *Rubyal v. Univ. Health Sciences Ctr.*, 768 P.2d 1259 (Colo. App. 1988).

On September 6, 2022, Claimant’s ATP, Dr. Ladwig discharged Claimant and declined to provide further medical care based on Dr. Olsen’s opinion that Claimant’s need for further treatment was not work-related. Both Dr. Olsen and Dr. Ladwig indicated that Claimant may require further treatment, and indicated that Claimant should seek that treatment from Dr. Sacha outside the workers’ compensation system. The decision to decline treatment was not medical in nature, but on Dr. Olsen’s opinion concerning legal issues of compensability and causation. *See e.g.*, *Dover v. Ameriserve Food Distrib.*, W.C. No. 4-451-332 (Mar. 12, 2003); *Garcia, supra*; *Davis, supra*. Dr. Ladwig’s report includes a notation that it was received by Respondents’ counsel on October 27, 2022, from which the ALJ infers that Respondents either knew, or should have known, that Dr. Ladwig had declined to provide further treatment. Respondents were, therefore, under the obligation to appoint a new ATP “forthwith,” and did not do so. Consequently, the right of selection passed to Claimant, and Claimant selected Dr. Sacha as his ATP. Claimant has satisfied his burden of establishing that Dr. Sacha is his ATP.

ORDER

It is therefore ordered that:

1. Respondent sustained a compensable injury to his lower back on August 17, 2022.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant’s August 17, 2022 industrial injury.

3. Dr. Sacha is Claimant’s authorized treating physician.

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: May 9, 2023

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the left knee surgery performed by Dr. David Elfenbein on October 20, 2022, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted February 2022 work injury.

FINDINGS OF FACT

1. The claimant is employed with the employer at the [Redacted, hereinafter GN]. The claimant's job duties include checking-in airline passengers, weighing and tagging luggage, assisting with boarding, and related activities. This airport has a busy period during ski season, which typically runs from December to April. During ski season, passengers will often have larger and heavier bags containing ski equipment.

2. While performing her normal job duties on February 22, 2022, the claimant noted that she was experiencing pain in her left knee. The claimant noted this pain developed and worsened when she would lift luggage from the scale, and turn to place it on a conveyor belt behind her work station.

3. This conveyor belt was a new and temporary arrangement during construction at the airport. Prior to the placement of this conveyor belt, employees would not lift and place luggage on a belt. Rather, after a bag was weighed, the passenger would place the bag through a door. From there an employee with [Redacted, hereinafter TA] would handle the luggage for boarding.

4. The placement of the temporary belt was very close to the work station. The claimant testified that due to the narrow space, it was necessary to pivot on her left leg as she lifted and turned with the bags. This resulted in the development of pain in her left knee. The claimant communicated her concerns about the placement of the belt in an email to her supervisor, [Redacted, hereinafter ES], on February 22, 2022.

5. After February 22, 2022, the claimant attempted to work through this left knee pain, however, the pain did not improve. On March 23, 2022, the claimant emailed ES[Redacted] and stated: "Last month I mentioned to you I was struggling with bags and I still am. In addition what was originally just soreness has turned into a full blown injury. My knee is swollen and I can't bend it and I have numbness in both legs and feet." Following this email, the claimant was instructed to complete an OJI Incident Report.

6. On March 23, 2022, the claimant completed the requested report. The claimant specifically noted "since the new baggage belt has been installed I have had to twist and lift baggage sometimes exceeding 60 [pounds] [onto] the belt in a confined area." She also noted that she initially had soreness that would go away, "but now I have a constant pain, swelling and limited movement in my knee."

7. Thereafter, the claimant began treatment with Bonnie Strickland, FNP as her authorized treating provider (ATP). Nurse. Strickland recommended physical therapy. When the claimant's symptoms did not improve, on April 27, 2022, Nurse Strickland referred the claimant for an orthopedic consultation. In the medical record of that date, Nurse Strickland opined "although a pre-existing condition, her symptoms were exacerbated by the new requirement to move luggage."

8. On May 4, 2022, the claimant was seen for an orthopedic evaluation by Dr. David Elfenbein. In the medical record of that date, Dr. Elfenbein noted that the claimant had experienced two months of left knee pain since experiencing a twisting injury. At that time, the claimant's left knee symptoms included aching, stabbing, clicking, popping, numbness, and tingling. On examination, Dr. Elfenbein noted that the claimant's left knee had mild effusion, and medial joint line tenderness. Dr. Elfenbein opined that the claimant had suffered a tear of the medial meniscus. At that time, he ordered magnetic resonance imaging (MRI) of the claimant's left knee.

9. On May 31, 2022, the claimant underwent the recommended left knee MRI. The MRI showed a mildly displaced horizontal cleavage tear of the medial meniscus body, and scattered high-grade degenerative changes involving all compartments.

10. On June 3, 2022, the claimant returned to Dr. Elfenbein to discuss the MRI findings. Dr. Elfenbein noted that the claimant had an undersurface posterior medial meniscus tear with mild arthritic changes. Dr. Elfenbein also noted some subchondral edema and cyst formation. On that date, Dr. Elfenbein recommended that the claimant undergo four weeks of physical therapy.

11. On July 6, 2022, Dr. Elfenbein continued to recommend physical therapy. He specifically noted "I am not recommending a surgical intervention at this time, this may be recommended or necessary in the future to alleviate or treat this condition, especially if conservative measures fail or the condition continues to progress or worsen."

12. On July 29, 2022, the respondents filed a General Admission of Liability regarding the claimant's injured left knee.

13. On August 3, 2022, the claimant returned to Dr. Elfenbein. On that date, the claimant reported continuing left knee pain with little improvement from physical therapy. Dr. Elfenbein recommended that the claimant undergo surgery to her left knee. Specifically, Dr. Elfenbein recommended a left partial meniscectomy.

14. At the request of the respondents, Dr. Timothy O'Brien conducted a review of the claimant's medical records. In a report dated September 15, 2022, Dr. O'Brien opined that the claimant did not suffer a left knee injury at work in February 2022. With regard to the recommended left knee surgery, Dr. O'Brien opined that the surgery would fail, cause an increase in pain, and aggravate the arthritic condition in the claimant's left knee. In support of his opinions, Dr. O'Brien noted that the claimant did not report a specific incident that resulted in her left knee pain. Dr. O'Brien also noted that the claimant did not immediately seek treatment of her left knee and the MRI findings demonstrate chronic and long-standing degenerative conditions in the claimant's left knee.

15. The respondents relied upon the opinions of Dr. O'Brien and denied authorization for the requested left knee surgery.

16. Following the respondents' denial, the claimant elected to undergo the recommended left knee surgery. On October 20, 2022, Dr. Elfenbein performed a left knee diagnostic and surgical arthroscopy with partial medial and lateral meniscectomies and chondroplasty of the patella trochlea. This surgery was paid for by the claimant's private insurance, [Redacted, hereinafter RP].

17. On February 13, 2023, Dr. Elfenbein authored a letter regarding the claimant's need for left knee surgery. In that letter, Dr. Elfenbein noted that a twisting injury is an extremely common mechanism of meniscal tearing. Dr. Elfenbein stated his opinion that the claimant suffered an acute left meniscal tear. Dr. Elfenbein noted that the medial meniscal tear was complex, which indicates some chronic component. Dr. Elfenbein also noted that during the surgery there was significant synovitis, which also suggests "an acute or subacute component to that tear." Although Dr. Elfenbein agrees with the medical literature identified in Dr. O'Brien's report, it is Dr. Elfenbein's opinion that those studies do not apply to the claimant's left knee condition.

18. Dr. O'Brien's testimony was consistent with his written report. Dr. O'Brien testified that it continues to be his opinion that the claimant did not suffer a work injury. Dr. O'Brien also testified that the type of surgery performed by Dr. Elfenbein on the claimant's left knee should never be performed on an individual with osteoarthritis.

19. The claimant testified that prior to feeling pain in her left knee at work in February 2022, she did not experience pain in her left knee. The claimant further testified that since the surgery in October 2022, she has significantly less pain and improved range of motion. The claimant testified that since the surgery her left knee has "improved tremendously".

20. The ALJ credits the medical records, the claimant's testimony, and the opinions of Dr. Elfenbein and Nurse Strickland over the contrary opinions of Dr. O'Brien. The ALJ finds that the claimant has demonstrated that it is more likely than not that the left knee surgery performed by Dr. David Elfenbein on October 20, 2022, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted February 2022 work injury. The ALJ finds that the pre-existing condition in the

claimant's left knee was aggravated and accelerated by her February 2022 injury, resulting in the need for the surgery performed by Dr. Elfenbein.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left knee surgery performed by Dr. David Elfenbein on October 20, 2022, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted February 2022 work injury. As found, the medical records, the claimant's testimony, and the opinions of Dr. Elfenbein and Nurse Strickland are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the claimant's left knee surgery performed by Dr. Elfenbein on October 20, 2022.

Dated May 10, 2023.

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

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-208-346-002

ISSUES

I. The parties seek an order accepting the stipulated facts and allocating dependency benefits at this time evenly between Decedent's three minor biological children, Dependent-Claimants [Redacted, hereinafter CF], [Redacted, hereinafter JG], and [Redacted, hereinafter KF].

STIPULATIONS

The parties entered into stipulated facts as follows:

1. Alleged Dependent-Claimant [Redacted, hereinafter MG] is not a dependent of Decedent under the Act;
2. Alleged Dependent-Claimant [Redacted, hereinafter AA] is not a dependent of Decedent under the Act;
3. Alleged Dependent-Claimants JG[Redacted], JG[Redacted], and KF[Redacted] are dependents of Decedent entitled to dependency benefits under the Act;
4. Dependency benefits should be allocated evenly between Decedent's three biological children, each of whom is currently a minor, CF[Redacted], JG[Redacted], and KF[Redacted];
5. Decedent's AWW for calculating dependent benefits is $1,692.85;
6. Respondents shall not seek a safety rule violation offset against the above identified entitled Dependent-Claimants' dependency benefits; and
7. Respondents have reimbursed Decedent's family for funeral benefits and therefore owe no additional funeral benefits under the Act.

FINDINGS OF FACT

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

1. Decedent was hired by Employer November 1, 2021. (Resp. Ex. B, bn 006). Decedent filled out an Employee Information Form identifying his emergency contact as his girlfriend, [Redacted, hereinafter MZ]. (Resp. Ex. A, bn 001) He also completed a W-4 form (Employee's Withholding Certificate) indicating he was single, or married filing separately. (Id. at bn 003)
2. Decedent passed away on June 18, 2022, in the course and scope of his duties for Employer. (Resp. Exs. B-D)
3. An Amended Workers' Claim for Compensation was filed on behalf of Decedent on July 7, 2022. (Resp. Ex C)

4. A Dependents' Notice and Claim for Compensation was filed by Alleged Dependent-Claimant MG[Redacted] on behalf of herself, Dependent-Claimant surviving son CF[Redacted], Dependent-Claimant surviving son JG[Redacted], Dependent-Claimant surviving daughter KF[Redacted], and Alleged Dependent- Claimant AA[Redacted], who was not related to Decedent, but is the biological son of MG[Redacted]. (Resp. Ex. D)

5. Alleged Dependent-Claimant MG[Redacted] is the biological mother and legal guardian of Dependent-Claimant surviving son CF[Redacated] (D.O.B. 9/27/05), Dependent-Claimant surviving son JG[Redacted] (D.O.B. 9/19/07), and Dependent-Claimant surviving daughter KF[Redacted] (D.O.B. 08/12/10). (Resp. Ex. D; Clt Exs. 1-3) As stipulated, MG[Redacted] is not a dependent of Decedent under the Act. (Stipulation #1)

6. Alleged Dependent-Claimant AA[Redacted] (D.O.B. 9/23/14) is the biological son of MG[Redacted] and [Redacted, hereinafter JH]. (Resp. Ex. D, bn 013) He is not the biological son of Decedent. MG[Redacted] is the mother and legal guardian of AA[Redacted]. As stipulated, AA[Redacted] was not a dependent of Decedent under the Act. (Stipulation #2)

7. As stipulated, on his date of death, Decedent left three Dependents, his biological minor children identified as Dependent-Claimant surviving son CF[Redacted] (D.O.B. 9/27/05), Dependent-Claimant surviving son JG[Redacted] (D.O.B. 9/19/07), and Dependent-Claimant surviving daughter KF[Redacted] (D.O.B. 08/12/10). (Resp. Ex. D; Clt. Exs. 1-3; Stipulation #3)

8. On April 7, 2023, Respondent Insurer filed a Fatal Case – General Admission. (Resp. Ex H) In the remarks section Insurer indicated it was admitting for funeral benefits, and a hearing was set for April 18, 2023 to determine dependents. (Id. at bn 023) A copy of the Statement of Funeral Goods and Services Selected Worksheet was attached to that admission. (Id. at bn 026) As stipulated, by the date of hearing Insurer had fully reimbursed Decedent's family for the funeral benefits. (Stipulation # 7)

9. At the time of Decedent's death, he was living with MZ[Redacted], his girlfriend. (Resp. Ex. A, E) On October 17, 2022 a prehearing was held before PALJ Zarlengo which included MZ[Redacted], who testified by phone. (Ex. C) During the prehearing MZ[Redacted] verbally represented that she has no intention of pursuing a dependency claim. (Id.) As of the date of hearing, MZ[Redacted] has not filed a dependency claim. As of the date of hearing, the parties had no knowledge of any other possible dependents of Decedent who were dependents of Decedent as of the date of Decedent's death.

10. Dependent-Claimants, through their counsel, represented that none of the entitled Dependent-Claimants have received any social security survivor benefits as of the date of the hearing. Respondents therefore withdrew and reserved the issue of offsets.

11. As stipulated, the Decedent's average weekly wage for calculating dependent benefits is $1,692.85

CONCLUSIONS OF LAW

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

1. 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).
2. Section 8-42-121, C.R.S,. 2021, provides in pertinent part that death 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."
3. The parties seek an order affirming their stipulation regarding the identity of entitled Dependent-Claimants, and for an allocation of death benefits/dependency between Dependent-Claimant surviving son CF[Redacted] (D.O.B. 9/27/05), Dependent-Claimant surviving son JG[Redacted] (D.O.B. 9/19/07), and Dependent-Claimant surviving daughter KF[Redacted] (D.O.B. 08/12/10), at equal amounts of 1/3 each, to try to help protect these children's workers' compensation benefits for their future needs.
4. As found, the ALJ finds that an apportionment of the death benefits between Dependent-Claimant surviving son CF[Redacted] (D.O.B. 9/27/05), Dependent-Claimant surviving son JG[Redacted] (D.O.B. 9/19/07), and Dependent-Claimant surviving daughter KF[Redacted] (D.O.B. 08/12/10), in a 1/3 split, is equitable and fair.
5. The ALJ finds, consistent with the Act, that the allocation of dependency benefits between the identified entitled Dependent-Claimants will continue until an event occurs that requires a reallocation of dependency benefits between entitled dependents, as determined by law, such as death of an entitled dependent-claimant, or a dependent-claimant reaching the age of majority as defined by the Act.
6. The ALJ finds that MG[Redacted], as mother and guardian of the Dependent-Claimants, should establish separate bank accounts for Dependent-Claimant surviving son CF[Redacted], Dependent-Claimant surviving son JG[Redacted], and Dependent-Claimant surviving daughter KF[Redacted], so that each currently minor Dependent-Claimant receives all benefits which they are entitled to under the Act.

ORDER

1. Dependent-Claimant CF[Redacted], Dependent-Claimant JG[Redacted], and Dependent-Claimant KF[Redacted] are the only persons entitled to recover death benefits/dependency benefits under the Act in this case.
2. Decedent's AWW for computing death benefits/dependency benefits is $1,692.85.

3. Respondents waive their right to assert a safety rule offset against the identified Dependent-Claimants.
4. Respondents shall pay death benefits/dependency benefits to identified Dependent-Claimant CF[Redacted], Dependent-Claimant JG[Redacted], and Dependent-Claimant KF[Redacted] in an allocation of 1/3 each, from the date of Decedent's passing until said benefits can be modified/reallocated and/or terminated by operation of law.
5. All matters not determined herein are reserved for future determination.

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DATED: May 11, 2023

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-213-239-002

ISSUES

- Did Claimant prove by a preponderance of the evidence that a left total shoulder arthroplasty recommended by Dr. David Weinstein and Dr. Joseph Ruzbarsky is reasonably needed and causally related to the admitted June 6, 2022 industrial injury?

FINDINGS OF FACT

1. Claimant works for Employer as a ski lift mechanic. The job is physically demanding and requires frequent heavy lifting, overhead work, and awkward postures. He has worked for Employer approximately 18 years. Repair and maintenance of ski lifts occurs year-round.

2. On June 6, 2022, Claimant and a co-worker were in a ski lift basket repairing equipment on a lift tower. The bucket was approximately 40 feet above the ground. Claimant misstepped and started to fall forward out of the basket. He reached behind his body with his left arm and grabbed a bar to prevent himself from falling. He hung by his left arm, which caused him to swing around and hit his right shin on the basket frame. He then crawled back into the basket.

3. Claimant suffered a significant laceration to his right shin and felt immediate pain in his left shoulder. After resting for few moments, Claimant continued working. However, the shoulder pain made it difficult to lift his arm. The co-worker performed the bulk of the remaining work because Claimant could not effectively use his left arm.

4. Claimant returned to the base of the ski lift, where he was met by EMTs. They gave Claimant a sling and he returned to work. Claimant finished the shift, and also worked the next day, using primarily his right arm. He did not seek treatment because he hoped the shoulder would improve on its own.

5. Claimant saw Kimberly Woodke, PA-C at the Rio Grande Hospital Clinic on June 8, 2022. Ms. Woodke observed Claimant held his left arm close to his body to minimize pain with movement. Shoulder range of motion was significantly limited. X-rays showed severe glenohumeral joint narrowing and osteophyte formation, but no fracture or dislocation. Ms. Woodke ordered an MRI and referred Claimant to Dr. David Weinstein, an orthopedic surgeon. Claimant was put in a sling and released to work with limited use of the left arm.

6. Claimant had the left shoulder MRI on June 27, 2022. The interpreting radiologist noted rotator cuff tendinosis but appreciated no tears. The MRI showed advanced glenohumeral joint osteoarthritis with degenerative labral tearing and maceration, osteophytes, and prominent subchondral cysts.

7. Claimant saw Dr. Weinstein on June 29, 2022. Dr. Weinstein personally reviewed the MRI images. He agreed with the radiologist about the advanced osteoarthritis, but also saw signal consistent with a partial-thickness subscapularis tear and medial subluxation of the biceps. Dr. Weinstein advised Claimant could consider an arthroscopic rotator cuff repair and subacromial decompression, but such a procedure would probably not be effective because of the extensive degenerative changes. The most likely surgical option was a total shoulder replacement. Because of his age and "high activity level," Claimant wanted to avoid arthroplasty as long as possible. Dr. Weinstein administered a steroid injection and ordered six weeks of PT.

8. Claimant returned to Dr. Weinstein on August 10, 2022 and reported no improvement. He described constant aching, exacerbated by any use of the left arm. Claimant stated, "Prior to his injury, he was having mild discomfort but was able to do full activities, he is no longer able to do so." Dr. Weinstein opined Claimant's injury caused "significant aggravation of his pre-existing glenohumeral arthritis." Dr. Weinstein recommended a total shoulder arthroplasty.

9. Dr. Jon Erickson reviewed the preauthorization request for Respondents on August 18, 2022. Dr. Erickson noted conflicting interpretations from Dr. Weinstein and the radiologist about whether the MRI showed a tendon tear. Dr. Erickson opined, "Based upon the lack of indication of aggravation or worsening of his pre-existing condition . . . [I] recommend denial of the surgical request. Based on the patient's MRI, clearly this procedure is indicated but should be pursued using his private healthcare insurance."

10. Dr. Weinstein appealed the preauthorization denial on August 26, 2022. Dr. Weinstein wrote,

> Apparently, there is a question regarding the patient having a partial tear or not. There is certainly evidence of inflammation on the patient's MRI scan from 06/29/2022. By my interpretation on series 4, image 13, there is evidence of interstitial tearing of the supraspinatus. On image 15 and 16 of series 3, there is subluxation of the biceps, which would indicate at least partial tearing of the superior portion of the subscapularis. While there is certainly preexisting glenohumeral arthritis, he appears to have aggravated this from his Workman's Compensation injury of 06/06/2022, as he was able to perform all full activities prior to his injury and is no longer able to do so.

11. Dr. Erickson responded to Dr. Weinstein's appeal on September 1, 2022. He opined, "The fact that [Claimant] is no longer able to do his work is not in any way evidence of aggravation or worsening of a pre-existing condition. What is needed is radiographic evidence of acute trauma, and that is not present on this MRI." However, Dr. Erickson stated, "Out of deference to the skills of Dr. Weinstein, I will request that I have a chance to review the actual MRI, and I will do so with an MSK expert radiologist. We will try to determine whether or not there is evidence of any acute tears."

12. Claimant had a second surgical opinion with Dr. Joseph Ruzbarsky on September 15, 2022. Dr. Ruzbarsky reviewed the MRI images did not see a rotator cuff

tear. He agreed with the recommendation for a total shoulder arthroplasty. Regarding causation, Dr. Ruzbarsky concluded Claimant suffered an "acute exacerbation of shoulder arthritis due to an injury at work," and stated, "we would submit for approval through his workers' compensation insurance."

13. Dr. Erickson issued a supplemental report on September 19, 2022. He had reviewed the MRI with a MSK expert radiologist, and opined "all the abnormalities seen on this MRI are clearly pre-existing and in no way were caused by his injury of 06/06/2022." Dr. Erickson opined, "the presence of pain or dysfunction, according to the medical treatment guidelines, is not adequate to provide evidence of aggravation or worsening of a pre-existing condition." Rather, Dr. Erickson opined there must be "actual objective evidence of acute trauma on the patient's MRI." Accordingly, Dr. Erickson maintained his opinion the shoulder arthroplasty is unrelated to the work injury.

14. On October 26, 2022, Ms. Woodke issued a report disagreeing with Dr. Erickson's causation assessment. She stated, "based on my physical examination there was a definite change and significant limitation of strength and range of motion following the reported injury." Ms. Woodke later reiterated, "I strongly believe [the] need for shoulder surgery is related to his industrial injury."

15. At hearing, Claimant credibly described the substantial change in the condition and function of his shoulder since the work accident. Claimant previously had periodic aches and pains, including occasional left shoulder discomfort, but never injured the shoulder and never required any left shoulder treatment. His shoulder never interfered with his ability to perform physically demanding work. Additionally, Claimant regularly participated in activities such as hunting, fishing, backpacking, kayaking, maintaining his mountain property, and vehicle maintenance without difficulty.

16. By contrast, Claimant's left shoulder has been severely limited since the work accident. Even simple movements with his left arm cause severe pain and discomfort. He has difficulty sleeping and awakens frequently because of shoulder pain. He now needs to support his arm with a pillow while driving. Claimant can no longer access a drive-up ATM with his left arm and has trouble closing his vehicle door. He has been unable to engage in his normal recreational activities or home maintenance tasks.

17. Dr. Erickson testified at hearing consistent with his reports. Dr. Erickson agrees a total shoulder arthroplasty is reasonable because of the severe bone-on-bone glenohumeral joint arthritis. However, he reiterated that the need for the surgery is related to the natural progression of Claimant's severe, pre-existing arthritis, and not the June 6, 2022 work accident. He opined that relying on Claimant's subjective report of symptoms and post-injury functional capacity to determine causation "goes against the basis of . . . the medical treatment guidelines which is based purely on objective medical evidence." Dr. Erickson opined Claimant suffered a minor strain on June 6, 2022, which resolved within 4-6 weeks. Claimant's ongoing symptoms are solely related to his pre-existing condition.

18. Claimant's testimony is credible and persuasive.

19. The causation opinions of Dr. Weinstein, Dr. Ruzbarsky, and Ms. Woodke's are credible and more persuasive than the contrary opinions offered by Dr. Erickson.

20. Claimant proved the total shoulder arthroplasty recommended by Dr. Weinstein and Dr. Ruzbarsky is reasonably needed to cure and relieve the effects of the June 6, 2022 work accident. The industrial injury aggravated, accelerated, or combined with Claimant's underlying pre-existing condition to produce the need for shoulder replacement surgery.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

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

Considering the severe, "bone-on-bone" osteoarthritis in Claimant's shoulder, there is no substantial question that the proposed arthroplasty is reasonbly needed. The real issue here is causation. As found, Claimant proved the work accident aggravated, accelerated, or combined with his pre-existing condition and proximately caused the need for a left total shoulder arthroplasty. The causation opinions of Dr. Weinstein, Dr. Ruzbarsky, and Ms. Woodke are credible and more persuasive than the contrary opinions offered by Dr. Erickson. Claimant's testimony regarding the significant change in his symptoms and level of function after the accident is credible and persuasive. Claimant's left shoulder was severely arthritic and "bone on bone" immediately before the work accident, but he was still able to perform physically demanding work and engage in a wide range of outdoor-related avocational activities without difficulty.

Dr. Erickson's insistence on the need for "objective evidence of actual trauma on Claimant's MRI" is inconsistent with the legal standard for compensable aggravations. A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). Certainly, the absence of

objective structural change is a factor to consider when assessing the veracity of reported symptoms, but the persuasive evidence supports Claimant's statements his shoulder was asymptomatic or minimally symptomatic before the work accident. The June 6, 2022 accident caused an abrupt, substantial, and long-lasting change in Claimant's symptomology and functional abilities. As such, the injury proximately caused disability and a need for treatment, *i.e.*, arthroplasty, that would not have existed "but for" the accident.

ORDER

It is therefore ordered that:

1. Insurer shall cover the left total shoulder arthroplasty recommended by Dr. David Weinstein and Dr. Joseph Ruzbarsky.

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

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

DATED: May 11, 2023

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their July 23, 2021 General Admission of Liability (GAL) acknowledging that Claimant suffered compensable injuries on August 9, 2019.

2. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover an overpayment of Temporary Total Disability (TTD) benefits in the amount of $52,610.34.

FINDINGS OF FACT

1. Claimant worked for Employer as a Robot and Freezer Operator. He testified that on August 9, 2019 a robot was not functioning on line one. While helping the line one operator hand-stack 30-pound cases of cheese, Claimant tripped over an empty palate, fell backwards and landed on his back. Claimant noted he experienced pain in the middle of his lower back. He completed an incident report and Employer offered medical treatment. However, Claimant declined. Notably, the incident report specified "[n]ot seeking medical attention." Claimant felt he could manage the symptoms on his own with stretching and taking over-the-counter medications.

2. Claimant explained that for three days after the accident he stayed home in a chair and took Ibuprofen for his symptoms. About one month after the August 9, 2019 incident he began having pain in the right thigh with numbness and weakness into his entire right leg. He also suffered pain in the right buttock. Although Claimant attempted to manage his symptoms with pain patching and Ibuprofen, they progressively worsened. Nevertheless, Claimant continued to work full duty for Employer. However, he explained that other employees would hand-stack for him because of his continuing lower back symptoms when a robot broke down.

3. On May 14, 2021 Claimant was disciplined by Employer and told that his job performance was unacceptable. Furthermore, on June 22, 2021 Claimant was disciplined by Employer for repeatedly failing to complete paperwork.

4. Claimant did not seek professional medical treatment for his August 9, 2019 industrial accident until he visited primary care physician Garrett Urban, M.D. on June 25, 2021. Dr. Urban recounted that Claimant had a previous back Injury that was well-controlled "until a fall at work a few years ago. His pain has persisted since with flares. It is currently flaring," Dr. Urban permitted Claimant to return to modified duty employment with restrictions of not lifting, carrying, pushing, or pulling in excess of 10 pounds. He was also limited to walking and standing for no more than two hours per day.

5. Claimant explained that he had suffered a Workers' Compensation injury in the form of a bulged disc while working for a different employer in 2005. He received medical treatment for about six to eight weeks and had no symptoms after 2005. Claimant had no additional injuries prior to his August 9, 2019 back injury while working for Employer.

6. On June 29, 2021 Claimant saw Nurse Practitioner Ryan Reiss, who is in practice with Dr. Urban. NP Reiss recounted that Claimant continued to suffer lower back pain as the result of a workplace injury. He noted that x-ray findings revealed minimal grade 1 spondylolisthesis of L4-5 and lumbar spondylosis. NP Reiss assigned Claimant 5-pound weight restrictions with no lifting or bending at the waist.

7. On July 23, 2021 Respondents filed a General Admission of Liability (GAL) acknowledging that Claimant was entitled to receive medical benefits and Temporary Total Disability (TTD) benefits as a result of his August 9, 2019 industrial injury.

8. Because Employer was unable to accommodate the restrictions from Dr. Urban and NP Reiss, Claimant has not returned to work. Respondents began paying Claimant TTD benefits at the rate of $595.91 per week beginning June 29, 2021. TTD benefits paid up to the date of hearing totaled $52,610.34 (88 2/7 weeks x $595.91).

9. On September 15, 2021 Claimant underwent an MRI of his lumbar spine. The imaging showed mild degenerative disc disease and facet arthritis at L4-5 and L5-S1; a rightward disc bulge and annular fissure with mild right foraminal stenosis at L4-5; and mild central canal and mild bilateral foraminal stenosis, left greater than right, at L5-S1.

10. Based on a referral from NP Reiss, on October 21, 2021 Claimant underwent an evaluation with Physician's Assistant Sherrie Kay McCoy of Greeley Neurosurgery. PA McCoy noted that Claimant had suffered lower back pain since he was stacking boxes in 2019. She commented that on June 21, 2021 Claimant "got up but could not stand up straight." PA McCoy diagnosed Claimant with back pain, obesity and tobacco use.

11. On December 21, 2021 Claimant returned to PA McCoy for an examination. She remarked that the MRI findings of the lower back revealed only a "small HNP at L5/S1 which is not causing his symptoms. This is a very small disc, not causing impingement." PA McCoy administered an L5/S1 epidural steroid injection at L5/S1.

12. On January 6, 2022 Claimant visited NP Reiss for an evaluation and noted little improvement. NP Reiss recounted that Claimant had suffered a complex injury several years ago when he fell at work. He had been treating his lower back pain with Ibuprofen but the symptoms had become severe and radiated down his right leg with any type of flexion. NP Reiss referred him to orthopedic surgery. The surgeon's office referred Claimant for an EMG/NCV study due to the new symptom of radiculopathy down the right thigh. The EMG/NCV testing performed on February 17, 2022 was unremarkable.

13. On March 21, 2022 Claimant returned to NP Reiss for an examination. NP Reiss summarized that Claimant had undergone the following treatment:

> [He] has had MRIs and x-rays. [N]eurosurgical PA Sherry McCoy has seen patient who states this is not a surgical problem. He has had conservative therapy with injections and PT. [N]othing seems to be making pain better or worse. [A]ctivity and standing seems to cause worsening symptoms. [S]edentary lifestyle also seems to cause more stiffness…. Neurosurgery also recently x-rayed both of patient's hips to see if there are more than 1 issue causing his pain from shooting down the right leg. There were findings of mild osteoarthritis.

14. On March 21, 2022 NP Reiss also referred Claimant to physiatrist Greg Reichhardt, M.D. However, on April 6, 2022 Claimant visited physiatrist John Shonk, M.D. at PM&R for an evaluation. Dr. Shonk determined Claimant's facet joints were driving his myofascial pain and referred him for L1-S1 facet blocks. If successful, then Claimant would be referred for median branch blocks. If the branch blocks were successful, then Claimant would be referred for possible ablations.

15. On May 31, 2022 Claimant visited Jerome Allen Swanson, M.D. Dr. Swanson noted that the reason for the visit was lumbar facet joint arthropathy. He performed bilateral facet injections.

16. On June 30, 2022 Claimant underwent an independent medical evaluation with Katherine F. McCranie, M.D. After conducting a physical examination and reviewing Claimant's medical records, Dr. McCranie concluded that Claimant likely did not sustain an injury that caused a disability or need for medical treatment on August 9, 2019 while working for Employer. She recounted that on August 9, 2019 Claimant was involved in an incident at work in which he tripped and fell onto his back. However, Claimant did not experience significant enough symptoms at the time to seek medical treatment. Dr. McCranie reasoned that, considering the two-year gap between the time of the incident and when Claimant first sought medical treatment, "causality is not within a degree of medical probability." She commented that, if the injury on August 9, 2019 was an acute lumbar discogenic or facetogenic event, it would have been significant enough to seek medical treatment.

17. Dr. McCranie explained that the progressive nature of Claimant's increase in symptoms over time was more suggestive of degenerative disc disease rather than an acute injury. Furthermore, Claimant continued regular duty employment during the two years after the incident. Dr. McCranie reasoned that Claimant's symptoms were not significant enough during the intervening period before medical treatment to warrant time off work. She also remarked that it is unknown what other activities Claimant was involved with outside of the workplace that could have contributed to the onset of progressive symptomatology. Dr. McCranie thus determined that there was not a 50% causality link between Claimant's current symptoms and the August 9, 2019 incident. She summarized that Claimant's lack of medical treatment for two years, continued full-time work without

restrictions and reported progressive symptomatology was more consistent with a degenerative process.

18. At a follow-up appointment with NP Reiss on July 25, 2022 Claimant noted his symptoms had significantly improved. NP Reiss assessed lumbar back pain with radiculopathy affecting the lower extremities. Claimant could resume moderate activities with a five-pound weight restriction.

19. On August 17, 2022 Claimant returned to Dr. Shonk for an examination. Dr. Shonk noted the facet injections were wearing off after providing two months of very good relief. He referred Claimant for nerve ablations.

20. On September 9, 2022 Claimant underwent bilateral medial branch blocks and medial branch ablations at L3, L4, and L5. He subsequently received bilateral medial branch ablations at L1 and L2 on September 30, 2022.

21. On October 28, 2022 Claimant visited East Morgan County Hospital for physical therapy based on a referral from Dr. Schonk. Angela Eicher, PT recounted that Claimant "tripped and was flipped on his back at work and had severe pain which he tried to medicate with tylenol and ibuprofren but eventual had to see the MD due to pain and cramping." PT Eicher assessed Claimant with chronic lower back pain based on a history of ruptured and herniated discs. She remarked that Claimant had suffered right lower extremity pain, but improved with recent nerve ablations. Pt Eicher recommended physical therapy once or twice per week for six weeks.

22. On November 18, 2022 Claimant returned to NP Reiss for an examination. NP Reiss assessed Claimant with radiculopathy that affected his right lower extremity. He referred Claimant to Dr. Reichhardt for a second opinion. NP Reiss noted that Claimant felt the ablations and therapies had been unsuccessful because he was unable to perform basic household tasks without significant pain and spasms.

23. On January 3, 2023 Claimant again visited NP Reiss for an examination. NP Reiss remarked that Claimant had been released from employment. Nevertheless, he continued Claimant's five-pound lifting restriction based on his "poor response to multipole etiologies of treatment." Treatment had included injections, physical therapy, dry needling and, rest over the preceding 1.5 years. NP Reiss diagnosed Claimant with lower back pain including right-sided sciatica.

24. On January 31, 2023 Claimant returned to Dr. Reichhardt for an evaluation. Dr. Reichhardt documented that Claimant's mechanism of injury was tripping over a pallet and landing on his lower back on August 9, 2019. He noted that the objective findings were consistent with a work-related mechanism of injury causing lower back pain. Dr. Reichhardt reviewed possible lower back pain generators with Claimant and commented on a negative SI joint screen. He explained that, because of Claimant's lack of improvement with radiofrequency ablation, he likely did not have facet-mediated pain. The most likely pain generator was discogenic. Dr. Reichhardt thus suggested an independent exercise program and continued physical therapy. He noted that, once

Claimant completed physical therapy and strengthening, he would likely be approaching Maximum Medical Improvement (MMI).

25. After considering additional medical records, Dr. McCranie issued a supplemental report on February 9, 2023. She maintained that Claimant's symptoms were not likely causally related to the August 9, 2019 work incident.

26. Dr. McCranie also testified at the hearing in this matter. She explained that Claimant's lower back symptoms were not causally related to the August 9, 2019 work accident. Dr. McCranie reiterated that Claimant stated he had fallen at work on August 9, 2019 but did not seek any medical treatment for a period of about 23 months. She reasoned that, if Claimant had suffered a significant back injury, there would not have been a significant temporal gap in medical treatment. Moreover, Claimant continued to work on a full-time basis during the almost two-year period. Dr. McCranie remarked that, if he had suffered a back injury and received treatment earlier, his work restrictions would have been greater in the beginning and lessened over time. Third, Dr. McCranie commented that there was a lack of objective pathology to suggest a traumatic injury. She explained that electrodiagnostic testing was normal, there was no evidence of acute or chronic radiculopathy, and an MRI essentially revealed age-appropriate discogenic changes.

27. Respondents have failed to demonstrate that it is more probably true than not that they are entitled to withdraw their July 23, 2021 GAL acknowledging that Claimant suffered compensable injuries on August 9, 2019. Initially, Claimant testified that, while hand-stacking 30-pound cases of cheese on August 9, 2019, he tripped over an empty palate, fell backwards and landed on his back. He noted he experienced pain in the middle of his lower back. Claimant completed an incident report and Employer offered medical treatment but he declined. Claimant subsequently developed pain in his right thigh with numbness and weakness into his entire right leg. He attempted to manage his back symptoms with pain patches and Ibuprofen, but they progressively worsened. Although Claimant continued to work full duty for Employer, he explained that other employees would hand-stack for him when a robot broke down because of his continuing lower back symptoms. Claimant did not seek professional medical treatment for his August 9, 2019 industrial accident until he visited primary care physician Dr. Urban on June 25, 2021. He has subsequently undergone significant medical treatment including physical therapy, diagnostic testing, epidural steroid injections, bilateral medial branch blocks and medial branch ablations. Although a specific diagnosis has been elusive, on January 31, 2023 Dr. Reichhardt determined Claimant's most likely pain generator was discogenic. Claimant has not reached MMI.

28. Although Respondents filed a GAL on July 23, 2021, Dr. McCranie concluded that Claimant likely did not sustain an injury on August 9, 2019 that caused a disability or need for medical treatment. She reasoned that, considering the two-year interval between the time of the work accident and when Claimant first sought medical treatment, "causality is not within a degree of medical probability." Dr. McCranie commented that, if Claimant had suffered a back injury, there would not have been a significant temporal gap in seeking medical treatment. Moreover, Claimant continued full-

time work during the almost two-year period. Dr. McCranie thus determined that there was not a 50% causality link between Claimant's current symptoms and the August 9, 2019 incident. She summarized that Claimant's lack of medical treatment for two years, continued full-time work without restrictions and reported progressive symptomatology was more consistent with a degenerative process.

29. Despite Dr. McCranie's testimony, the medical records reveal that Claimant has consistently maintained he suffered an industrial injury while working for Employer on August 9, 2019. When Claimant initially sought professional medical treatment on June 25, 2021, Dr. Urban recounted that Claimant had a previous back Injury that was well-controlled "until a fall at work a few years ago. His pain has persisted since with flares. It is currently flaring." During an October 21, 2021 evaluation at Greeley Neurosurgery, PA McCoy noted that Claimant had suffered lower back pain since he was stacking boxes in 2019. She commented that by June 21, 2021 Claimant "got up but could not stand up straight." On January 6, 2022 NP Reiss recounted that Claimant had suffered a complex injury several years ago when he fell at work. He had been treating his lower back pain with Ibuprofen but the symptoms had become severe and radiated down his right leg with any type of flexion. On October 28, 2022 PT Eicher recounted that Claimant had "tripped and was flipped on his back at work and had severe pain which he tried to medicate with tylenol and ibuprofren but eventually had to see the MD due to pain and cramping." Finally, on January 31, 2023 Dr. Reichhardt documented that Claimant's mechanism of injury was tripping over a pallet and landing on his lower back on August 9, 2019. He determined that the objective findings were consistent with a work-related mechanism of injury.

30. As the preceding chronology illustrates, the medical records are replete with references to a work injury in 2019 that necessitated the use of over-the-counter medications until Claimant's back symptoms became severe enough to seek professional medical treatment. Despite the lack of temporal proximity, there is a causal connection between Claimant's August 9, 2019 work injury and his subsequent medical treatment. There was no break in the causal chain between Claimant's work accident while hand-stacking 30-pound cases of cheese and his current back symptoms. Therefore, Claimant's work activities on August 9, 2019 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Respondents' request to withdraw the July 23, 2021 GAL is denied and dismissed. Respondents are therefore not entitled to recover an overpayment of TTD benefits in the amount of $52,610.34.

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. Generally, a claimant is required to prove by a preponderance of the evidence that an alleged injury was directly or proximately caused by the employment or working conditions. However, §8-43-201, C.R.S. provides that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." As found, on July 23, 2021 Respondents filed a GAL acknowledging that Claimant was entitled to receive medical and TTD benefits as a result of his August 9, 2019 industrial injury. Because Respondents seek to withdraw their GAL, they bear the burden of proof by a preponderance of the evidence.

7. As found, Respondents have failed to demonstrate by a preponderance of the evidence that they are entitled to withdraw their July 23, 2021 GAL acknowledging

that Claimant suffered compensable injuries on August 9, 2019. Initially, Claimant testified that, while hand-stacking 30-pound cases of cheese on August 9, 2019, he tripped over an empty palate, fell backwards and landed on his back. He noted he experienced pain in the middle of his lower back. Claimant completed an incident report and Employer offered medical treatment but he declined. Claimant subsequently developed pain in his right thigh with numbness and weakness into his entire right leg. He attempted to manage his back symptoms with pain patches and Ibuprofen, but they progressively worsened. Although Claimant continued to work full duty for Employer, he explained that other employees would hand-stack for him when a robot broke down because of his continuing lower back symptoms. Claimant did not seek professional medical treatment for his August 9, 2019 industrial accident until he visited primary care physician Dr. Urban on June 25, 2021. He has subsequently undergone significant medical treatment including physical therapy, diagnostic testing, epidural steroid injections, bilateral medial branch blocks and medial branch ablations. Although a specific diagnosis has been elusive, on January 31, 2023 Dr. Reichhardt determined Claimant's most likely pain generator was discogenic. Claimant has not reached MMI.

8. As found, although Respondents filed a GAL on July 23, 2021, Dr. McCranie concluded that Claimant likely did not sustain an injury on August 9, 2019 that caused a disability or need for medical treatment. She reasoned that, considering the two-year interval between the time of the work accident and when Claimant first sought medical treatment, "causality is not within a degree of medical probability." Dr. McCranie commented that, if Claimant had suffered a back injury, there would not have been a significant temporal gap in seeking medical treatment. Moreover, Claimant continued full-time work during the almost two-year period. Dr. McCranie thus determined that there was not a 50% causality link between Claimant's current symptoms and the August 9, 2019 incident. She summarized that Claimant's lack of medical treatment for two years, continued full-time work without restrictions and reported progressive symptomatology was more consistent with a degenerative process.

9. As found, despite Dr. McCranie's testimony, the medical records reveal that Claimant has consistently maintained he suffered an industrial injury while working for Employer on August 9, 2019. When Claimant initially sought professional medical treatment on June 25, 2021, Dr. Urban recounted that Claimant had a previous back Injury that was well-controlled "until a fall at work a few years ago. His pain has persisted since with flares. It is currently flaring." During an October 21, 2021 evaluation at Greeley Neurosurgery, PA McCoy noted that Claimant had suffered lower back pain since he was stacking boxes in 2019. She commented that by June 21, 2021 Claimant "got up but could not stand up straight." On January 6, 2022 NP Reiss recounted that Claimant had suffered a complex injury several years ago when he fell at work. He had been treating his lower back pain with Ibuprofen but the symptoms had become severe and radiated down his right leg with any type of flexion. On October 28, 2022 PT Eicher recounted that Claimant had "tripped and was flipped on his back at work and had severe pain which he tried to medicate with tylenol and ibuprofren but eventually had to see the MD due to pain and cramping." Finally, on January 31, 2023 Dr. Reichhardt documented that Claimant's mechanism of injury was tripping over a pallet and landing on his lower back on August

9, 2019. He determined that the objective findings were consistent with a work-related mechanism of injury.

10. As found, as the preceding chronology illustrates, the medical records are replete with references to a work injury in 2019 that necessitated the use of over-the-counter medications until Claimant's back symptoms became severe enough to seek professional medical treatment. Despite the lack of temporal proximity, there is a causal connection between Claimant's August 9, 2019 work injury and his subsequent medical treatment. There was no break in the causal chain between Claimant's work accident while hand-stacking 30-pound cases of cheese and his current back symptoms. Therefore, Claimant's work activities on August 9, 2019 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Respondents' request to withdraw the July 23, 2021 GAL is denied and dismissed. Respondents are therefore not entitled to recover an overpayment of TTD benefits in the amount of $52,610.34.

ORDER

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

1. Respondents' request to withdraw the July 23, 2021 GAL is denied and dismissed. Respondents are thus not entitled to recover an overpayment of TTD benefits in the amount of $52,610.34.

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

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

DATED: May 11, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence grounds for reopening his claim.

2. Whether the medical treatment recommended by ATP Holmboe is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

3. Alternatively, whether the medical treatment recommended by ATP Holmboe is reasonable and necessary to relieve the effects or prevent deterioration of Claimant's industrial injury.

4. If Claimant establishes grounds for reopening, whether Claimant is entitled to temporary disability benefits.

FINDINGS OF FACT

1. On October 31, 2019, Claimant sustained an admitted injury arising out of the course of his employment with Employer. The injury occurred when Claimant fell on ice and landed on his back, striking his head on the ground.

2. On November 1, 2019, Claimant began treatment with authorized treating physician (ATP), Kirk Holmboe, D.O., at Midtown Occupational Health Services. Dr. Holmboe diagnosed Claimant with a closed head injury, abdominal wall strain and cervical, thoracic, and lumbar strains. Dr. Holmboe referred Claimant for physical therapy, massage and chiropractic care, and Claimant reported improvement with treatment. In January 2020, Dr. Holmboe referred Claimant to Samuel Chan, M.D., for a physiatry evaluation. (Ex. B).

3. Claimant saw Dr. Chan initially on January 14, 2020, with complaints of head pain, right shoulder pain, and right-sided lower back pain with numbness and tingling into the right foot. Dr. Chan indicated his clinical findings were suggestive of facet-related pain, but ordered a lumbar MRI to rule out disc issues. (Ex. D). The MRI, performed on January 20, 2020, did not reveal any acute findings, and Dr. Chan interpreted the results as being within normal limits. (Ex. E & D).

4. Dr. Chan determined that Claimant's symptoms were suggestive of suprascapular neuritis and right SI joint dysfunction, and recommended a right suprascapular nerve block, and right SI joint injection. He performed the suprascapular nerve block on February 4, 2020, and the SI joint injection on February 20, 2020. (Ex. D). Claimant reported to both Dr. Chan and Dr. Holmboe that he received significant benefit from both injections and that his pain was minimal. (Ex. B & D).

5. On March 19, 2020, Dr. Chan indicated that Claimant was having only occasional pain with no functional limits, and that Claimant was likely at maximum medical improvement (MMI). He did not anticipate any permanent impairment, and recommended maintenance care in the form of two additional SI joint injections over the following 4-6 months. (Ex. D).

6. On March 20, 2020, Dr. Holmboe placed Claimant at MMI, with no formal work restrictions and no impairment rating. (Ex. B).

7. Claimant next sought treatment on October 22, 2020, when he saw Dr. Chan. Claimant reported that his lumbar spine pain had returned. Dr. Chan recommended a repeat SI injection. He opined that Claimant remained at MMI, but that the injection shoulder be performed as maintenance care. (Ex. 5).

8. On November 12, 2020, Dr. Chan performed the SI injection. Claimant returned one week later and reported his pain had resolved, and he was discharged. (Ex. D).

9. Approximately four months later, on April 6, 2021, Claimant returned to Dr. Holmboe, reporting that pain had returned to his right lower back, and reported symptoms radiating down his right leg. Dr. Holmboe referred Claimant back to Dr. Chan. (Ex. 6). Dr. Holmboe opined that Claimant's symptoms were related to his original, November 30, 2019 injury because the symptoms had returned without an intervening event. He recommended a repeat lumbar MRI and referred Claimant to Dr. Chan. Dr. Holmboe indicated that Claimant remained at MMI, but the case may need to be reopened depending on Dr. Chan's treatment recommendations. (Ex. 6).

10. The MRI, performed on April 28, 2021, showed no significant changes when compared to the January 20, 2020 MRI. (Ex. D).

11. Claimant saw Dr. Chan on May 4, 2021, reporting that he had done well following the November 2020 SI injection, and that his pain had returned slowly. Dr. Chan indicated that Claimant's leg pain was not likely related to his work injury, if he had not previously reported leg symptoms. Dr. Chan's clinical findings were consistent with a chronic SI joint dysfunction. Due to the recurrence of symptoms, Dr. Chan recommended Claimant undergo a L5 medial branch block (MBB) and S1-3 lateral branch blocks (LBB) for diagnostic purposes. He indicated that if the blocks were diagnostic, Claimant may be a candidate for radiofrequency rhizotomies in both locations. He further opined that these procedures should be considered as maintenance care. (Ex. D).

12. Claimant saw Dr. Holmboe on May 27, 2021, reporting continued pain over the right SI joint with some pain radiating into his thigh. Dr. Holmboe requested additional chiropractic sessions noting that Claimant found these helpful previously. Dr. Holmboe indicated Claimant was not at MMI, but offered no explanation for the change in MMI status from April 6, 2021. (Ex. 6).

13. On June 10, 2021, Dr. Holmboe indicated the medial and lateral branch blocks recommended by Dr. Chan were reasonable, and that Claimant's symptoms were the result of his November 30, 2019 work injury. Dr. Holmboe indicated Claimant was at MMI

effective March 20, 2020, and that he was receiving current treatment under maintenance care. His record contains no explanation for the change in MMI status from May 27, 2021. (Ex. 6).

14. On July 8, 2021, Dr. Chan performed a right SI injection, which resulted in a temporary improvement in Claimant's symptoms. Dr. Chan indicated that the injection provided some diagnostic benefit, and that consideration of the medial and lateral branch blocks would be appropriate. (Ex. D).

15. On August 5, 2021, Dr. Holmboe saw Claimant and indicated that he had no further treatment to offer except the rhizotomies recommended by Dr. Chan. He discharged Claimant from care, noted that Claimant remained at MMI and imposed no formal work restrictions. (Ex. 6).

16. Respondents have not authorized the MBB or LBBs requested and recommended by Dr. Holmboe and Dr. Chan.

17. Respondents conducted surveillance of Claimant on March 19, 2022, June 7, 2022, and August 1, 2022. (Ex. F, G & H). In the surveillance videos, Claimant is seen walking, driving, climbing in and out of vehicles, climbing on and off of trailers, and lifting various objects, without apparent difficulty.

18. On March 30, 2022, Claimant saw Allison Fall, M.D., for an independent medical examination (IME) at Respondents' request. Dr. Fall testified at hearing and was admitted as an expert in physical medicine and rehabilitation. Dr. Fall opined that Claimant had no significant objective findings which would indicate a worsening of condition. She recommended Claimant participate in an active exercise program. In a later addendum, on May 3, 2022, Dr. Fall opined that there was no medical indication for MBB, because Claimant's complaints were subjective. She also opined there was no indication for additional active medical treatment. In her report, Dr. Fall opined that it is "inappropriate to recommend maintenance care when there is no permanent impairment." Dr. Fall offered cogent explanation for this opinion. (Ex. A).

19. On April 28, 2022, Claimant saw Caroline Gellrick, M.D., for an IME requested by Claimant's counsel. Dr. Gellrick opined that Claimant is not at MMI, and that the MMI determination should be reversed "due to further active treatment intervention that was in process." She further opined that the medial and lateral branch blocks requested by Dr. Chan are reasonable and necessary, and if Claimant has an RFA that is not successful, he may require further facet injections at the L4-5 level. Dr. Gellrick's opinion that Claimant is not at MMI is not persuasive. Her opinion regarding the reasonableness and necessity of medial and lateral branch blocks is credible. Dr (Ex. 4).

20. Employer terminated Claimant's employment on October 6, 2020.

21. [Redacted, hereinafter TM] was Claimant's supervisor when he worked at Employer in 2020, and testified at hearing regarding Claimant's termination. TM[Redacted] testified that Employer terminated Claimant for "a number of reasons, the primary one being falsifying recounts of incidents." TM[Redacted] testified that Claimant

sustained a finger injury in July 2020, and told TM[Redacted] he initially did not want treatment. He testified that later he was "made aware after the fact that [Claimant] was trying to seek financial compensation" from Employer. TM[Redacted] testified that it was "brought to [his] attention that [Employer] was unable to help in that regard because -- specifically because [Claimant] had told his medical provider that this incident, in fact, did not happen at work." TM[Redacted] offered no explanation as to how he learned this information, or whether he had personal knowledge. TM[Redacted] also testified that in September 2020, Claimant sustained another finger injury. TM[Redacted] indicated that Claimant did not want to file an injury report, and that while walking to TM's[Redacted] supervisor's office, Claimant "made it clear to me at that point that he planned on lying once we got up to the office, he told me that was his intent, and he didn't understand why we're going up to the office." TM[Redacted] offered no cogent testimony as to whom Claimant allegedly intended to lie or what he intended to lie about. He later testified that he did not know if Claimant wanted to file a worker' compensation claim, or whether Claimant ultimately filed a claim regarding the September 2020 finger injury. TM's[Redacted] testimony is of little evidentiary value because his testimony demonstrates he had little, if any, personal knowledge of the information to which he testified.

22. Claimant testified at hearing that his pain is worsened by certain activities, primarily driving, and lifting. He testified that when he lifts things, he tends to feel the effects the following day or evening. He testified that he did not work from October 2020, when he was terminated by Employer until April 5, 2021. During this period, he testified that he did not sustain any new injuries involving his lower back. Claimant testified that his back pain waxes and wanes, and has good and bad days depending on activities. Claimant'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. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible

inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential 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 Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Reopening for Change in Condition

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

Claimant has failed to establish that his claim should be re-opened due to a change in condition. The evidence establishes that Claimant has experienced an return of symptoms, but not that his original work injury has changed. Neither Dr. Chan nor Dr. Holmboe have opined that Claimant's condition has changed. The April 2021 MRI, when compared to the January 2020 MRI confirmed that Claimant's lumbar pathology was unchanged. When Claimant was placed at MMI in March 2020, Dr. Chan and Dr. Holmboe opined that maintenance medical treatment (*i.e.*, injections) may be reasonable and appropriate in the future, despite the fact that Claimant was reporting minimal pain at that time. From this, the ALJ infers that it was reasonably anticipated that Claimant may experience a return of symptoms after MMI, without a change of condition. The fact that

Claimant has experienced exacerbations or recurrence of symptoms is not evidence that Claimant's physical condition has changed since reaching MMI. Additionally, both Dr. Chan and Dr. Holmboe opined that Claimant remained at MMI when each last saw him, and neither opined that Claimant's physical condition had changed or worsened.

Maintenance Medical Benefits

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

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

Claimant has established that the medial and lateral branch blocks and the SI joint injections recommended by Dr. Chan and Dr. Holmboe is reasonably necessary to relieve the effects or prevent the deterioration of Claimant's work-related injury. The procedures recommended by Dr. Chan - MBB and LBB, are diagnostic tests that are performed to determine the potential efficacy of a radio frequency rhizotomy or radio frequency ablation (RFA) procedure. *See* W.C.R.P. Rule 17, Ex. 1, F.4.e, and F.4.f. As Dr. Chan indicated, the results of the medial and lateral branch blocks would dictate whether RFA procedures are warranted. No credible evidence was presented that an RFA would "cure" Claimant's work-related injury. However, the RFA procedure is a procedure that provides extended pain-relief of 7-9 months or longer. *Id*. The ALJ therefore finds that the MBB and LBB procedures recommended by Drs. Chan and Holmboe are more likely than not reasonably necessary to relieve the effects of the Claimant's industrial injury.

While the surveillance video demonstrates that Claimant was able to function without apparent difficulty at the time of surveillance, the actions performed in the video are do not conflict with the restrictions placed on Claimant and do not demonstrate that Claimant does not experience symptoms which may be relieved by the MBB and LBBs recommended by Dr. Chan and Dr. Holmboe.

With respect to the July 8, 2021 SI injection, Claimant received the injection based on Dr. Chan's recommendation. Dr. Chan indicated that the SI injection should be considered maintenance care based on the Claimant's chronic right SI symptoms, and that he had concordant findings on examination. Claimant had also received symptomatic relief from previous SI joint injections. Although the Claimant received only temporary relief from the July 8, 2021 injection, this does not render the treatment unreasonable given the information available before the injection was performed. Claimant has established that the July 8, 2021 SI injection was reasonably necessary to relieve the effects of his industrial injury.

With respect to chiropractic care recommended by Holmboe, Claimant has failed to establish that the treatment is a reasonably necessary maintenance medical treatment. Although Claimant reported subjective improvement to Dr. Holmboe from chiropractic care, no records of chiropractic care were offered or admitted into evidence from which it can be determined whether chiropractic care resulted in any objective improvement. The ALJ finds it more likely than not that further chiropractic care is not reasonably necessary to relieve the effects of or prevent deterioration of Claimant's industrial injury.

Temporary Disability Benefits

An injured worker entitlement to temporary disability benefits continue until terminated pursuant to § 8-42-105 (3), C.R.S., which provides: "Temporary total disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement; (b) The employee returns to regular or modified employment; (c) The attending physician gives the employee a written release to return to regular employment; or (d) (I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." See also § 8-42-106 (2), C.R.S. (temporary partial disability benefits).

Claimant was placed at MMI on March 20, 2020. Although Dr. Holmboe briefly stated Claimant was not at MMI on May 27, 2021, the following visit, two weeks later he stated Claimant was at MMI. When Dr. Holmboe discharged Claimant on August 5, 2021, he indicated the date of MMI was March 20, 2020, from which the ALJ infers his May 27, 2021 MMI statement was a mistake or typographical error. Notwithstanding, because Claimant has failed to establish grounds to reopen his claim, and remains at MMI, Claimant has failed to establish an entitlement to temporary disability benefits. Claimant's request for temporary disability benefits is denied and dismissed.

The issue of whether Claimant is responsible for his termination is moot.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim is denied and dismissed.

2. Respondents shall pay for the medial branch block and lateral branch blocks, recommended by Dr. Chan and Dr. Holmboe and for the July 8, 2021 SI injection performed by Dr. Chan according to the Medical Fee Schedule, as maintenance medical benefits.

3. Claimant's request for authorization of chiropractic care as a maintenance medical benefit is denied and dismissed.

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

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: May 15, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-147-757-003

STIPULATION

- The parties stipulate that the Claimant was assigned a 2% left upper extremity rating by the ATP and neither party disputes this rating.

ISSUES

- Did Respondents overcome the DIME's cervical rating and determination of MMI by clear and convincing evidence?

- Whether the medical treatment for Claimant's cervical spine, including the cervical surgery is reasonable, necessary, and related?

FINDINGS OF FACT

1. Claimant was a custodian for the [Redacted, hereinafter KC] District.

2. Claimant suffered admitted injuries on August 6, 2020 when she fell as she was exiting a vehicle after driving to another school building to use the bathroom.

3. Claimant initially treated at Keefe Memorial Hospital, Prairie View Clinic on the date of the injury. Her primary complaint was "LEFT SHOULDER INJURY /BUMP ON FOREARM". She also added that she also hurt her right hip. The assessment was:

    1. work related injury

    2. fall – tripped over curb

    3. left elbow strain

    4. lumbar strain

    5. left shoulder strain

    6. chest wall bruising

    She was treated with an injection of Toradol and given a prescription for Ibuprofen. (Respondents' Exhibit F, pp. 54 – 55).

4. On October 15, 2020 Claimant returned for examination at Keefe Memorial Hospital and noted "vast improvement" in her medial elbow pain. Her treating provider had growing concern Claimant had sustained a left wrist injury given her medial elbow improvement and lack of findings elsewhere and Claimant's physical therapist was concerned she had sustained a scapholunate injury. She was noted as wearing a thumb splint for the past 2 weeks and had continued pain with movements like turning a doorknob. A left wrist MRI was ordered. (Respondents' Exhibit F, p.73).

5. On December 21, 2020 Claimant reported to Dr. Nicholas Olsen for further work-up of her upper extremity issues. (Respondents' Exhibit N, pp. 280-283). Claimant denied mid or lower back pain and physical examination by Dr. Olsen **showed Claimant's c-spine to have full range of motion, no signs of radiculopathy, and was otherwise unremarkable.** Dr. Olsen believed Claimant had a fairly extensive workup thus far but had yet to complete an EMG. **He noted that Claimant was unlikely to have cervical radiculopathy as she had an unremarkable cervical spine examination.** He noted a fairly benign examination, but ordered tests to rule out CRPS as all other explanations for her pain had been eliminated.

6. Similar physical examination findings were documented by Dr. Olsen during Claimant's January 11, 2021 examination as she continued to have full range of motion in her c-spine without pain or dysfunction. (Respondents' Exhibit N, p. 286). **He noted EMG results were negative for findings of cervical radiculopathy** and all CRPS testing was negative.

7. A February 11, 2021 MRI of Claimant's c-spine showed stenosis of the central canal at C4-5 with moderate bilateral foraminal narrowing, moderate stenosis of the central canal at C5-6, and mild stenosis of the central canal at C6-7. (Respondents' Exhibit E, p. 27).

8. Claimant followed up with Dr. Olsen on May 13, 2021 with reports of an undiagnostic response to both the c-spine TESIs that were attempted by Dr. Olsen. (Respondents' Exhibit N, p. 308), Claimant noted that the "only injection that has helped her to date is the first coronavirus. She states that after getting the coronavirus, she noted her left arm paresthesia had improved for a week." Dr. Olsen was not able to offer an explanation as to why she may have experienced relief. He explained to Claimant that "we have thoroughly worked up a pain generator in the cervical spine. Neither the left C4-5 or C5-6 transforaminal epidural steroid injection offered significant efficacy. This would rule out her neck as the source of her symptoms." (Respondents' Exhibit N, p. 309).

9. Claimant continued to treat until she was placed at MMI by Dr. Olsen on July 6, 2021. This was following an IME with Dr. Mark Paz. Dr. Olsen agreed with the 2% upper extremity rating given by Dr. Paz.

10. Claimant underwent a Division Sponsored IME with Dr. Winslow on March 1, 2022. The initial report issued by Dr. Winslow is undated and unsigned. (Claimant's Exhibit 9). In his report, Dr. Winslow agreed to the 2% upper extremity rating. He also noted that the Claimant had a cervical surgery recently and felt that the cervical spine was related. In his initial report he states "The patient presented to the clinic in a neck brace with a recent cervical spine fusion. I have no notes from surgeon, consult, surgical notes or information regarding the surgery. While the previous independent medical examiner dismissed and did not include cervical thoracic or lumbar spine, the patient's injury MOA was indeed injured during a fall, had symptoms early on of neck, back and lower back symptoms, was treated and accepted as part of her care." However, with respect to the neck, Dr. Winslow does not reference any neck or cervical diagnosis or treatment in the medical records until December 21, 2020. In the summarized note for that date, he notes a consultation from Associates of Colorado and the notation that it is unlikely she has cervical radiculopathy as she has an unremarkable cervical examination. Despite this apparent contradiction, he determined in the initial report that the cervical spine was work related. Having made that determination, he deferred a cervical rating since the evaluation was too soon after Claimant's cervical surgery and he could not perform the range of motion testing.

11. Dr. Winslow subsequently issued an addendum report dated June 28, 2022 where he provided an updated rating of 19% impairment for the cervical spine, in addition to the 2% upper extremity rating. (Claimant's Exhibit 10). He also determined that the Claimant reached MMI on May 3, 2022. This is the date of his follow up DIME. He states "Dr. Paz reports MMI June 8, 2021, MMI in my opinion is after the patient completes her therapy for her surgery which can be completed as maintenance. She will be placed at MMI today 5/3/2022". (Respondents' Exhibits H, p. 24). In his rationale for his decision as to MMI and impairment, he states "On review of the medical records in my opinion and based on application of the guidelines it is apparent that causally this is related to her work accident and is reasonable and necessary care. She had no symptoms prior to this, she had cervical spine disease that necessitated surgery resulting in significant improvement in the patient's clinical symptoms. Either this is the most incredible coincidence or more likely the work injury aggravated accelerated and placed the patient in a position where she required a fusion that she did not require prior to this injury, there was no indication in the medical record, history or any other information provided that the patient was getting ready for or would likely have needed a spinal fusion/surgery if this had not been case. She is therefore rated appropriately; her surgery will be included and her previous injury and subsequent impairment rating related to her accident." (Respondents' Exhibit H, p. 125).

12. Dr. Hattem testified on behalf of Respondents. He performed a record review IME of the Claimant on behalf of Respondents. He issued reports dated August 25, 2022 and January 17, 2023. Dr. Hattem was qualified as an expert in occupational medicine with Level II accreditation. In addition to review of extensive medical records regarding Claimant's treatment, he also reviewed the DIME report from Dr. Winslow.

According to his initial report, Dr. Winslow assigned an impairment rating to the left upper extremity of 2%.[1]

13. Dr. Hattem persuasively testified, consistent with his report, that Dr. Winslow made various errors in his cervical rating including providing a Table 53 rating for a 1 level fusion, instead of a 2 level fusion, and errors in range of motion testing where he provided incorrect ratings for cervical right rotation and cervical left rotation. The range of motion ratings were both inaccurate based on the applicable tables in AMA Guides resulting in an under-rating based on the range of motion measured by Dr. Winslow.[2] Although these errors exist and, are well documented, they do not resolve the central issue as to whether there should be a cervical rating in first place and whether that part of the DIME Report is clearly incorrect.

14. Dr. Hattem also testified that with respect to causation of the neck, he reviewed the medical records which revealed all cervical exams prior to March 2020 were normal. He reviewed Dr. Olsen's records with respect to evaluation of symptoms that might be related to the neck. With respect to Dr. Olsen's evaluation in December, 2020, Dr. Hattem interpreted his evaluation as an attempt to rule out the cervical spine as a pain generator, even though Claimant had never complained of cervical pain.

15. Dr. Hattem testified consistently with his IME report that utilizing a causation analysis, his opinion was that the cervical spine was not related to the work injury. As part of his analysis, he noted that Dr. Winslow was under the false impression that Claimant had never experienced similar types of symptoms. According to the records reviewed by Dr. Hattem, Claimant had consulted with an orthopedic surgeon, Dr. Hurley in June 2017 and presented with non-traumatic bilateral elbow pain, neck, bilateral shoulder, bilateral hand pain, soreness in the hips, knees, ankles and toes.[3]

16. Dr. Hattem also opined that Dr. Winslow's inclusion of a cervical impairment rating as a work related injury was clearly in error based on the lack of an adequate causal analysis. In his report dated January 17, 2023 he concludes that based on his analysis, ". . . Dr. Winslow clearly erred when he attributed [Redacted, hereinafter MA] cervical spine condition to her fall of August 6, 2020." Additionally, Dr. Hattem testified that the causal analysis employed by Dr. Winslow, namely that because X followed Y that Y caused X, was insufficient. I find Dr. Hattem's testimony and report to be persuasive, credible and more than a difference of opinion with the opinions of Dr. Winslow as to causation. Based on Dr. Hattem's testimony and written opinions, I find Dr. Winslow's inclusion of a cervical impairment rating to be clearly incorrect.

17. Dr. Reiss also testified at the hearing via telephone on behalf of Respondents. Dr. Reiss, an orthopedic surgeon was qualified as an expert in orthopedic

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[1] The DIME summary sheet references the right upper extremity in error, but in the narrative, he correctly refers to the left upper extremity. (Respondents' Exhibit H, p. 121).

[2] These errors are also noted by the Division IME Unit in an incomplete notice dated July 15, 2022. (Respondents' Exhibit Z). The evidence is devoid of any response to the notice.

[3] Dr. Hurley's note of June 8, 2017 is consistent with the testimony of Dr. Hattem. (Respondents Exhibit G).

surgery and as a level II accredited physician. He testified that he reviewed the X-Rays and MRI images and it was his opinion that the imaging showed degenerative preexisting changes rather than anything acute. He elaborated that if there was an acute cervical strain at the time of the injury, there would be neck pain at the time of the injury. Contrary to that, there was considerable documentation of a lack of neck symptomatology and a normal exam of the neck. It was his opinion that it is very unlikely that Claimant injured her neck in the incident and that is supported by the non-diagnostic cervical injections and the results of the EMG testing. Dr. Reiss opined that Dr. Winslow made a significant error in determining that the cervical spine was causally related to the work injury incident.

18. After the Claimant was placed at MMI and before the DIME occurred, the Claimant underwent a 2 level cervical fusion at C4 – C6 with Dr. Rauzzino. However, the exhibits submitted by the parties do not include the pre-operative or operative reports. The only records from Dr. Rauzzino's office are post-surgery. As such, absent is a complete, concurrent historical record as to the Claimant's symptoms or the rationale for surgery, other than the historical data contained in the post-surgical records.

19. Post-fusion, Claimant reported an improvement of symptoms for the first few weeks to few months. However, according to a report of December 19, 2022 from Dr. Rauzzino, approximately 11 months after the surgery, the Claimant was complaining of pain in her left upper extremity. Dr. Rauzzino reviewed a recent CT scan and MRI scan and found no obvious complications. He wanted to do an EMG/nerve conduction study for potential RSD.[4]

CONCLUSIONS OF LAW

A. Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

[4] Dr. Hattem noted in his testimony that Claimant had a work up for CRPS previously, which was negative.

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

B. Burden and standard of proof

The DIME physician's findings include his subsequent opinions, as well as his initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). The finding of a DIME physician concerning a claimant's MMI status or medical impairment rating is binding on the parties unless it is overcome only by clear and convincing evidence. C.R.S. §8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

In this case, Respondents must overcome the DIME's cervical rating and MMI determination by clear and convincing evidence. With respect to the medical benefits sought, Claimant must prove that the medical treatment sought, including the surgery performed by Dr. Rauzinno was reasonable, necessary and related.

C. Respondents overcame the cervical rating and determination of MMI of the DIME by clear and convincing evidence.

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

As noted in the findings, Dr. Hattem persuasively testified that Dr. Winslow made errors in his rating of the Claimant's cervical spine. However, more concerning than the errors with respect to the Table 53 rating and the range of motion ratings is the lack of a meaningful causation analysis by Dr. Winslow with respect to the claimed injury to the cervical spine. His causation analysis is based on a "temporal" relationship between the occurrence of the injury followed by the neck surgery. He states "Either this is the most incredible coincidence or more likely the work injury aggravated accelerated and placed the patient in the position where she required a fusion that she did not require prior to this injury. . ." (Claimant's Exhibit 10, p.38). This *post hoc* fallacy ignores the facts that Dr. Winslow notes in his own report. Specifically, Dr. Winslow summarized in his initial report the medical records he reviewed beginning on August 6, 2020. Importantly, in the summary of the chart note of September 24, 2020 from KC[Redacted], he notes "KC[Redacted] clinic again focusing everything seems to be focused around the assessment left elbow sprain pain, continued left elbow pain. *(No comments conversations discussions about cervical spine low back are noted in the exam, treatment, history."* (Claimant Exhibit 9, p. 25). Clearly, at the initial DIME evaluation, Dr. Winslow noted the lack of temporal complaints or discussion of cervical pain or injury. However, without any discussion regarding this prior observation, he determines in the addendum report that there is a causal relationship between the initial injury and the need for subsequent cervical fusion.

I conclude that Dr. Hattem's opinions that Dr. Winslow's causation determination is deficient, based on his incomplete causation analysis, to be credible and persuasive. I further conclude that Dr. Winslow clearly erred in his determination that the Claimant's cervical spine condition is related to the compensable work injury of August 6, 2020.

Since the Respondents' have overcome the determination of Dr. Winslow that the neck was related, the treatment for the neck at the hands of Dr. Rauzzino is rendered moot since the treatment for the neck is not related.

Respondents' have also challenged the date of MMI assigned by Dr. Winslow. I conclude that based on the totality of the evidence that the date of MMI assigned by Dr. Winslow was based on his consideration that the surgery performed by Dr. Rauzzino extended the MMI date since it was his opinion that the surgery was related. Since I conclude that the surgery was not related to the work injury, I conclude that the date of MMI assigned by Dr. Olsen of July 6, 2021 to be the date of MMI.

ORDER

It is therefore ordered that:

1. Respondents prevailed in their challenge to the Division IME impairment rating for the cervical spine by clear and convincing evidence. Respondents are not obligated to pay the 19% whole person rating for the cervical spine imposed by the Division IME physician, Dr. Winslow. The date of Maximum Medical Improvement is July 6, 2021.

2. Pursuant to the parties' stipulation, the 2% impairment rating for the left upper extremity is determined to be awardable.

3. Respondent may take credit for any PPD benefits previously paid to Claimant in connection with this claim.

4. Claimant has failed to sustain her burden of proof that the surgery performed by Dr. Rauzzino was reasonable, necessary and related and the request for the medical benefits related to that surgery are denied.

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

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

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

DATED: May 16, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-109-869-002

ISSUE

1. Did Claimant overcome the DIME physician's permanent impairment rating by clear and convincing evidence, and if so, what is Claimant's correct permanent impairment rating?

PROCEDURAL ISSUES

At the hearing, Claimant endorsed the issue of disfigurement, specifically as it related to voice/vocal issues. Claimant has withdrawn that issue.

On October 24, 2022, the second day of the hearing, Claimant offered Exhibit 4, an addendum report from Karin Pacheco, M.D. dated October 4, 2022, into evidence. Respondents' counsel objected, and moved to exclude the report. On the first day of hearing, Claimant's counsel completed Dr. Pacheco's direct examination, and Respondents' counsel was in the middle of cross-examination when the June 27, 2022 hearing was continued because Dr. Pacheco was no longer available to testify that day. Claimant's counsel asserted, in support of Exhibit 4, "I requested that Dr. Pacheco prepare this supplemental report in order to conserve the time, energy, and effort of the Court, because I'm entitled to redirect, and that is basically, the report would be the redirect testimony that Dr. Pacheco would provide." (Vol. II Tr. 13:19-24). The ALJ took Exhibit 4 under advisement. Respondents' counsel completed his cross-examination of Dr. Pacheco, and Claimant's counsel completed her redirect of Dr. Pacheco. Exhibit 4 is not admitted into evidence.

FINDINGS OF FACT

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

Claimant's Prior Medical History

1. Claimant is a 48 year-old woman who worked for Employer as a registration clerk in the emergency department (ED).

2. On May 31, 2019, Claimant was seen by her PCP for symptoms that had been ongoing for three weeks, including coughing, dyspnea/shortness of breath (SOB), and bronchitis. According to the medical records, Claimant had checked into the ED the previous Thursday, had a chest x-ray and a nebulizer treatment, and she received steroids. Claimant rested for a few days and returned to work, but she could not make it through her 12-hour shift. (Ex. A).

3. Less than two weeks later, on June 11, 2019, Claimant returned to her PCP for escalating issues that included wheezing, a recurring cough, an upper respiratory infection (URI) and dyspnea/SOB. Blanca Richmond-Coca, M.D., documented in the medical record that Claimant's wheezing was a new problem, and they should consider whether Claimant has undiagnosed asthma. She also documented that at times exertion provoked flares of coughing and difficulty talking, so Claimant would require FMLA leave one to three times each month, for one to two days for each episode. She referred Claimant to pulmonologist, James, Meyer, M.D. (Ex. A).

Claimant's Admitted Work Injury Through October 20, 2020 (MMI)[1]

4. On June 13, 2019, Claimant was working for Employer. Law enforcement brought a man to the ED who was placed in the behavioral health unit. When Claimant entered the room to band the patient, she noticed a strong pungent odor. Shortly after leaving the room, Claimant started sneezing, her nose and face started to swell, and she had trouble breathing. (Ex. D).

5. Claimant continued to have difficulty breathing so she went to the ED. Kelli Jones, M.D., treated Claimant emergently as Claimant's problems were becoming severe, and she was suffering respiratory distress and wheezing. Dr. Jones intubated Claimant and noted that Claimant's "presentation was very rapidly progressive and [she] was concerned she may need a cricothyroidotomy if she could not be intubated. She had an in-line nebs and at one point was difficult to bag." Dr. Jones noted that after Claimant was intubated, they took a chest x-ray to verify correct placement of the tube. Based on the x-ray, respiratory therapy withdrew the tube 4 cm. Dr. Jones specifically noted in the medical record that there were no complications with the intubation, and Claimant tolerated the procedure well. Claimant was admitted to the ICU. (Ex. B).

6. The ALJ finds that Claimant's intubation on June 13, 2019 was emergent, but there were no documented complications.

7. Claimant was extubated on June 15, 2019. James Knight, M.D. examined Claimant that day. Claimant reported dyspnea, throat tightness, and chin numbness. Dr. Knight noted Claimant was moving air well. On June 17, 2019, Claimant was discharged from the hospital with a primary diagnosis of anaphylaxis, and secondary diagnoses of airway obstruction and acute respiratory failure. It was recommended that Claimant follow up with an allergist. (Ex. F).

8. On June 19, 2019, Claimant saw Dr. Richmond-Coca, her PCP, with a chief complaint of worsening anxiety. Dr. Richmond-Coca noted that Claimant's anxiety increased following her recent hospitalization. (Ex. F).

9. On July 3, 2019, Claimant was evaluated by Authorized Treating Provider (ATP), William Woo, M.D. He diagnosed Claimant with respiratory distress, and noted in the medical record that he spoke with another allergist who agreed that Claimant's labs were not consistent with an anaphylaxis type reaction. Dr. Woo further documented that

[1] The MMI date, October 20, 2020, is not at issue.

Claimant experienced respiratory anxiety after the intubation, and her PCP prescribed her Xanax. Claimant remained fearful, so Dr. Woo recommended she see a psychologist, and referred her to John DiSorbio, Ed.D. (Ex. D). Dr. DiSorbio's treatment notes identify the emotional impact Claimant's work injury and personal stressors have had on Claimant. (Ex. E).

10. On July 15, 2019, Claimant was seen at an ED for her continued cough, increased SOB, and wheezing. These are the same symptoms Claimant had prior to the admitted work-related injury on June 13, 2019. Her pulmonary function testing (PFT) on July 15, 2019, was normal. On July 19, 2019, she was seen by John Ferguson, M.D., a pulmonologist, who performed another PFT, which was also normal. On September 4, 2019, Claimant was seen by another pulmonologist, Majd Kobitary, M.D. Dr. Kobitary administered another PFT and performed spirometry testing, both of which were normal. (Ex. F).

11. On September 11, 2019, Claimant was evaluated by Justin King M.D., an ENT. Dr. King performed a laryngoscopy on Claimant. The laryngoscopy was normal. (Ex. F).

12. Claimant went to an ED on September 13, 2019, for an URI and bronchitis. The following day she was seen at a different ED for SOB. (Ex. F).

13. Dr. Woo evaluated Claimant on October 23, 2019. He noted that since his last evaluation, Claimant had been on a cruise when she experienced a coughing episode that caused her vocal cord to spasm and close, and she passed out. The ship's doctor performed a chest x-ray and diagnosed her with bronchitis. Claimant continued to be anxious, and fearful that if she coughed it would trigger a larynx spasm. Dr. Woo referred Claimant to Gary Gutterman, M.D., a psychiatrist. (Ex. F).

14. On November 11, 2019, Claimant was seen at the UCHealth ED, with SOB and chest heaviness that had been ongoing since June. A CT of her neck and upper chest showed no masses or evidence of other lesions along the course of the vagus or recurrent laryngeal nerves. A laryngoscopy showed left vocal cord weakness, but no significant paradoxical movement of the cords or upper airway obstruction. (Exs. F and M).

15. Daniel Beswick, M.D., the ENT Stat Consult at UC Health ED, evaluated Claimant and performed a fiberoptic laryngoscopy on Claimant the same day, November 11, 2019. The testing indicated Claimant had left vocal fold hypomobility, and the right vocal fold had normal and full abduction and adduction. The neck CT showed no evidence of masses along the course of the left recurrent laryngeal nerve, and there was no subglottic stenosis on imagining. Dr. Beswick indicated that Claimant had left vocal cord weakness that ***could be*** from intubation several months prior. He also noted that the laryngoscopy examination had limited utility in evaluating for vocal cord dysfunction (VCD) as it is an episodic disorder that was not seen on that date. According to the medical record, Claimant's symptoms improved with nebulizer treatments and steroids with no airway obstruction, and no acute ENT intervention was needed. Dr. Beswick

recommended Claimant follow up in an ENT clinic for an evaluation of the left vocal cord paresis. (Ex. F).

16. On November 15, 2019, Claimant had her third session of speech therapy. Claimant told her therapist about her recent trip to the ED. The therapist noted that Claimant had a new diagnosis of a paralyzed vocal cord, and she had been diagnosed with left TVF paralysis, which would explain Claimant's hoarseness and breathy vocal quality. (Ex. F).

17. On December 1, 2019, Claimant presented to the ED with SOB and mild hoarseness. She was diagnosed with simple vocal cord dysfunction, SOB, vocal cord dysfunction (VCD), and chronic cough. Claimant was to follow up with the ENT. (Ex. F).

18. A few days later, on December 6, 2019, Claimant was evaluated by Mona Abaza, M.D., an ENT at UC Health. Dr. Abaza performed a video stroboscopic vocal cord evaluation on Claimant. The testing showed Claimant had muscle tension dysphonia (MTD), laryngopharyngeal reflux, and striking zone mass. Claimant was assessed with vocal cord weakness, functional voice disorder, vocal cord nodules, vocal cord leukoplakia and spasm of the larynx. Dr. Abaza recommended a referral to a speech ENT and she felt Claimant would benefit from 8-12 aggressive voice therapy sessions. (Ex. F).

19. Dr. Woo evaluated Claimant on January 15, 2020, and noted Claimant was using inhalers, had started speech therapy, was seeing a psychiatrist, and had a cold. Dr. Woo indicated that since he last saw Claimant, she had a laryngoscopy that identified possible left-sided vocal cord paralysis or weakness, but she then went to an ENT clinic and had another laryngoscopy that revealed there was no paralysis, and only some vocal cord nodules. He also noted that Claimant might have a form of cough variant asthma, and it is possible that the cough variant asthma had been irritating her vocal cords, and could be the underlying cause of the vocal cord nodules. (Ex. D)

20. On January 17, 2020, Claimant was seen by a certified speech pathologist for a therapy session. Claimant had a URI that was worsening her cough and causing more difficulty with her breathing. (Ex. 2) On February 12, 2020, Claimant's speech therapist diagnosed Claimant's speech issue as being related to MTD, and she recommended Claimant see Daniel Fink, M.D., an Otolaryngologist, for a trial of superior laryngeal nerve (SLN) blocks and a repeat vocal cord scope. (Ex. M).

21. On March 13, 2020, Claimant saw Dr. Fink for administration of an SLN block. The SLN block was performed in his office without any difficulty. On July 9, 2020, Dr. Fink performed a laryngoscopy that showed normal abduction and adduction on the right, and a reduced abduction and adduction on the left, with no lesions. Dr. Fink's plan was to give Claimant laryngeal Botox injections bilaterally and concurrent with the SLN blocks. On August 13, 2020, Dr. Fink diagnosed Claimant's conditions as MTD, vagus neuropathy, and a cough. He noted Claimant received a good, but temporary response, from the SLN blocks. Following Claimant's first Botox injection, her breathlessness resolved, her cough resolved, her breathing improved, and her speech was normal. On

September 24, 2020, Dr. Fink reported that Claimant's symptoms returned two weeks prior, and were back to baseline. On October 1, 2020, Dr. Fink noted Claimant was only getting about six weeks of relief from the SLN Block and Botox injections, so she would need them on a more frequent basis than the standard recommendations. (Exs. I and M).

22. At Respondents request, Kathleen D'Angelo, M.D. performed an Independent Medical Examination (IME) on Claimant. She conducted an extensive review of Claimant's medical records and issued a very long and detailed IME report dated March 15, 2020, summarizing those records. Dr. D'Angelo opined that Claimant had work-related acute respiratory failure as well as a resultant vocal cord dysfunction and paralysis, pre-existing asthma, Anosmia (not work related), and an aggravation of Claimant's anxiety and insomnia due to her work-related condition. Dr. D'Angelo recommended a repeat laryngeal scope to determine if the vocal cord function was normalized. She also recommended that Claimant continue with speech therapy. (Ex. F).

23. Dr. D'Angelo noted that "due [to] what appears to have been a difficult intubation" Claimant sustained a known complication of vocal cord dysfunction/paralysis. She noted that Dr. Jones had difficulty intubating the patient and had considered performing a stat-tracheotomy. According to Dr. D'Angelo it is well known in ER medicine that anaphylaxis causes swelling to the airway with associated problems in passage of an endotracheal tube. She noted that once on the ventilator, [Redacted, hereinafter MM] was documented to be "difficult to bag" which is another sign of airway obstruction. (Ex. F).

24. The ALJ finds Dr. D'Angelo's opinion generally credible, but not persuasive. Dr. D'Angelo completed a very detailed and comprehensive review of Claimant's medical records. But Dr. D'Angelo's conclusion regarding Claimant's intubation being difficult is not supported by the medical records. As found, there were no complications with Claimant's intubation on June 13, 2019, and Claimant tolerated the procedure well.

25. Between March 15, 2020 and October 20, 2020 (Claimant's date of MMI), Claimant continued to treat with Dr. Woo (Ex. D), Dr. DiSorbio (Ex. E), Dr. Gutterman (Exs. G and H), and Dr. Fink (Ex. I).

26. On June 10, 2020, Dr. Gutterman opined Claimant reached MMI for the mental aspect of her claim with a 6%-7% mental impairment rating associated with PTSD. (Ex. H)

27. Dr. Woo opined Claimant was at MMI as of October 20, 2020. He noted that during the examination, Claimant did not cough throughout the visit, there was no wheezing and her speech was coherent and intelligible. He further noted that as a result of Dr. Fink's injections Claimant experienced better speech and breathing control without laryngeal spasms, and Claimant's respiratory distress with vocal cord dysfunction was stable. With regard to permanent impairment, Dr. Woo indicated that "there is no evidence of impairment. She has good breathing ability when she is optimally treated. She has

had previous PFT's which were normal. Using Table VI on page 182 of the AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition, Revised she is Class 1 for speech and I would assess zero percent impairment." He recommended regular intervals of SLN blocks about every six weeks. (Ex. J).

Claimant's Post October 20, 2020 MMI History

28. On October 23, 2020, Claimant was seen by her PCP for hypertension, fatigue, snoring apnea fatigue, possible sleep apnea, chronic anxiety, and wheezing. Claimant's PCP noted that Claimant "has a complex history prior to her work comp injury where she was intubated. There has been [a] question if she has had asthma in the past and would like to see specialists at NJH." On November 20, 2020, Claimant was seen by her PCP for COVID, and another episode of bronchitis. Her symptoms included SOB, and a worsening cough. (Ex.1).

29. After being placed at MMI by Dr. Woo, Claimant still treated with Dr. Fink, who continued to provide the same diagnoses, including MTD. He continued to administer SLN bocks and Botox injections every six weeks, without any identified side effects. (Ex. I).

30. On December 21, 2020, Respondents filed a Final Admission of Liability consistent with Dr. Woo's opinions regarding MMI, and impairment. (Ex. K) On January 15, 2021, Claimant filed a Notice and Proposal for a DIME. On the Notice, the two regions selected for evaluation were Region 5, ENT (Nose & Throat) and Region 6, Other (Respiratory/Pulmonary). (Ex. L).

31. Michael Volz, M.D., a Level II accredited pulmonologist was selected as the DIME physician. Dr. Volz met with Claimant on March 20, 2021, took a history from Claimant, performed a comprehensive record review, and physically examined Claimant (including an oropharynx/throat exam). (Ex. M).

32. Dr. Volz spent over 12 hours reviewing Claimant's medical records, and he prepared a 29-page DIME report. He listed numerous pertinent medical conditions and 14 different clinical diagnoses (work and non-work related), none of which included difficulty swallowing/dysphagia. He agreed that Claimant achieved psychiatric MMI as of June 20, 2020, and opined Claimant achieved overall MMI by October 20, 2020. He agreed with Dr. Gutterman's 6-7% mental health impairment for PTSD. Dr. Volz addressed the medical impairment aspect of this claim, as follows:

> Determination of Permanent Disability related to laryngeal problems is based upon Section 9.3a – Respiration (page 180-181) as found in Chapter 9, pages 173-183, of the Revised 3rd Edition of the AMA Guides to the Evaluation of Permanent Impairment. More specifically, the PI is related to the larynx as discussed in the narrative on pages 180-181 and in Table 5 – Classes of Air Passage Defects found on page 181. Using this information, I am assigning an IR of 5%. She has Class [1] IR of WP that is moderate and therefore applying 5% IR.

> Additionally, the claimant has experienced cough and shortness of breath (dyspnea) as well as hypoxemia/hypoxia. These manifestations are discussed in Chapter 5, pages 115-126, of the Revised 3rd Edition of the AMA Guides to the Evaluation of Permanent Impairment. None of these manifestations have attributable designation for Permanent Impairment and a search for the underlying basis is recommended or needed to ascertain attribution as there are a number of diagnoses/causes for these manifestations, whether lung/pulmonary or another organ system. (Ex. M).

33. Dr. Volz opined that the "medical aspect of the MMI that is or might be attributed to the injury on the DOI is exclusively related to laryngeal problems that Dr. Fink is managing. The most current diagnosis is related to laryngeal problems of adductor spasmodic dysphonia as well as vocal cord edema." He assigned Claimant a 12% whole person impairment rating (7% psychological and 5% other/air passage defect). (Ex. M).

34. The ALJ finds that Dr. Volz's opinions are based upon an exhaustive review and analysis of all available information, and his opinions are credible and persuasive.

35. On October 5, 2021, Respondents filed a new FAL consistent with Dr. Volz's opinions. (Ex. O). Claimant disagreed with the impairment rating provided by Dr. Volz and requested a hearing to overcome his opinion. (Ex. P).

36. On behalf of Respondents, Jeffrey Schwartz, M.D. conducted an IME on Claimant. Dr. Schwartz is a pulmonologist, but he is not Level II accredited. Dr. Schwartz reviewed over 1,200 pages of Claimant's medical records (including prior medical records and reports from Drs. Woo, DiSorbio, Kobitary, King, Gutterman, Fink, D'Angelo, and Volz). As part of his IME, Dr. Schwartz took a history from Claimant, examined her, and ran additional spirometry testing, which was normal. (Ex R).

37. In his IME report, Dr. Schwartz discussed the complexity of Claimant's medical situation, including the cause of Claimant's symptoms in light of her preexisting issues. Dr. Schwarz opined that there was no evidence of laryngeal damage from intubation. He noted Claimant had undergone multiple laryngoscopies since November 2019, all of which failed to confirm VCD. Dr. Schwartz noted that Dr. Fink diagnosed Claimant as having MTD, and Dr. Fink treated this successfully with injections. He opined that Claimant's MTD was likely secondary to her PTSD. He indicated that Dr. Volz's reasoning in providing a limited respiratory rating was appropriate given Claimant's repeated normal objective measures on PFTs. (Ex. R).

38. At the hearing, Dr. Schwartz testified that in his opinion, Claimant has MTD, which is a speech disorder, and it is caused by her PTSD. (Vol II Tr. 163:12-164:14). He explained that with MTD the muscles in the throat get tense or overly active, and therefore this condition affects the muscles in the larynx, which controls speech, so speech is abnormal. (*Id*. at 164:22-165:6) He opined that MTD is a speech disorder, not an air passage disorder, and the correct treatment for MTD is speech therapy and Botox injections, which is consistent with Dr. Fink's treatment. (*Id*. at 165:22-166:18). Dr. Schwartz also testified that there is no evidence that Claimant had a swallowing issue as

of her date of MMI, he explained that Claimant's swallowing issue could be caused by a number of non-work injury related conditions including GERD, and in his opinion, to a reasonable degree of medical probability, Claimant's swallowing issue is not causally related to the injections administered by Dr. Fink. (*Id*. at 171:22-173:3). The ALJ finds Dr. Schwartz's testimony to be credible and persuasive.

39. Karin Pacheco, M.D., is an allergist, immunologist and occupational medicine physician at National Jewish Hospital. She is also Level II accredited. Dr. Pacheco performed an Occupational/Environmental Consultation on behalf of Claimant. She received a subjective history of Claimant's symptoms and present illness from Claimant, and she reviewed select medical records. According to Dr. Pacheco's report, she reviewed the following: two reports from Dr. Fink (9/24/20 and 10/1/20), imaging from Platte Valley Medical Center, notes from Claimant's hospitalization from June 13, 2019 – June 17, 2019 (ER notes, 6/13/19 note from the internal medicine attending physician, 6/15/19 progress note, 6/13/19 pulmonary consult, and discharge summary), and National Jewish test data from 2022. The testing performed at National Jewish in April of 2022, all of which was normal, included full pulmonary function testing, methacholine challenge, laryngoscopy, and a CT scan of the chest. (Ex. V).

40. Dr. Pacheco testified that the documents listed in her report are the only records she reviewed (Vol. I Tr. 123:17-22). Thus, in forming her opinion, Dr. Pacheco did not review any of the following: Dr. Volz's DIME report; Dr. Woo's records; Claimant's PCP's records; ED records after the work-related event; post-hospitalization pulmonology reports; or any ENT reports other than the two reports from Dr. Fink. Dr. Pacheco also did not review the PFT reports, spirometry reports or laryngoscopy reports for testing administered prior to 2022.

41. According to her report, Dr. Pacheco was asked to reconsider Claimant's impairment rating regarding the upper airway work-related injuries that Dr. Pacheco stated were related to vocal cord trauma from intubation or from treatment of the vocal cord trauma. In her report, Dr. Pacheco writes, "[a]ccording to her records, it is unclear if the patient underwent a traumatic intubation. She reports several attempts, but only 1 is recorded in the emergency room record." (Ex. V).

42. Claimant testified she currently has problems speaking, difficulty breathing and has to exert herself to speak. Her condition is made worse with stress. (Vol. I Tr. 41:18-42:15). Claimant testified she had has difficulty swallowing and started choking on her food in December 2021/January 2022. (Vol I Tr. 49:20-50:7).

43. Dr. Pacheco used the same Table (Table 5 Classes of Air Passage Defects) from the AMA Guidelines as utilized by Dr. Volz. She opined that Claimant's presentation was consistent with Class II from that table, for 15 to 30% impairment of the whole person. Dr. Pacheco also opined that Claimant's swallowing issue, warranted permanent impairment ratings. She concluded:

> I consulted the AMA guides to the evaluation of permanent impairment, third edition (revised) as used in the state of Colorado. I first turned to Chapter 9, "Ear,

nose, throat and related structures" on page 173. I then turned to table 5, classes of air passage defects, on page 181. I considered that the patient's presentation was consistent with class II, 15 to 30% impairment of the whole person. Specifically, a recognized air passage defect exists, as described by Dr. Fink, and includes decreased motion of the right vocal cord, and no movement of the left vocal cord [untrue]. Dyspnea does not occur at rest and is not produced by walking freely on the level. Dyspnea is produced by stress, prolonged exertion, hurrying, hill climbing, etc. Part of the patient's dyspnea relates to difficult in regulating vocal cord movement. Examination does reveal partial obstruction of the laryngeal pharynx and larynx. Treatment for vocal cord dysfunction requires Botox injections every 6 weeks, on an ongoing basis. I therefore placed the patient at the upper range of class II impairment at 25% impairment of the whole person.

I then turned to chapter 10, the digestive system, and specifically consulted table 2, classes of impairment of the upper digestive tract on page 189. I noted that the patient developed dysphagia and abnormal swallowing, as evidenced by the barium swallowing study obtained May 9, 2022. I considered that the patient's findings fall in class I, 0 to 5% impairment of the whole person, as symptoms and signs of upper digestive tract disease are present with anatomic loss or alteration, but continuous treatment is not required and weight can be maintained. Further treatment with speech pathologist will be necessary to maintain adequate and safe swallow. I therefore assigned a 5% impairment of the whole person for this condition. (Ex. V).

44. At the hearing, Dr. Pacheco testified that Claimant suffers from VCD caused by vocal cord trauma sustained during intubation. (Vol I. Tr. 77:16-79:25). She based her opinions primarily on the November 2019 laryngoscopy showing left vocal cord weakness, but she also reasoned Claimant must have VCD because Dr. Fink would not have provided ongoing injections if Claimant did not have a vocal cord injury. (*Id*. 77:6-15). Dr. Pacheco admitted that the most recent laryngoscopy performed in April 2022 at National Jewish did not identify any airway obstruction or difficulty. (Vol. II. Tr. 56: 7-17; Ex. V). She attributed each of the normal laryngoscopies obtained after the November 2019 laryngoscopy, to where Claimant was in her Botox cycle. (Vol. I Tr. 98:10-99:1).

45. With regard to Claimant's swallowing issue, Dr. Pacheco indicated that while Claimant responded well to Dr. Fink's injections, in her opinion this treatment resulted in the side effect of dysphagia/difficulty swallowing. Specifically, she testified that Claimant's injection treatment with Botox, Marcaine and Kenalog caused Claimant's repetitive disorganized tongue movement, reduced tongue based retraction leading to dysphagia, vocal breathiness, and SOB with talking. (Vol. I Tr. 75:23-77:15, 90:15-91: 1-15). Again, in her opinion, because the swallowing issue is a consequence of claim-related treatment, Claimant is entitled to an impairment rating under Chapter 10 of the AMA Guidelines, which she assessed at 5%.

46. Other than Dr. Pacheco's testimony, there is no objective evidence in the record that Claimant experienced side effects, including swallowing issues, from Dr. Fink's injections. Dr. Fink's records do not document any swallowing side effects from

the SLN blocks and Botox injections.

47. Furthermore, the Notice for DIME only specified two regions for the DIME evaluation: Nose and Throat, and Respiratory/Pulmonary. Thus, these are the only two regions Dr. Volz, the DIME physician evaluated. (Ex. L). The ALJ finds that Claimant never requested a DIME evaluation of her digestive system.

48. Dr. Pacheco was not aware of Claimant's preexisting issues (URIs, bronchitis, coughing, anxiety), or that Claimant was being treated for escalating URI issues just prior to her date of injury. Similarly, Dr. Pacheco was unaware Claimant was experiencing difficulty with talking, physical exertion and SOB severe enough that just prior to her date of injury, she was being referred to a pulmonologist, and regular FMLA leave was recommended. Dr. Pacheco was also not aware that after the work injury Claimant went to the ED repeatedly for bronchitis and SOB. (Ex. V.; Vol. I Tr. 114:22-25, 118:6-119:17, 120:23-123:22). Dr. Pacheco was not aware of these numerous issues because she only reviewed a very limited subset of Claimant's medical records before rendering her opinion.

49. Claimant has an extremely complex mental and physical medical history both before and after her work incident that involved some claim-related issues, and some unrelated issues.

50. Claimant's ATP, Dr. Woo gave Claimant a permanent impairment rating of 0%, and he relied upon Table 6 (Speech Classification Chart). Dr. Woo diagnosed Claimant with respiratory distress with VCD. He noted that Claimant had good breathing ability when she is optimally treated, and her PFTs were normal. Dr. Volz gave Claimant an impairment rating of 12% (5% Medical and 7% Mental Health), and he relied upon Table 5 (Classes of Air Passage Defects). Dr. Volz noted that a vocal cord disorder has been established, but a VCD has not yet been determined or diagnosed. Dr. Pacheco gave Claimant an impairment rating of 29 % (Medical only), and relied upon Table 5 (Classes of Air Passage Defects) and Chapter 10 (Digestive System), Table 2 (Classes of Impairment of the Upper Digestive Track). Dr. Pacheco testified that Claimant has vocal cord trauma caused by intubation resulted in VCD.

51. As found, Dr. Volz's DIME report is thorough, credible, and persuasive. He was familiar with Claimant's complex medical history and treatment. While he and Dr. Woo relied upon different tables in Chapter 9 of the AMA Guidelines, their impairment ratings were not drastically different. In contrast, Dr. Pacheco's medical impairment rating, just for Claimant's medical condition is nearly five times what Dr. Volz assigned. Further, Dr. Pacheco did not have all of Claimant's relevant medical records, and she assigned an impairment rating for a condition not listed on the Notice of Dime, and not present until after Claimant reached MMI.

52. Based on the totality of the evidence, Claimant failed to prove by clear and convincing evidence that it is highly probable that Dr. Volz's impairment rating is incorrect.

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming the DIME's Impairment Rating

The determination and assessment of permanent impairment requires the DIME physician to diagnose the claimant's condition or conditions, and determine their causal relationship to the industrial injury. *See Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998) A DIME physician's findings regarding causation, relatedness, and impairment are binding on the parties unless overcome by "clear and convincing

evidence." § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). Clear and convincing evidence is that quantum and quality of evidence that renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it is highly probable the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. Wellbridge d/b/a Colo. Athletic Club*, W.C. No. 4-914-378-02 (ICAO, June 25, 2015). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO July 19, 2004). This enhanced burden of proof for non-scheduled injuries reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med*, 961 P.2d at 592.

In addition to examining Claimant, Dr. Volz, the DIME physician, spent over 12 hours reviewing Claimant's voluminous medical records. He thoroughly reviewed and summarized Claimant's medical care from March 2015 through January 5, 2021. This included Claimant's pre-existing conditions, and her claim-related and unrelated care subsequent to her admitted work injury on June 13, 2019. Dr. Volz reviewed Claimant's multiple laryngoscopies, her PFTs, the reports of her ATP, and the multiple reports from Dr. Fink regarding the current treatment he was providing (SLN blocks and Botox injections). In his DIME report, Dr. Volz discussed 14 different clinical diagnosis, including, but not limited to, disorder of vocal cords, respiratory distress, laryngeal edema determined by laryngoscopy, cough, dyspnea, and wheezing. Dr. Volz noted that this was a "highly complex case" and many of Claimant's listed diagnosis are symptomatic diagnoses. (Ex. M). As found, Dr. Volz's DIME opinion is credible and persuasive.

Dr. Schwartz, a pulmonologist, agreed that Claimant's medical situation is very complex, including the cause of Claimant's symptoms in light of her preexisting issues. Dr. Schwartz reviewed over 1,200 pages of Claimant's medical records and he examined her. Dr. Schwartz credibly testified that Dr. Volz's reasoning in providing a limited respiratory rating was appropriate given Claimant's repeated normal objective measures on PFTs. While Dr. Schwartz and Dr. Volz have different opinions as to whether Claimant suffers from a speech disorder or a laryngeal disorder, the ALJ finds this is a mere difference of medical opinion. Claimant's voluminous medical records contain diagnoses of MTD, VCD, and vocal cord disorder. As found, Dr. Schwartz is credible and persuasive.

Dr. Pacheco is board-certified in Internal Medicine, Allergy/Immunology, and Occupational Medicine. Dr. Pacheco, unlike Dr. Schwartz is Level II accredited. Dr. Pacheco examined Claimant, and relied upon Claimant to provide her with a summary of her injury, history and treatment. As a part of her Occupational/Environmental Consultation, Dr. Pacheco reviewed a very limited number of Claimant's medical records. Claimant saw Dr. Fink on numerous occasions, yet Dr. Pacheco only reviewed two of his records. In addition to these records, Dr. Pacheco reviewed Claimant's medical records from June 13, 2019 – June 17, 2019, when Claimant was intubated and hospitalized after the admitted work-injury, imaging from Platte Valley Medical Center, and testing Dr.

Pacheco ordered in April 2022. As found, Claimant has a complex medical history, including treatment before and after the admitted injury. Dr. Pacheco, however, did not have Claimant's complete set of medical records to base her opinion on, but instead her opinion is based upon incomplete information and assumptions. Dr. Pacheco's limited review of this complex case is not sufficient to meet the burden of proving that Dr. Fink's impairment rating is wrong.

Claimant testified her swallowing issues and choking on food started in December 2021/January 2022. Dr. Pacheco opined that Claimant's post-MMI swallowing issue is directly related to the injection treatment provided by Dr. Fink under this claim, and is a side effect of that treatment. She further opined this swallowing issue entitles Claimant to a 5% rating under Chapter 10 of the AMA Guidelines. This opinion is not persuasive for several reasons. First, as found, there is no objective evidence in Dr. Fink's medical records that Claimant was experiencing side effects, particularly difficulty swallowing food, as a result of his SLN blocks and Botox injections. Second, the Notice of Dime noted two regions for evaluation: Region 5, ENT (Nose & Throat) and Region 6, Other (Respiratory/Pulmonary). (Ex. L). Dr. Volz did not diagnosis, relate or rate Claimant's swallowing issue because that issue had not materialized as of the date of MMI, and it was not identified as an issue by Claimant or any other provider as of the date of Dr. Volz's DIME evaluation. As such, Dr. Volz did not err in failing to diagnose, relate and rate a condition that had not yet developed, and one that he had not been asked to evaluate.

Claimant has an extremely complex medical history, both before and after her admitted work injury. Dr. Volz thoroughly reviewed and outlined Claimant's complex medical history, and analyzed Claimant's situation before ultimately rendering his opinions on impairment. As found, Claimant failed to prove by clear and convincing evidence that it is highly probable that Dr. Volz's impairment rating of 5% for an air passage defect is incorrect.

ORDER

It is therefore ordered that:

1. Claimant failed to overcome the DIME opinion of Dr. Volz regarding permanent impairment with clear and convincing evidence.

2. Claimant's request for a 29% whole person impairment rating is denied and dismissed.

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

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

DATED: May 17, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-148-418-004

ISSUES

- Did Claimant prove that Respondent CS[Redacted] is subject to a penalty pursuant to C.R.S. §8-43-304 for violation of C.R.S. §8-42-101(3)(a)(1).[1]

PROCEDURAL HISTORY (NOTICE TO PMC AND JURISDICTION)

An Application for Hearing was filed in this matter on October 26, 2022 by Claimant requesting penalties against [Redacted, hereinafter PM] and [Redacted, hereinafter CS] for "seeking to recover bills from the Claimant despite knowing the bills are covered under this workers compensation claim". According to the Certificate of Mailing, the Application was sent to counsel for CS[Redacted], counsel for Employer and PM[Redacted]. The notice of hearing sent by OAC on December 7, 2022 provided notice that the hearing scheduled for April 11, 2023 at 1:00 p.m. would be held at the Pueblo Municipal Courthouse. The certificate of service indicated service to counsel for Claimant and Counsel for CS[Redacted]. The official notice does not include counsel for the employer or PM[Redacted]. Counsel for Claimant has provided evidence that his office forwarded the notice to PM[Redacted] separately. This forwarded notice was not served by the Office of Administrative Courts as provided by C.R.S. 8-43-211(1). As such, it does not constitute statutory notice of the hearing to be held. Further, even if the Claimant's notice was sufficient, there is no evidence that PM[Redacted] was advised that the in person hearing scheduled in Pueblo was converted to a "virtual" video hearing. Finally, since PM[Redacted] was neither joined pursuant to C.R.C.P 19, or waived personal jurisdiction, it was not subject to the jurisdiction of this tribunal for the purposes of imposition of a penalty. *See, Delta County Memorial Hospital v. ICAO*, 495 P.3d 984 (Colo. App. 2021). As such, the penalties against PM[Redacted] may not proceed due to lack of notice and lack of jurisdiction.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on April 13, 2020 while working as a police officer for the [Redacted, hereinafter CP] when he was struck from behind in his patrol car while investigating an accident. He was taken to PM[Redacted] by ambulance.

[1] As indicated below, the ALJ considers the issue of violation of C.R.S. §8-42-101(4) as tried by consent instead of C.R.S. §8-42-101(3)(a)(1), which was an incorrect citation utilized by Claimant in his Application for Hearing.

2. Claimant was provided treatment at PM[Redacted] on the date of the injury and released the following day. (Claimant's Exhibit 4, pp. 18 -23).

3. A general admission of liability admitting for medical benefits and temporary disability benefits was filed on December 2, 2020. The certificate of service indicates that the admission was served on the Employer, the Division of Workers' Compensation and the Claimant.

4. A Final Admission of Liability was filed on March 18, 2022 and was served on Claimant, Claimant's attorney, the Employer and the carrier's attorney and the Division of Workers Compensation. (Respondent CS's[Redacted] Exhibit C, p.11).

5. Following the apparent non-payment of the medical bills for Claimant's treatment at PM[Redacted], Respondent CS[Redacted] prepared a Complaint on or about October 21, 2021 to be filed in Pueblo Count Court alleging damages for its Client, PM[Redacted] for two dates of service; November 26, 2019 and April 14, 2020. The amount sought for the workers compensation date of injury was $4,884.56 in principal and $299.60 in interest. The Summons, Complaint and Return of Service were filed in the Pueblo County Court on November 9, 2021 by CS's[Redacted] counsel, [Redacted, hereinafter MB]. (Respondent CS's[Redacted] Exhibit D, p. 28).

6. On November 2, 2021, attorney [Redacted, hereinafter AS], on behalf of Claimant, sent a letter to attorney MB[Redacted] and informed him, among other things, that the incident on April 14, 2020 that resulted in the treatment with PM[Redacted] was while the Claimant was an employee of the CP[Redacted] and was covered by Workers Compensation and that information was communicated to PM[Redacted]. He further stated "As you are aware, "It is unlawful, void and unenforceable as a debt for any physician, chiropractor, **hospital**, person, expert witness, reviewer, evaluator or institution to contract with, bill, **or charge any party** for services, rendered in connection with injuries coming within the purview of this article." (Emphasis in the original). (Claimant's Exhibit 3, p. 16).[2]

7. Claimant, now Defendant in the County Court action, through counsel [Redacted, hereinafter LS], filed an Answer to the Complaint on December 13, 2021 generally denying the allegations in the Complaint and specifically alleging that the claim for treatment was covered under and admitted workers compensation claim with a WC number of 5-148-418. (Claimant Exhibit 1, p. 6). The filing fee for the Answer was $124.73 (Claimant Exhibit 5, p. 24).

8. A trial on the County Court case was set for June 2, 2022. (Claimant Exhibit 1, p. 9). The trial was continued by unopposed motion dated June 1, 2022. An order granting the continuance was entered on that date. (Respondent CS[Redacted] Exhibit D, p. 28). On July 11, 2022 the County Court E-Filing record indicates that the case was

[2] This quotation from the statute is incomplete and misleading since it omits the reference to billing medical fees in excess of the medical fee schedule.

closed on that date. No other information as to the basis for the closure is evidenced on the E-Filing record or provided by the parties.

9. On July 13, 2022, counsel for CS[Redacted], [Redacted, hereinafter HC] sent an email for Respondents' counsel [Redacted, hereinafter LM] requesting a Financial (sic) Admission of Liability or letter of liability. LM[Redacted] responded on July 20, 2022 providing the Final Admission of Liability "which is evidence of the compensable work related injury that [Redacted, hereinafter LC] sustained on 4.13.20". (Respondent CS[Redacted] Exhibit C, p. 009).

CONCLUSIONS OF LAW

A. Penalty

Section 8-43-304(1) provides that any person who ". . .violates articles 40 to 47 of this title 8, or does any act prohibited thereby. . . shall also be punished by a fine of not more than one thousand dollars per day for each such offense. . ." Further, C.R.S. §8-43-305 provides that 'Every day during which any . . other person . . . fails to perform any duty imposed by articles 40 to 47 of this title. . . shall constitute a separate and distinct violation thereof."

The assessment of penalties is governed by an objective standard of negligence and involves a two-step analysis. First, the ALJ must determine whether, in this case, CS[Redacted] violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

Initially, CS[Redacted] argues in its position statement that Claimant incorrectly cites to C.R.S. 8-42-101(3)(a)(I) as the basis for the penalty. As correctly pointed out by CS[Redacted], that section deals with charging a medical fee in excess of the fee schedule. No evidence of a violation of that section was provided. Clearly, based on Claimant's arguments, evidence presented and the arguments and evidence presented by CS[Redacted], the penalty sought is for a violation of 8-42-101(4). For example, the issue framed by Claimant in his position statement is "Whether Claimant proved by a preponderance of the evidence that he is entitled to penalties from CS[Redacted] for its attempt to collect a debt against the Claimant? Similarly, CS[Redacted] presented testimony from [Redacted, hereinafter DC] that no admission pertaining to W.C. 5-148-418 was received until it was transmitted by LM[Redacted] (Respondents' attorney) to HC[Redacted] on July 20, 2022. Based on this, I conclude that this issue was tried by consent. Issues may be tried by consent if not properly raised by the pleadings,

amendments to the pleadings at the conclusion of the trial or hearing. See, *Robbolino v. Fisher-White Contractors*, 738 P.2d 70 (Colo. App. 1987).

C.R.S. 8-42-101(4) provides that "Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee."

Although Claimant submitted copies of the General Admission and the Final Admission, Claimant has failed to sustain its burden of proving that is provided adequate notice of either of these two documents to CS[Redacted] until it was provided by attorney LM[Redacted] to CS's[Redacted] attorney on July 20, 2022. By then, all collection activity by CS[Redacted] had ceased. Claimant has not provided evidence that there was any collection activity occurred after this date. Claimant has argued that he provided information regarding the claim on February 11, 2022 in his position statement to MB's[Redacted] and that the Final Admission sent at that time was on another claim. Instead of sending the correct Final Admission on this claim to CS[Redacted], he argues he sent the hearing notice with all the information to get the bills paid to CS[Redacted], through counsel, on February 24, 2022. While this information is helpful to understand the communications that occurred, the actual communications were not submitted into evidence. As such, the ALJ is unable to credit this argument without the supporting documentation which may be subject to examination by counsel for CS[Redacted]. Relying on the actual evidence submitted, I conclude that CS[Redacted] was not adequately notified of the compensable nature of the claim for which payment of the medical fees were requested until it was supplied with the Final Admission of Liability on July 20, 2023. The collection activities prior to that date did not violate C.R.S. 8-42-101(4) since CS[Redacted] did not have proper notice that the medical fees sought were related to a compensable workers compensation claim. I conclude that based on the evidence presented, any representations prior to the submission of the Final Admission of Liability, in this case, were not sufficient notice to trigger compliance with that statute.

ORDER

It is therefore ordered that:

1. Claimant's request for imposition of penalties against the Respondent CS[Redacted] is denied and dismissed.

2. Any issue not resolved by this order is reserved for future determination.

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

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

DATED: May 18, 2023

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-215-086-001

ISSUES

1. Whether Dependent has demonstrated by a preponderance of the evidence that she a proper and sole recipient of death benefits related to Decedent's industrial fatality.

STIPULATIONS OF THE PARTIES

1. By stipulation of the parties and Order of Administrative Law Judge Royce Mueller on April 28, 2023, Decedent's weekly death benefit rate is $1,228.99.

FINDINGS OF FACT

1. Decedent died on August 30, 2022, while in the course and scope of his employment. Respondents ultimately filed a Fatal General Admission of Liability on January 4, 2023, establishing the compensable nature of Decedent's industrial fatality. The General Admission of Liability noted that dependency was still undetermined at that time.

2. There is a question as to whether another individual, [Redacted, hereinafter EV], is an appropriate dependent under the Workers' Compensation Act regarding the death benefits related to Decedent's industrial fatality.

3. Counsel for Claimant/Dependent [Redacted, hereinafter MG] provided various representations during the hearing, as an officer of the court. Respondents did not object to the representations made. Counsel for MG[Redacted] stated that he made contact with EV[Redacted] by telephone in December of 2022. During the telephone conversation, Counsel for Claimant obtained EV's[Redacted] mailing address and email address from EV[Redacted].

4. On February 6, 2023, Claimant's counsel's office mailed a copy of the Notice of Hearing for the May 4, 2023, hearing to EV[Redacted]. The Notice of Hearing was mailed by regular USPS mail as well as by certified mail, return receipt requested.

5. On March 30, 2023, the Notice of Hearing Claimant's counsel mailed to EV[Redacted] by certified mail, return receipt requested was returned to Claimant's counsel's office as unclaimed. The Notice of Hearing mailed by Claimant's counsel that was sent by regular USPS mail was not returned. After receiving the certified mail back as unclaimed, counsel for Claimant mailed a second Notice of Hearing for the May 4, 2023, proceedings to EV[Redacted] by regular mail and also emailed EV[Redacted] a

copy of the same. The Notice of Hearing mailed to EV[Redacted] on March 30, 2023, was not returned to Claimant's counsel's office.

6. On April 19, 2023, counsel for Respondents mailed a copy of the Notice of Hearing for the May 4, 2023, proceedings to EV[Redacted] using the same address as that used by counsel for Claimant. Respondents' counsel's office did not receive the mail returned.

7. On May 3, 2023, counsel for Claimant contacted the Colorado Division of Workers' Compensation. After searching by both Decedent's name and social security number, the customer service representative confirmed that only Claimant's claim for fatal benefits had been filed.

8. EV[Redacted] did not appear at the May 4, 2023, hearing.

9. Claimant and Decedent were married on June 3, 2000. Prior to his death, Decedent and Claimant cohabitated as husband and wife at [Redacted, hereinafter MA]. Decedent was the sole financial provider of the household.

10. Claimant credibly testified that Decedent had five biological children, but none of them were under the age of 21, Decedent had minimal contact with any of the adult children, and Decedent was not financially supporting any of his adult children prior to his death.

CONCLUSIONS OF LAW

1. 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).

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. A widow is presumed to have been wholly dependent on a decedent unless she was either "voluntarily separated and living apart from the spouse at the time of the

. . . death or was not dependent in whole or in part on the deceased for support." §8-41-501(1)(a), C.R.S.

Dependency

5. 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.

6. A widow is presumed to be wholly dependent on a decedent unless she was either "voluntarily separated and living apart from the spouse at the time of the . . . death or was not dependent in whole or in part on the deceased for support." §8-41-501(1)(a), C.R.S.

7. As found, Claimant has demonstrated by a preponderance of the evidence that she was married to Decedent at the time of his industrial fatality. Furthermore, Claimant has demonstrated that she and Decedent were living together at the time of Decedent's death and that she was financially dependent on Decedent prior to his death.

8. As found, the parties have provided appropriate and adequate notice to Decedent's other potential dependent and such dependent has failed to file a claim for benefits. As Claimant is the only individual that has filed a claim for death benefits and has established herself as a whole dependent under §8-41-501, C.R.S., she is the sole recipient of said benefits.

ORDER

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

1. Claimant is the whole dependent of Decedent and is hereby awarded death benefits at a weekly rate **$1,228.99**.

2. Respondents shall pay death benefits dating back to Decedent's death plus interest at a rate of 8% per annum.

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: May 18, 2023.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-212-186-001

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the respondent.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his low back, including a surgery performed by Dr. Brian Witwer on September 13, 2022, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. The issues of average weekly wage (AWW), temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, and any related offsets were also endorsed for hearing. At the hearing, the ALJ determined that these issues shall be reserved and held in abeyance pending a determination of compensability.

FINDINGS OF FACT

1. The claimant worked for the respondent as a state trooper. The claimant's job duties included all aspects of law enforcement including speed enforcement, road safety, and crash investigation. This matter involves an alleged injury that occurred in October[1] 2021.

2. As a state trooper the claimant is required to wear a duty belt. The duty belt allows a trooper to attach the following: a flashlight, a radio, a taser, a firearm, two additional magazines for the firearm, handcuffs, and an expandable asp. When all of the items are attached to the duty belt, it weighs approximately 18 pounds. As a trooper, the claimant spent a significant amount of every shift driving. As a result, the claimant arranged the items of his duty belt around the front of the belt and on the sides. This allowed the claimant's low back to be free to rest against the back of his vehicle seat without obstruction.

3. In 2021, the claimant underwent four surgeries: a lumbar fusion, bilateral shoulder replacements, and cataract surgery. All of these surgeries were paid for by the claimant's personal health insurance, Cigna.

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[1] The First Report of Injury and later documents identify the date of injury as November 3, 2021. However, the ALJ is persuaded that this was the date the claimant reported his issues/symptoms to a supervisor, and not the date of the incident involving his duty belt. The ALJ finds that the date of the alleged injury was October 8, 2021.

4. The lumbar fusion was performed by Dr. Brian Witwer on February 16, 2021. That surgery involved an L4 to S1 anterior lumbar interbody fusion (ALIF) and an L4-L5 laminectomy. The claimant underwent the February 2021 surgery because he had a five to six year history of low back pain. The claimant testified that following that surgery, his pain symptoms were resolved.

5. The claimant was released to return to work from all of his 2021 surgeries by October 6, 2021. The claimant was released to full duty as a state trooper without restrictions. The claimant testified that as of October 6, 2021 he was pain free.

6. The claimant reported to work with the respondent on October 8, 2021. As he was preparing for his shift, he put on his duty belt. At that moment, he felt immediate pain in his back. The claimant described this pain as the same as that he experienced prior to the February 2021 surgery.

7. Following this onset of pain on October 8, 2021, the claimant attempted to work with the pain. However, the claimant continued to experience low back pain that radiates into his right hip and leg. In addition, the claimant began experiencing right foot numbness.

8. On November 3, 2021, the claimant informed his supervisor of his pain symptoms and requested to return to light duty. On November 1, 2021, the respondent prepared an Employer's First Report of Injury. The date of injury was identified as November 3, 2021. However, the ALJ is persuaded that the incident at issue occurred on October 8, 2021.

9. After reporting his low back symptoms to his supervisor on November 3, 2021, the claimant was placed on light duty and worked in dispatch out of the [Redacted, hereinafter ML], Colorado location from November 2021 until August 2022.

10. The claimant's authorized treating provider (ATP) for this claim is Dr. Craig Stagg. The claimant was first seen by Dr. Stagg on December 2, 2021. At that time, the claimant reported his history of low back pain and the success of the February 2021 surgery with Dr. Witwer. The claimant also described the incident involving his duty belt and the onset of immediate low back pain with radiating symptoms. At that time, Dr. Stagg referred the claimant to Dr. Witwer for consultation.

11. On December 2, 2021, the claimant was seen in Dr. Witwer's practice by Audrey Kramer, NP. At that time, the claimant reported that after wearing his duty belt he felt that all of his preoperative pain had returned. NP Kramer referred the claimant to physical therapy and ordered magnetic resonance imaging (MRI) of the claimant's lumbar spine.

12. On January 19, 2022 the claimant underwent a lumbar spine MRI. The results showed evidence of the prior interbody fusion at the L4-L5 and L5-S1 levels; persistent moderate spinal stenosis at the L4-L5 level; persistent right neural foraminal narrowing at the L5-S1 level due to a lateral disc bulge. The radiologist, Dr. Michael Neste, opined that there was likely impingement of the exiting L5 nerve root.

13. On January 31, 2022, the claimant was seen by Dr. Witwer. At that time, the claimant described the return of his preoperative low back and right leg symptoms. Dr. Witwer discussed the MRI findings and recommended an epidural steroid injection.

14. On February 18, 2022, the claimant underwent a right L5-S1 transforaminal epidural steroid injection (TFESI). The claimant testified that this injection provided approximately one month of relief.

15. On February 22, 2022, the claimant underwent computed tomography (CT) of his lumbar spine. The CT scan showed mild scoliosis and mild retrolisthesis at the L2-L3 level; mild anterolisthesis at the L4-L5 and L5-S1 levels; hardware from the prior lumbar surgery; a posterior disc bulge at the L4-L5 level; and multilevel facet arthrosis.

16. Based upon his review of the claimant's CT scan, Dr. Witwer recommended the claimant undergo a right L5-S1 laminectomy, lateral recess release and facetectomy with wide foraminotomies.

17. On July 25, 2022, Dr. Philip Stull authored a report following his review of the claimant's medical records. In his report, Dr. Stull opined that the symptoms the claimant experienced when returning to work in October 2021 are related to pre-existing chronic and advancing degenerative lumbosacral spondylosis and degenerative disc and facet joint disease. Dr. Stull further opined that the surgery recommended by Dr. Witwer would be reasonable and necessary to address the claimant's lumbar spine condition. However, it is Dr. Stull's opinion that the need for surgery is not related to the action of putting on a duty belt at work. Based upon the opinions of Dr. Stull, the respondents denied authorization for the recommended surgery.

18. On September 13, 2022, Dr. Witwer performed the recommended surgery. The surgical note of that date identifies the procedure as "wide facetectomy, completed removal of bone over the foramina at L5-S1 on the right, lumbar decompression decompressing the right L5 nerve root, microscope technique." This surgery was paid for by the claimant's private insurance, Cigna.

19. At the request of the respondent, on February 21, 2023 the claimant attended an independent medical examination (IME) with Dr. Anant Kumar. In connection with the IME, Dr. Kumar reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Kumar listed the claimant's diagnosis as a long history of degenerative disc disease, mild right lumbar scoliosis, gradually worsening multilevel arthrosis with facet effusion, and instability at the L4-L5 level. Dr. Kumar specifically noted that between 2018 and

November 17, 2020 there was "significant worsening of [the claimant's] facet degeneration with severe facet effusion at multiple levels with the worse facet effusion at the L4-5 level." Dr. Kumar also noted significant pathology at LS-S-1 level.

20. Dr. Kumar noted that the most recent MRI showed that the cage from the February 2021 fusion surgery has subsisted into the spine. It is Dr. Kumar's opinion that the claimant's need for the September 2022 surgery, while reasonable, is unrelated to any work injury. It is Dr. Kumar's opinion that the claimant did not suffer a compensable injury in October 2021. Dr. Kumar further opined that the claimant's need for surgery is solely related to the long-standing pre-existing degenerative changes in his lumbar spine.

21. On March 20, 2023, Dr. Kumar issued a supplemental report after his review of additional medical records. Dr. Kumar's opinion regarding the relatedness of the September 2022 surgery was unchanged.

22. On March 31, 2023, the claimant retired from his position as a state trooper.

23. Dr. Kumar's testimony was consistent with his IME reports. Dr. Kumar testified there is no medical explanation to support the claimant's claim that his duty belt caused an injury to his lumbar spine. Dr. Kumar explained that the duty belt does not put pressure on the lumbar spine because it sits on top of the wearer's trochanter (hip) bones. Dr. Kumar further testified that the surgery performed by Dr. Witwer in February 2021 did not properly stabilize the claimant's spine. It is this spinal instability that has resulted in the return of the claimant's low back and leg pain. It is Dr. Kumar's further opinion that the claimant's chronic low back pain and radiating leg symptoms were caused by multiple levels of facet effusion, foraminal stenosis, and degenerative disc disease.

24. Dr. Kumar testified that due to the lack of correct stabilization at the L5-S1 level, there is evidence of cage subsidence in the claimant's imaging studies. This subsidence has gradually worsened with time, which has resulted in incomplete fusion at the L4-S1 segment. Dr. Kumar testified that during the fusion surgery an additional plate should have been placed at the L5-S1 level to better stabilize the spine.

25. With regard to the surgery performed by Dr. Witwer on September 13, 2022, Dr. Kumar testified that the surgery was reasonable and necessary to correct issues caused by the April 2021 surgery. However, it continues to be Dr. Kumar's opinion that the need for the September 2022 surgery was not caused by the duty belt. Rather, the need for that surgery was the initial failed fusion.

26. The issues of claimant's entitlement to TTD benefits, TPD benefits, the calculation of his AWW and any offsets available to the respondent have been held in abeyance, as noted above.

27. The ALJ credits the medical records, the opinions of Dr. Stull, and the testimony and opinions of Dr. Kumar. The ALJ is not persuaded by the claimant's belief that the back and leg symptoms he felt in October 2021 were caused by the placement of his duty belt. Although there may have been a temporal relationship between the use of the duty belt and the onset of symptoms, the ALJ does not find that the use of the duty belt caused the symptoms. The ALJ specifically credits the testimony of Dr. Kumar that the duty belt does not put pressure on the lumbar spine, because it sits on top of the wearer's trochanter (hip) bones. The ALJ also credits the opinion of Dr. Kumar that the claimant's need for the September 2022 surgery was related to the failed 2021 fusion surgery, and not the act of using the duty belt. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that when he put on his duty belt in October 2021, that he suffered an injury necessitating medical treatment.

CONCLUSIONS OF LAW

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

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

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

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); see a/so *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. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the respondent. As found, the medical records, the opinions of Dr. Stull, and the testimony and opinions of Dr. Kumar are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits in this matter is denied and dismissed. All remaining endorsed issues are dismissed as moot.

Dated May 19, 2023.

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-164-544-002

ISSUE

Whether Claimant has established by a preponderance of the evidence that the right shoulder surgery recommended by Authorized Treating Physician (ATP) Douglas A. Foulk, M.D. is reasonable, necessary and causally related to his November 24, 2020 admitted industrial injury.

FINDINGS OF FACT

1. Claimant works for Employer as a restaurant manager. He testified that as he was leaving work and walking to his truck on November 24, 2020, he slipped and fell on ice. Claimant stated he twisted his right knee and landed on his right side. He was able to drive himself home and reported the incident to Employer on the following day.

2. Claimant initially sought treatment for his injuries on November 28, 2020 at NextCare Urgent Care. He reported that he was walking at work and slipped on ice. Claimant complained of right knee pain. He noted that there was no other associated pain or injuries. Claimant was assessed with a sprain of the right knee and advised to follow-up with workers' compensation.

3. On November 30, 2020 Employer completed a First Report of Injury. The body part listed on the form is the "lower extremities – knee." Under "how the injury occurred," the form specifies, "I slipped and fell on a patch of ice in the parking lot, and twisted my knee trying not to fall." Employer's First Report of Injury does not mention any damage to the right shoulder or any other body part. Respondents subsequently filed a General Admission of Liability (GAL) on March 8, 2021.

4. On December 10, 2020 Claimant attended his first appointment at Midtown Occupational Health Services with Matthew Edwards PA-C/Larence Cedillo, D.O. Claimant reported that three weeks earlier he slipped on ice and injured his right knee. Claimant did not specify the exact mechanism of injury, but explained that his right leg went sideways. Claimant also reported that he was developing some left leg and mild low back soreness from compensation. He had no other concerns and did not report any right shoulder pain or symptoms. Claimant was diagnosed with a right knee sprain and referred for an MRI scan.

5. On December 15, 2020 Claimant attended his first physical therapy appointment at Midtown Occupational Health Services. Claimant reported that he slipped and fell at work and twisted his knee. He was unable to describe the specific mechanism of injury or how his knee twisted. Notably, Claimant again did not report any right shoulder symptoms.

6. Claimant followed-up with PA Edwards on December 22, 2020 for his right knee. He did not mention any right shoulder symptoms and the report specifically notes "no new concerns." Claimant subsequently attended two additional physical therapy sessions on January 5, 2021 and January 7, 2021 with no mention of any right shoulder symptoms.

7. Respondents' claims adjuster notes were admitted into evidence. For the entry on January 4, 2021 adjuster [Redacted, hereinafter CS] documented that Claimant's present symptoms included "Right knee: pain/swelling/sometimes difficulty walking. Right shoulder pain swelling/hard to move sometimes/pretty much sore all the time/has difficulty sleeping as he can't have pressure on his right shoulder. Thinks he had a torn R/C tear prior, got some PT about 10 years ago." Adjuster CS[Redacted] also noted that Claimant "[s]lipped on a patch of ice, twisted his right knee, and fell down on the right side. He said he fell down flat on his right side. Major concern was right knee, Right shoulder has been bothering him and he is concerned about that."

8. Claimant denied he was ever actually diagnosed with a rotator cuff tear. After a short period of time his shoulder healed and he never required any treatment besides a couple of physical therapy visits in the 1990's. Claimant also denied any other right shoulder injuries or treatment prior to November 2020.

9. On January 13, 2021 Claimant was evaluated by Joseph Hsin, M.D. at Orthopedic Centers of Colorado. Claimant reported that two months earlier he had slipped and fallen on ice at work. He did not report any right shoulder symptoms.

10. On February 18, 2021 Claimant underwent a right knee arthroscopy with partial medial meniscectomy and chondroplasty of the patella. Claimant followed-up with Orthopedic Centers of Colorado on February 23, 2021 and March 23, 2021. Notably, he still did not report any right shoulder symptoms. Claimant also underwent physical therapy at Orthopedic Centers of Colorado on March 2, 2021 and March 11, 2021. He again did not mention any right shoulder symptoms.

11. After undergoing right knee surgery and rehabilitation, Claimant returned to Midtown Occupational Health Services and was evaluated by Sadie Sanchez, M.D. on May 18, 2021. Claimant reported that on November 24, 2020 he was leaving work and slipped on ice. He twisted his right knee, fell onto his right side and landed on his right shoulder. Claimant alleged that during the entire period of time that he received medical treatment for his slip and fall he experienced right shoulder pain. He hoped the symptoms would improve. Dr. Sanchez recounted that Claimant did not state anything to his medical providers about his right shoulder but mentioned it to his adjuster. She could not find any reference to Claimant's right shoulder in the notes and wanted to confirm with the adjuster. Dr. Sanchez could not state with 51% or greater certainty that Claimant's right shoulder condition was causally related to the November 24, 2020 work injury.

12. On June 15, 2021 Claimant followed-up with Lon Noel, M.D. at Midtown. Dr. Noel documented that Claimant had been undergoing physical therapy and chiropractic treatments twice weekly based on Dr. Sanchez's recommendations.

Examination of the right shoulder revealed active range of motion deficits. Claimant also exhibited generalized shoulder girdle tenderness and tightness. Although there was no pain to direct palpation of the acromioclavicular joint, there was pain on palpation of the long head of the biceps tendon. Dr. Noel diagnosed status post right shoulder injury with chronic pain.

13. On June 29, 2021 Claimant underwent an MRI arthrogram of the right shoulder. The MRI revealed a remote osseous Bankart lesion injury and Hill-Sachs deformity. There was also an anterior labral tear and supraspinatus tendinosis with an interstitial type of tear of the distal supraspinatus tendon. Finally, there was a degenerative change of the acromioclavicular joint with acromial morphology predisposing to impingement.

14. On July 2, 2021 Claimant returned to Dr. Noel for an examination. Dr. Noel again reviewed Claimant's November 24, 2020 mechanism of injury in which he torqued his right knee and fell on his right shoulder. Claimant continued to exhibit right shoulder pain and decreased range of motion. Dr. Noel remarked that Claimant would continue physical therapy two times each week and undergo an orthopedic evaluation to be scheduled with Douglas A. Foulk, M.D.

15. On August 10, 2021 Claimant was evaluated by Dr. Foulk at Panorama Orthopedics. Dr. Foulk determined that the MRI imaging and physical examination were consistent with a rotator cuff tear. He recommended proceeding with a right shoulder arthroscopy including a rotator cuff repair, evaluation of the labrum, subacromial decompression, and debridement.

16. On August 30, 2021 William Ciccone, II, M.D. performed a medical records review at the request of Respondents. Dr. Ciccone determined the right shoulder surgery proposed by Dr. Foulk was reasonable, but not causally related to Claimant's November 24, 2020 work accident. He based his opinion on Claimant's failure to report shoulder symptoms to any medical provider until May 18, 2021 or approximately six months following his injury. Dr. Ciccone would have expected right shoulder complaints prior to six months after Claimant's date of injury.

17. On November 29, 2022 the parties conducted the pre-hearing evidentiary deposition of Dr. Ciccone. Dr. Ciccone maintained that the right shoulder surgery proposed by Dr. Foulk was not causally related to Claimant's November 24, 2020 work accident. He noted that Claimant's first mention of right shoulder pain in the medical records that could be associated with a shoulder injury occurred on May 18, 2021 or almost six months after the accident. Dr. Ciccone would have expected some complaints of shoulder pain prior to six months after the accident. He also remarked that it was not likely that the right knee pain overshadowed any right shoulder symptoms. Dr. Ciccone commented that, when sees patients with various injuries, they complain of multiple injuries.

18. Dr. Ciccone explained that Claimant's right shoulder MRI showed an anterior labral tear with a possible Hill-Sachs deformity, including partial-thickness rotator

cuff tearing and degenerative changes in the AC joint. He was unable to determine the age of the pathology in Claimant's right shoulder. Although a fall on the right side could produce the shoulder pathology documented on the MRI, Claimant would have experienced symptoms at the time of the incident and not six months later. Assuming Claimant mentioned his right shoulder symptoms to the claims adjuster about six weeks after the November 24, 2022 slip and fall, Dr. Ciccone did not change his opinion because Claimant would have experienced symptoms at the time of the accident.

19. On December 2, 2022 Dr. Noel responded to a letter from Claimant's counsel inquiring whether Claimant's right shoulder injury was causally related to his November 24, 2020 industrial accident. Counsel recounted the history of Claimant's claim and specified that Claimant sought medical treatment for his right shoulder after he had recovered from right knee surgery. Claimant reported that his right shoulder pain continued throughout his treatment and rehabilitation for his right knee and hoped it would resolve. Dr. Noel determined that the fall described by Claimant on November 24, 2020 caused, aggravated or accelerated his underlying right shoulder pathology as evidenced by the MRI of June 29, 2021. He noted that the MRI was consistent with an acute partial rotator cuff tear superimposed on chronic changes. Dr. Noel concluded that Claimant's need for right shoulder surgery as recommended by Dr. Foulk was caused, aggravated or accelerated by the work-related fall on November 24, 2020.

20. Claimant testified at the hearing in this matter. He commented that his major concern after the November 24, 2020 fall involved his right knee until he obtained treatment and underwent surgery. As Claimant proceeded through the treatment process, he continued to experience right shoulder symptoms that did not improve over time. Claimant remarked that he ultimately discussed his right shoulder with his Workers' Compensation physicians because he required treatment.

21. Claimant has failed to establish it is more probably true than not that the right shoulder surgery recommended by Dr. Foulk is reasonable, necessary and causally related to his November 24, 2020 admitted industrial injury. Initially, Claimant explained that, while leaving work and walking to his truck on November 24, 2020, he slipped and fell on ice. He stated he twisted his right knee and landed on his right side. Claimant sought treatment for his injuries on November 28, 2020 at NextCare Urgent Care. *He* complained of right knee pain and noted there were no other injuries. On November 30, 2020 Employer completed a First Report of Injury. The body part listed on the form states "lower extremities – knee." The document does not mention an injury to the right shoulder or any other body part.

22. Claimant subsequently obtained medical treatment and physical therapy over a lengthy period of rime with multiple providers but did not mention any right shoulder symptoms. The medical records are simply devoid of documentation that Claimant suffered a right shoulder injury during his slip and fall on November 24, 2020. Nevertheless, Claimant explained that his primary concern involved his right knee. As he proceeded through the treatment process, he noted he was experiencing right shoulder symptoms that he believed would improve over time. After undergoing right knee surgery and rehabilitation, Claimant finally mentioned right shoulder symptoms to Dr. Sanchez on

May 18, 2021. Notably, Dr. Sanchez could not state with 51% or greater certainty that Claimant's right shoulder condition was causally related to the November 24, 2020 work injury.

23. On August 10, 2021 Dr. Foulk determined that Claimant's right shoulder MRI and physical examination were consistent with a rotator cuff tear. He recommended proceeding with a right shoulder arthroscopy. On December 2, 2022 Dr. Noel responded to a letter from Claimant's counsel and determined that the fall described by Claimant on November 24, 2020 caused, aggravated or accelerated his underlying right shoulder pathology as evidenced by the MRI of June 29, 2021. He noted that the MRI was consistent with an acute partial rotator cuff tear superimposed on chronic changes. Dr. Noel thus agreed with the right shoulder surgery recommended by Dr. Foulk.

24. In contrast, Dr. Ciccone maintained that the right shoulder surgery proposed by Dr. Foulk was not causally related to Claimant's November 24, 2020 work accident. Dr. Ciccone noted that Claimant's first mention of right shoulder pain in the medical records that could be associated with a shoulder injury occurred on May 18, 2021 or almost six months after the accident. He would have expected some complaints of shoulder pain prior to six months after the event. Dr. Ciccone also remarked that it was not likely that the right knee pain overshadowed any right shoulder symptoms. He commented that, when he sees patients with various concerns, they complain of multiple injuries. Dr. Ciccone was unable to determine the age of the pathology shown on Claimant's right shoulder MRI. Although a fall on the right side could produce the shoulder pathology documented on the MRI, Claimant would have experienced symptoms at the time of the incident and not six months later. Assuming Claimant mentioned his right shoulder symptoms to the claims adjuster about six weeks after the November 24, 2022 slip and fall, Dr. Ciccone did not change his opinion because Claimant would have experienced symptoms at the time of the accident.

25. In Claimant's conversation with adjuster CS[Redacted] on January 4, 2021, adjuster notes document that Claimant "[s]lipped on a patch of ice, twisted his right knee, and fell down on the right side. He said he fell down flat on his right side. Major concern was right knee, Right shoulder has been bothering him and he is concerned about that." Despite recently expressing concerns to the adjuster, Claimant failed to mention any right shoulder symptoms at an evaluation with Dr. Hsin on January 13, 2021. Furthermore, after his right knee surgery, Claimant followed-up with Orthopedic Centers of Colorado on February 23, 2021 and March 23, 2021. Notably, he still did not report any right shoulder symptoms. Claimant also underwent physical therapy at Orthopedic Centers of Colorado on March 2, 2021 and March 11, 2021. He again did not mention any right shoulder symptoms. Although Claimant expressed concerns about his right shoulder to adjuster CS[Redacted] on January 4, 2020, the record demonstrates that he failed to mention any right shoulder symptoms to medical providers until May 23, 2021. The temporal delay in reporting pain to medical providers despite his expressed concerns to adjuster CS[Redacted] diminishes Claimant's assertion that his right knee pain overshadowed any right shoulder symptoms.

26. Despite Claimant's testimony and Dr. Noel's opinion, the medical records and persuasive medical opinion of Dr. Ciccone reflect that Claimant did not likely suffer a right shoulder injury during the course and scope of his employment on November 24, 2020. Moreover, although not determinative, the significant temporal delay in reporting any right shoulder symptoms to medical providers suggests that Claimant's right shoulder condition was not causally related to the November 24, 2020 accident. The medical records are simply devoid of any evidence that the slip and fall caused a right shoulder disability or the need for medical treatment. Claimant did not mention any right shoulder symptoms to medical providers until approximately six months after the incident. He has thus failed to demonstrate his work activities on November 24, 2020 aggravated, accelerated or combined with his pre-existing condition to produce a need for surgical intervention. The right shoulder surgery recommended by ATP Foulk is thus not causally related to the November 24, 2020 slip and fall. Accordingly, Claimant's surgical request is denied and dismissed.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. 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 Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

8. As found, Claimant has failed to establish by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Foulk is reasonable, necessary and causally related to his November 24, 2020 admitted industrial injury. Initially, Claimant explained that, while leaving work and walking to his truck on November 24, 2020, he slipped and fell on ice. He stated he twisted his right knee and landed on his right side. Claimant sought treatment for his injuries on November 28, 2020 at NextCare Urgent Care. *He* complained of right knee pain and noted there were no other injuries. On November 30, 2020 Employer completed a First Report of Injury. The body part listed

on the form states “lower extremities – knee.” The document does not mention an injury to the right shoulder or any other body part.

9. As found, Claimant subsequently obtained medical treatment and physical therapy over a lengthy period of rime with multiple providers but did not mention any right shoulder symptoms. The medical records are simply devoid of documentation that Claimant suffered a right shoulder injury during his slip and fall on November 24, 2020. Nevertheless, Claimant explained that his primary concern involved his right knee. As he proceeded through the treatment process, he noted he was experiencing right shoulder symptoms that he believed would improve over time. After undergoing right knee surgery and rehabilitation, Claimant finally mentioned right shoulder symptoms to Dr. Sanchez on May 18, 2021. Notably, Dr. Sanchez could not state with 51% or greater certainty that Claimant’s right shoulder condition was causally related to the November 24, 2020 work injury.

10. As found, on August 10, 2021 Dr. Foulk determined that Claimant’s right shoulder MRI and physical examination were consistent with a rotator cuff tear. He recommended proceeding with a right shoulder arthroscopy. On December 2, 2022 Dr. Noel responded to a letter from Claimant’s counsel and determined that the fall described by Claimant on November 24, 2020 caused, aggravated or accelerated his underlying right shoulder pathology as evidenced by the MRI of June 29, 2021. He noted that the MRI was consistent with an acute partial rotator cuff tear superimposed on chronic changes. Dr. Noel thus agreed with the right shoulder surgery recommended by Dr. Foulk.

11. As found, in contrast, Dr. Ciccone maintained that the right shoulder surgery proposed by Dr. Foulk was not causally related to Claimant’s November 24, 2020 work accident. Dr. Ciccone noted that Claimant’s first mention of right shoulder pain in the medical records that could be associated with a shoulder injury occurred on May 18, 2021 or almost six months after the accident. He would have expected some complaints of shoulder pain prior to six months after the event. Dr. Ciccone also remarked that it was not likely that the right knee pain overshadowed any right shoulder symptoms. He commented that, when he sees patients with various concerns, they complain of multiple injuries. Dr. Ciccone was unable to determine the age of the pathology shown on Claimant’s right shoulder MRI. Although a fall on the right side could produce the shoulder pathology documented on the MRI, Claimant would have experienced symptoms at the time of the incident and not six months later. Assuming Claimant mentioned his right shoulder symptoms to the claims adjuster about six weeks after the November 24, 2022 slip and fall, Dr. Ciccone did not change his opinion because Claimant would have experienced symptoms at the time of the accident.

12. As found, in Claimant’s conversation with adjuster CS[Redacted] on January 4, 2021, adjuster notes document that Claimant “[s]lipped on a patch of ice, twisted his right knee, and fell down on the right side. He said he fell down flat on his right side. Major concern was right knee, Right shoulder has been bothering him and he is concerned about that.” Despite recently expressing concerns to the adjuster, Claimant failed to mention any right shoulder symptoms at an evaluation with Dr. Hsin on January 13, 2021. Furthermore, after his right knee surgery, Claimant followed-up with Orthopedic

Centers of Colorado on February 23, 2021 and March 23, 2021. Notably, he still did not report any right shoulder symptoms. Claimant also underwent physical therapy at Orthopedic Centers of Colorado on March 2, 2021 and March 11, 2021. He again did not mention any right shoulder symptoms. Although Claimant expressed concerns about his right shoulder to adjuster CS[Redacted] on January 4, 2020, the record demonstrates that he failed to mention any right shoulder symptoms to medical providers until May 23, 2021. The temporal delay in reporting pain to medical providers despite his expressed concerns to adjuster CS[Redacted] diminishes Claimant's assertion that his right knee pain overshadowed any right shoulder symptoms.

13. As found, despite Claimant's testimony and Dr. Noel's opinion, the medical records and persuasive medical opinion of Dr. Ciccone reflect that Claimant did not likely suffer a right shoulder injury during the course and scope of his employment on November 24, 2020. Moreover, although not determinative, the significant temporal delay in reporting any right shoulder symptoms to medical providers suggests that Claimant's right shoulder condition was not causally related to the November 24, 2020 accident. The medical records are simply devoid of any evidence that the slip and fall caused a right shoulder disability or the need for medical treatment. Claimant did not mention any right shoulder symptoms to medical providers until approximately six months after the incident. He has thus failed to demonstrate his work activities on November 24, 2020 aggravated, accelerated or combined with his pre-existing condition to produce a need for surgical intervention. The right shoulder surgery recommended by ATP Foulk is thus not causally related to the November 24, 2020 slip and fall. Accordingly, Claimant's surgical request is denied and dismissed.

ORDER

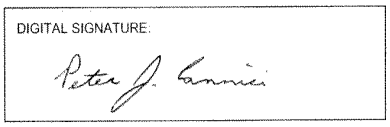
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for the right shoulder surgery recommended by ATP Foulk as a result of his November 24, 2020 slip and fall is denied and dismissed.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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: May 19, 2023.



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 5-200-468-003

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he sustained a compensable injury on or about, August 20, 2021?

2. Did Claimant prove by a preponderance of the evidence that he sustained a compensable injury on or about, October 14, 2021?

3. If Claimant proved by a preponderance of the evidence that he sustained a compensable injury, is he entitled to temporary total disability benefits?

FINDINGS OF FACT

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

1. Claimant is a 47-year old man who worked for Employer. He was hired by Employer on or about April 17, 2019. Claimant had a Commercial Drivers' License (CDL), and was hired as a CDL driver. Claimant delivered shingles to roofing jobs. Claimant testified he would physically lift and move the materials to the roof. The ALJ finds this was a physically demanding job.

2. On March 10, 2021, Claimant established care with Anthony Doft, M.D. at Banner Health. Dr. Doft prescribed Claimant Lamotrignine for his depression/anxiety. Claimant returned to Banner Health a few months later, on May 1, 2021, for a Well Adult Examination. Robert Mason, M.D. conducted the examination. Dr. Mason noted that the Lamotrigine helped Claimant with his depression, but Claimant wanted to increase the dose. (Ex. P).

3. On July 12, 2021, Claimant saw Dr. Doft for a follow-up appointment, and he specifically wanted to "discuss his Adderall dose." Under the history of present illness it states "[e]xperimentation with Adderall 10 mg bid no help at all. Went to 30 mg bid and it was night and day difference. . . . . He stopped lamotrigine 3/5 weeks ago. Just on Adderall alone [and] he feels a hundred times better." Dr. Doft changed Claimant's Adderall prescription to 30 mg, twice a day. (Ex. P). It is not clear from the records who first prescribed Adderall to Claimant. Claimant testified he did not want to "cross reference" his medical records, so he played back and forth between UCHealth and Dr. Doft for his Adderall prescription.

4. Claimant went to Concentra on August 11, 2021, for his U.S. Department of Transportation examination and recertification of his CDL license. Despite the recent voluntary increase in his Adderall dosage on July 12, 2021, Claimant marked "no" when asked if he was taking any prescription medication during his DOT examination. (Ex. O).

5. Claimant testified he did not realize he could not drive on his CDL license while on Adderall, but later testified he allowed his CDL license to expire because of the Adderall. And he further testified he drove for a couple of months while on Adderall even though he knew it was not allowed. The ALJ finds that Claimant's assertion he did not realize he could not maintain his CDL while taking Adderall, not credible.

6. Claimant testified that on August 20, 2021, he returned from his morning shift at about noon. The flat-bed truck he was driving had a conveyor on the back. Claimant testified he was wearing a hard hat when he fell off the back of the truck and hit his left shoulder and then his head on the cement. Claimant testified his hard hat came off, he took a knee by his truck, and a co-worker came to check on him. There is no objective evidence in the record as to the name of this co-worker. Claimant testified that about 10 minutes later he told [Redacted, hereinafter KK], his supervisor, about his fall and KK[Redacted] asked if Claimant could keep doing his job. Claimant testified that he answered affirmatively, and continued working.

7. KK[Redacted] is the Operations Manager for Employer. He testified that he would lay out the game plan for Claimant every day, and directed Claimant where to deliver shingles for roofs. The ALJ infers that Claimant and KK[Redacted] were in regular communication with each other. KK[Redacted] credibly testified that he has no recollection of Claimant telling him that he fell on August 20, 2021.

8. KK[Redacted] credibly testified that if an employee is injured, they can report the injury directly to him, they can go to the safety manager, or call "[Redacted, hereinafter TN]." RA[Redacted], managing partner for Employer, also credibly testified that employees should report any injury to KK[Redacted], corporate, "TN[Redacted]," or to himself. Employer provided Claimant with materials specifying how to report an injury. (Ex. T).

9. Claimant testified that sometime in October 2021, he spoke with KK[Redacted] about his shoulder pain, and he asked KK[Redacted] if he could do a lighter job. Claimant testified that KK[Redacted] moved him to the warehouse.

10. KK[Redacted] testified that he moved Claimant to the warehouse in October or November 2021 because it was the slow season, and he wanted to give Claimant the opportunity to have more hours. RA[Redacted] also testified that Claimant was moved to the warehouse in 2021, during the slow season, to get him 40 hours of work. RA[Redacted] testified that he liked Claimant and wanted to help guarantee he would get 40 hours of work.

11. The ALJ finds the testimony of KK[Redacted] and RA[Redacted] to be credible and persuasive. The ALJ finds Claimant was moved to the warehouse sometime in October/November 2021 because it was the slow season, and Employer wanted to get Claimant more hours of work.

12. Claimant testified that on October 14, 2021, at approximately 5:30 p.m., he was working alone in the warehouse when he fell onto a pallet. According to Claimant, the fall

did not hurt, but about 30 minutes later he felt something like a racquet ball coming out of the soft tissue on his lower spine, and this scared him. Claimant testified he called KK[Redacted] and told him what happened. KK[Redacted] credibly testified he had no recollection of Claimant contacting him on October 14, 2021 regarding his alleged fall. The ALJ finds KK[Redacted] credible. Claimant further testified he took a shower and decided to go to the ED. Claimant testified that he was trying to jump over the sensor in his garage, but he only made it half way when he collapsed. He testified that 911 was called and he went to UC Health.

13. Claimant arrived at the emergency department (ED) of UC Health – Medical Center of the Rockies on October 14, 2021, at approximately 6:32 p.m. per the medical records. According to the records, Claimant arrived at the ED by car. Amongst Claimant's complaints were back pain, left-sided abdominal mass as well as the syncopal episode that occurred that day. According to the medical record "[p]atient says he does a lot of ***heavy lifting while at work***. He states that ***this is what caused his back pain***. He states this [has] been going on for several months but the worst of it has been today." (emphasis added). Claimant also reported feeling dehydrated so he went out to the garage to get something to drink. He bent over to get water out of the refrigerator and when he stood up he began to feel lightheaded and fainted. At the ED he was evaluated for his syncopal episode and a mass on the left side of his abdomen. There is nothing in the record to indicate Claimant fell onto a pallet at work that day. Upon examination, Claimant had "no reproducible tenderness to the midline or paraspinal muscles of the cervical, thoracic or lumbar spine. No CVA tenderness." (Ex. Q).

14. The providers at UC Health completed a WC 164 Form and noted that Claimant was lifting heavy shingles and developed worsening back and abdominal pain. Claimant was diagnosed with abdominal contusion, lumbar strain and dehydration. (Ex. Q). The "After Visit Summary" notes that Claimant was to call UC Health Occupational Medicine Clinic in one day. (Ex. 7). There is no objective evidence in the record that Claimant went to the UC Health Occupational Medicine Clinic the next day.

15. With respect to the fainting episode in his garage, Claimant testified he was beginning to get addicted to Adderall, but did not want to show the physician treating him his sporadic behavior. Claimant further testified that while in the ED he reported acute left shoulder pain, and reported his fall at work that day, but did not think about reporting the date of injury. The medical record at UCHealth makes no reference to Claimant having acute left shoulder pain. The medical record also has no reference to Claimant falling at work that day. Claimant testified that he "talked the nurse out of reporting it as a work injury" because he did not want to get KK[Redacted] in trouble for letting him work alone in the warehouse. Claimant's October 14, 2021 ED visit was billed to Medicaid.

16. The ALJ finds Claimant's account of the events on October 14, 2021 to be inconsistent and not credible.

17. On October 25, 2021, Claimant saw Dr. Doft for a general follow up, and for a refill of his medications, including his Adderall. Claimant did not complain of any shoulder or

back pain, nor did he report any work injuries. The medical record notes that Claimant was very busy with work, and working 12-14 hours per day. (Ex. P).

18. Claimant saw Dr. Doft on December 6, 2021 for a follow-up appointment. Claimant reported wanting to decrease his Adderall dosage primarily due to his weight loss. He also discussed getting a medical marijuana card so he could use edibles for calming at the end of work. Claimant did not report any work injuries, any shoulder pain, or any back issues. (Ex. P).

19. Claimant resigned from Employer, and according to Claimant, things between he and RA[Redacted] "ended on a horrible note." Claimant, however, further testified that he intended to go back to work for Employer in the spring of 2022.

20. Claimant notified Employer on or about March 10, 2022, of his alleged injury in the summer of 2021 when he alleged to have fallen from the truck bed. The First Report of Injury lists the date of injury as June 21, 2021. The body parts that were affected were "both shoulders and elbows." The correct injury date of August 20, 2021 was clarified and confirmed, at a July 1, 2022 prehearing conference. (Exs. B and D).

21. Claimant testified that in March 2022, he had not done anything for three months, and one day lifted one pound dumbbells and this is when he experienced pain in his left shoulder, so he decided to contact Human Resources. Employer directed Claimant to go to an authorized treating provider, and he went to Concentra.

22. Claimant was evaluated at Concentra on March 14, 2022. He reported falling five and a half feet off a truck on August 20, 2021. He reported hitting his head, causing his hard hat to come off and also injuring his left shoulder. Claimant reported going "in and out of consciousness." He reported that the pain in his left shoulder was 8/10 and radiates to his back. Claimant said he had not been working since December because it was the offseason. Claimant told the provider that a "[f]ew weeks ago [he] tried to lift 3 lb weight for a bicep curl and reports pain flared up." Claimant further reported memory loss, mood changes, and depression since the injury. Claimant made no mention of his alleged injury in October 2021. Claimant was referred for MRIs of his left shoulder and head. (Ex. O).

23. The ALJ finds that Claimant suffered from depression and anxiety as early as March 2021, which was prior to his alleged injury on August 20, 2021. Further, Claimant testified that he was lifting one pound weights.

24. The first time Claimant mentioned any shoulder pain to Dr. Doft was on March 23, 2022. Under "chief complaint" Dr. Doft noted Claimant "is here to discuss left shoulder pain. He has had an MRI done already and is needing a referral to ortho." Claimant reported "struggling with shoulder pain since August 20, 2021" when he fell off a flatbed truck. He also told Dr. Doft that a month prior he picked up some dumbbells to do curls and after about 15 reps, he noticed his left arm did not go up correctly, and had "severe" pain the next day. Claimant reported not being able to sleep on his left shoulder, and the pain kept him awake most nights. Dr. Doft referred Claimant to Dan Heaston, M.D. Again

Claimant did not mention any issues with his back, or the alleged injury he suffered on October 14, 2021. (Ex. P).

25. On March 25, 2022, Claimant was evaluated by Dr. Heaston at Banner Health Orthopedics. Claimant reported that "about a month ago []he got his arm caught in a chair and jerked forward and caused him quite a bit of pain." The record also states that workers' comp ordered the MRI showing a partial thickness tear of the left supraspinatus and an intrasubstance tear of the infraspinatus. Dr. Heaston diagnosed Claimant with a partial tear of his left rotator cuff. (Ex. R).

26. Claimant saw Dr. Doft on May 16, 2022 to follow up on his medications and shoulder pain. Claimant reported that the pain in his left shoulder was worse, and it was radiating to his arms and chest. According to the medical record, Dr. Heaston advised against surgery since it was a partial tear. (Ex. P).

27. Claimant returned to Banner Orthopedics on June 30, 2022, and saw Garrett Snyder, M.D. He reported left shoulder pain ongoing since January of 2022. Claimant reported throwing shingles for a living, and that he reached behind him at home to grab something and felt a pop in his shoulder, and has experienced significant pain since that time. According to the medical record, Claimant wanted to proceed with surgery and did not have a preference if Dr. Snyder or Dr. Heaston performed the surgery. (Ex. R).

28. At a prehearing conference in this matter on July 1, 2022, Employer first learned of Claimant's alleged injury on October 14, 2021. Claimant was advised to file a Worker's Claim for Compensation form with respect to the October 14 2021, injury. (Exs. B and D).

29. On July 11, 2022, Claimant saw Dr. Doft because he needed a letter of explanation "to give the court for income abilities." The records note that Claimant fell off a flatbed work truck almost a year ago, but Claimant did not lose consciousness. This is contrary to Claimant's report to Concentra. Dr. Doft noted Claimant had "worse shoulder pain over the next 45 days. Took a break in the winter and then in the spring when he started lifting again and doing the tossing motion the left shoulder started hurting again. Had to switch to throwing the other direction." (Ex. P). There is no indication in the record that Claimant was allegedly injured on October 14, 2021, or that Claimant quit working for Employer on December 13, 2021.

30. On July 11, 2022, Dr. Doft wrote a letter on behalf of Claimant stating that Claimant was about to undergo surgery for a torn supraspinatus muscle and a torn biceps tendon. He went on to write "[i]t is my medical opinions that this injury started on August 20th of 2021 when he fell off a flat bed work truck and landed on his left shoulder. Further, continued manual labor throwing large bundles (75 lbs) of shingles the rest of the summer undoubtedly worsened that immediate damage to the point of requiring the above mentioned surgery. Thus, this should definitely be considered a work related injury." Dr. Doft completed a WC164 Form and stated that Claimant had a left shoulder rotator cuff tear. (Ex. P).

31. On August 2, 2022, Dr. Snyder operated on Claimant and performed a left shoulder arthroscopic distal clavicle resection, open biceps tenodesis. (Ex. R).

32. While questioning Dr. Doft at hearing, Claimant asserted that he saw Dr. Heaston one time for surgery and never met Dr. Snyder. The medical records, however, indicate that Dr. Snyder not only met with Claimant before his surgery, but he is also the doctor who performed Claimant's surgery.

33. Claimant testified that Medicaid paid for his surgery and three months of physical therapy post-surgery. (Ex. 8). Claimant testified that he needed the surgery, so he had to present his injury differently (i.e. not presenting it as a workers' compensation injury) to be able to use Medicaid.

34. Dr. Doft testified on Claimant's behalf at the hearing. The ALJ notes that Dr. Doft was never offered as an expert by Claimant at hearing and he is not Level II accredited. Dr. Doft testified that it was highly likely that Claimant's work caused the injury to his left shoulder, particularly throwing shingles five days a week. On cross examination, Dr. Doft testified that the first time Claimant reported an alleged work injury to him was on March 23, 2022. Dr. Doft further testified that he did not have all of Claimant's medical records.

35. The ALJ finds Dr. Doft's testimony to be neither credible nor persuasive. Dr. Doft is Claimant's PCP, and his opinion was based upon Claimant's subjective reports and very limited medical records.

36. Jeffrey Raschbacher, M.D., completed an Independent Medical Examination (IME) on September 27, 2022, on behalf of Respondents. Dr. Raschbacher disagreed that Claimant sustained a cumulative trauma injury as there was no evidence to support such a conclusion. He likewise confirmed that the medical records failed to support an injury on either of the dates complained of. (Ex. S).

37. Dr. Raschbacher credibly testified in support of his IME. Dr. Raschbacher confirmed that Claimant's first mention of left shoulder pain was in March of 2022, despite his numerous medical appointments and physical examinations between the alleged dates of injury and March 2022. Dr. Raschbacher testified that Claimant's injury and the medical records where more consistent with an injury at home as opposed to an acute injury months prior. He did not believe Claimant could continue to work his extensive duties for multiple months had he injured his left shoulder in August 2021. Dr. Raschbacher concluded, in his expert opinion, that it was more likely than not that Claimant was not injured at work.

38. The ALJ finds Dr. Raschbacher's opinion to be credible and persuasive.

39. On multiple occasions, Claimant saw different medical providers, yet he never reported any shoulder pain until March 2022. When Claimant went to the ED on October 14, 2021, just a short time after allegedly injuring himself, he never mentioned the alleged work-injury, and there was no objective evidence of something like a racquet ball coming out of the soft tissue on his lower spine. Further, Claimant routinely changes his story. He asserts that he injured his left shoulder when he fell off a truck on August 20, 2021.

But he tells some medical providers that he reached behind him and something popped. Claimant attempts to clarify his multiple stories by testifying he had to present the injury differently to the physicians so he could use Medicaid. The ALJ finds Claimant's testimony throughout the hearing to be inconsistent. Furthermore, his testimony was neither credible nor persuasive.

40. Based on the totality of the evidence, the ALJ finds that Claimant did not suffer a compensable injury on August 20, 2021 or on October 14, 2021.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of, or natural progression of, a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 P.2d at 786; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant saw multiple medical providers, but he never reported the alleged August 20, 2021 work injury, until March 2022. When Claimant went to the ED on October 14, 2021, just a short time after allegedly injuring himself, he never mentioned the alleged work injury, and there was no objective evidence of something like a racquet ball coming out of the soft tissue on his lower spine. Further, Claimant routinely changes his story. He asserts that he fell off a truck on August 20, 2021 and this is how he injured his left shoulder. But he tells some medical providers that he reached behind him and something popped. Claimant attempts to clarify his multiple stories by testifying he had to present the injury differently to use Medicaid. As found, Claimant's description of his alleged injuries was inconsistent and not credible.

Dr. Doft opined that Claimant's work of throwing shingles five days a week likely caused the injury to his shoulder. This, in and of itself, is inconsistent with Claimant's alleged mechanism of injury. Dr. Doft is not Level II accredited, and he did not have a

complete set of medical records to rely upon. As found, Dr. Doft's opinion is neither credible nor persuasive.

Dr. Raschbacher disagreed that Claimant sustained a cumulative trauma injury as there was no evidence to support such a conclusion. He likewise confirmed that the medical records failed to support an injury on either of the dates complained of. Dr. Raschbacher credibly testified that Claimant's first mention of left shoulder pain was in March of 2022, despite his numerous medical appointments and physical examinations between the alleged dates of injury and March 2022. Dr. Raschbacher testified that Claimant's injury and the medical records where more consistent with an injury at home as opposed to an acute injury months prior. Dr. Raschbacher concluded in his expert opinion that it was more likely than not that Claimant was not injured at work. As found, Dr. Raschbacher's testimony is credible and persuasive. Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury on either August 20, 2021 or October 14, 2021.

Medical Treatment

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The question of whether the need for treatment is causally-related to an industrial injury is one of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Claimant is seeking reimbursement for his surgery. As found, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable industrial injury, so Respondents are not liable for any medical treatment.

Temporary Total Disability Benefits

Claimant has the burden of proving entitlement to temporary total disability benefits in the first place. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Temporary total disability benefits are payable if Claimant proves a causal connection between his industrial injury and the temporary loss of wages. As found, Claimant did not suffer a compensable injury, so he is not entitled to temporary total disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work injury on August 20, 2021. His claim for compensability is denied and dismissed.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work injury on October 14, 2021. His claim for compensability is denied and dismissed.

3. Claimant's request for reimbursement of medical expenses is denied and dismissed.

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

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: May 19, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-202-694-001

ISSUE

1. Did Claimant suffer a compensable injury, or was his injury due to a pre-existing condition?

2. If Claimant suffered a compensable injury, is he entitled to medical benefits?

3. If Claimant suffered a compensable injury, is he entitled to TTD benefits?

4. If Claimant suffered a compensable injury, is he entitled to TPD benefits?

STIPULATION

The parties have stipulated to an average weekly wage of $1,537.86.

FINDINGS OF FACT

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

1. Claimant is a 25 year-old man who has worked for Employer as a fuel technician since 2018. Claimant's work involves installing fuel systems, as well as repairing and updating them.

2. On March 9, 2022, Claimant was working a job at the [Redacted, hereinafter SD]. [Redacted, hereinafter SS] was the supervisor on the job. Claimant testified he was helping install a fuel tank that was being lowered by a crane onto the tank platform. Claimant was kneeling down on the tank pad trying to get the fuel tank lined up when he felt a popping sensation in his left knee before it locked up. After a few minutes, Claimant was able to hyperextend his knee, and pop it back into place. Claimant's left knee was swollen and painful. Claimant credibly testified he immediately notified SS[Redacted] about his knee. Claimant was able to walk and over time the pain alleviated slightly.

3. Claimant previously injured his left knee playing lacrosse in 2014. Claimant received treatment from Orthopedic & Spine Center of the Rockies (OCR). He had a left knee arthroscopic ACL reconstruction and a partial lateral meniscectomy. (Ex. F).

4. Claimant credibly testified that he successfully recovered from his 2014 ACL surgery, and was able to play lacrosse again within six months. Claimant credibly testified his left knee had been asymptomatic up until March 9, 2022.

5. Claimant worked the next several weeks, but continued to have pain in his left knee. On March 28, 2022, Claimant was evaluated by Mark McFerran, M.D., at OCR.

Claimant told Dr. McFerran he injured his knee two weeks prior at work when he "was installing a fuel tank and was in an awkward position and felt a pop and locking sensation in the lateral part of the left knee. He moved his knee and felt it pop again." Dr. McFerran suspected Claimant had suffered a lateral meniscus tear in his left knee. Dr. McFerran noted that they would navigate through the workers compensation system because this occurred at work. (Ex. 2).

6. Claimant credibly testified that between March 9 and March 31, 2022, his knee would pop and lock at least daily. As more time passed, this progressed to two to three times a day. At times, Claimant would wake up in the middle of the night and have to manipulate his knee.

7. On March 31, 2022, Claimant called [Redacted, hereinafter DH], the Project Manager in the Refined Fuels Department, to report his left knee issue. Claimant testified he was driving home from work that day, and had to pull over because his knee was popping and locking. Claimant was concerned he was experiencing the same pain and problems with his knee while driving. DH[Redacted] and [Redacted, hereinafter MM], the Health & Safety Officer, recommended Claimant go to Concentra for an evaluation.

8. DH[Redacted] completed a "Supervisor's Accident/Incident Investigation Report." According to the report, under the section entitled "Description of Accident" it states "[w]hile working on hands and knees, knee seems to lock up. As movement continues, felt like tendon would snap back into place. Within an hour after the first time, swelling began around knee. [Redacted, hereinafter MZ] did not think it was necessary to see doctor right away. He wanted to see if it would work itself out." The witnesses to the event were SS[Redacted] and [Redacted, hereinafter BS]. Claimant, DH[Redacted] and MM[Redacted] all signed this document. (Ex. G).

9. MM[Redacted] completed a First Report of Injury on March 31, 2022. According to the report, Claimant reported that on or about March 9, 2022, his left knee would "lock up" and pop back into place. MM[Redacted] said Claimant was not able to define a specific incident or action where the problem began, but advised he works on his hands and knees. (Ex. N).

10. On March 31, 2022, Claimant was evaluated by Jeffrey Baker, M.D., at Concentra. Claimant reported injuring his left knee on March 9, 2022. He told Dr. Baker he started having sudden tightness, pain and numbness in his left knee. Claimant reported doing a lot of crawling at work. He also told Dr. Baker about the previous ACL surgery on his left knee. The medical record states "[t]here was no actual injury event." Dr. Baker noted that he needed to get Claimant's previous surgery notes to determine if this was a new injury or an exacerbation. Claimant was diagnosed with a left knee strain and given a referral for two weeks of physical therapy, three times a week. (Ex. 3).

11. Claimant returned to Concentra for a follow-up appointment on April 5, 2022. Claimant's left knee had not improved so he was referred for an MRI of his left knee. (Ex. 3).

12. Claimant underwent an MRI of his left knee on April 27, 2022. The MRI indicated "[e]vidence of prior partial meniscectomy with residual peripheral tear in the posterior horn and truncation of the body free edge." (Ex. 4).

13. Despite physical therapy and modified work duty, Claimant did not improve. On April 29, 2022, ATP, Dr. Baker, referred Claimant to an orthopedic specialist. (Ex. 3).

14. Claimant saw Dale Martin, M.D. at OCR on May 4, 2022. Dr. Martin reviewed the MRI and opined he thought Claimant was subluxating his popliteus tendon laterally. Dr. Martin kept Claimant on light-duty activities and added specific stretching to his physical therapy. (Ex. 2).

15. Claimant saw Dr. Martin on May 25, 2022, for a follow up appointment. Dr. Martin noted that therapy was not providing relief. Dr. Martin recommended a left knee arthroscopy and evaluation of the meniscal tear and percutaneous release of the popliteus. (Ex. 2).

16. Dr. Martin retired and Claimant was referred to his colleague, David Beard, M.D. On August 9, 2022, Dr. Beard examined claimant. He noted in the record that Claimant had an extensive course of physical therapy, used a knee brace, had modified duties, but had not improved. Dr. Beard agreed with the recommendation for surgery to repair Claimant's left lateral meniscus tear, and noted that the surgery had been reportedly denied by Insurer. (Ex. 2).

17. Claimant credibly testified he decided to proceed with the surgery because he needed to use his knee. On October 3, 2022, Dr. Beard performed a left arthroscopy with arthroscopic partial lateral meniscectomy to repair Claimant's left knee lateral meniscus tear. (Ex. 2).

18. Dr. Beard saw Claimant on October 14, 2022 to exam him post-surgery. Dr. Beard noted that Claimant only used crutches for one day, and was back to his regular activities. Dr. Beard further noted that in his professional opinion, Claimant's "lateral meniscus tear was not due to any type of residual laxity in his knee from his previous ACL reconstruction." (Ex. 2).

19. Claimant testified that he missed one week of work following surgery. He also testified that he was released to full duty work on October 14, 2022. This, however, is not specifically noted in Dr. Beard's October 14, 2022 medical record. Claimant further testified he has no current treatment recommendations.

20. The claimant took a DOT physical for Employer on January 14, 2022. The results of the physical reflect Claimant has no health problems or physical limitations. (Ex. 1).

21. The medical records document that Claimant fully recovered following the 2014 ACL repair and was able to work without restrictions until the March 9, 2022 incident. (Ex. F). This is consistent with Claimant's testimony that he did not experience any issues with his left knee until March 9, 2022, while kneeling and trying to install a fuel tank in the course of his employment.

22. DH[Redacted] prepared a letter regarding Claimant's report of the injury. The contents of the undated letter is consistent with Claimant's testimony regarding reporting of the injury to SS[Redacted], and the onset of pain dating back to March 9, 2022, and the progression of symptoms. (Ex. G).

23. MM[Redacted] credibly testified at hearing. He confirmed the incident report noted a specific time, date, location and cause of injury, and that these were consistent with Claimant's testimony.

24. Prior to having surgery, Claimants' physicians limited him to 40 hours of work per week. Claimant credibly testified that when he was on modified duty, he was unable to work overtime. There is no objective evidence in the record as to the frequency or availability of overtime for Claimant.

25. Claimant credibly testified that he needs and loves his job. He has continued to work for Employer and elected to proceed with surgery to expedite his recovery and return to work without restrictions.

26. Claimant incurred out-of-pocket expenses for medical treatment, including surgery, related to the March 9, 2022 work injury.

27. James Lindberg, M.D., testified at hearing on behalf of Respondents. Dr. Lindberg was admitted as an expert in orthopedic surgery, specializing in hips, knees, shoulders, and causation analysis. Dr. Lindberg is Level II accredited and has practiced as an orthopedic surgeon for 40 years.

28. Dr. Lindberg conducted a records review. He summarized this review in an October 31, 2022 letter to Respondent's counsel. Dr. Linberg opined that Claimant's injury was a continuation of his 2014 injury. He wrote "[o]n my reading of the MRI, it appears that there is a complete tear of the posterior horn of the lateral meniscus that was left in place at the time of his surgery in 2014. This is basically a continuation of his initial injury in 2014." He opined that since this happened occasionally at work, and there was no precipitating incident, this was not an acute injury but a continuation of his 2014 injury. (Ex. A). Dr. Lindberg never examined Claimant.

29. Dr. Lindberg testified in support of his report. He testified that during the 2014 surgery, they took 15% of Claimant's lateral meniscus, and did not repair the remaining portion of the meniscus or address the lateral meniscus tear. Dr. Lindberg testified that failing to repair that meniscus was an error of judgement by the initial surgeon because the meniscus has a terrible blood supply, and once it is torn, it is damaged and is not going to heal. Dr. Lindberg testified that the natural history of the knee following the 2014 injury was that the tear easily progressed over time and Claimant was "doomed." Dr. Lindberg explained that whether or not there was laxity, this situation would have happened with this meniscus after 2014. Dr. Lindberg further testified that there was no mechanism described by claimant occurring on March 9, 2022 that would cause a tear in the meniscus: no impact, no fall, no twisting of the knee. The ALJ finds Dr. Lindberg's testimony credible, but not persuasive.

30. As found, Claimant's left knee was asymptomatic until March 9, 2022. It was only when Claimant was kneeling on the tank pad and helping to get the fuel tank in place that his knee popped and locked up. The ALJ finds that Claimant suffered a compensable injury on March 9, 2022.

31. The ALJ finds that Claimant incurred medical expenses related to his March 9, 2022 work injury that he paid for out of pocket, including the October 3, 2022 surgery.

32. The ALJ finds that Claimant was out of work for at least a week following his October 3, 2022 surgery and is entitled to TTD benefits.

33. The ALJ finds that from March 10, 2022 until October 2, 2022, Claimant was restricted from working more than 40 hours per week, and was unable to earn overtime wages. The ALJ finds that Claimant is entitled to TPD benefits during the period of time he was on modified duty.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus the entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. ICAO*, 24 P.3d 29 (Colo. App. 2000).

It is undisputed that Claimant injured his left knee and underwent an ACL reconstruction and a partial lateral meniscectomy in 2014. 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 Office*, 107 P.3d 999, 1001 (Colo. App. 2004). But when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (I.C.A.O. Aug. 18, 2005).

As found, Claimant was performing his regular job duties for Employer on March 9, 2022. Claimant was kneeling and maneuvering a large fuel tanker into place when his left knee popped and locked up. He experienced an acute onset of pain and swelling. Claimant credibly testified that prior to March 9, 2022, his knee had been asymptomatic since his 2014 surgery. The medical records support Claimant's testimony that he had fully recovered following the 2014 ACL repair and was able to work without restrictions until March 9, 2022. Based on the totality of the evidence, Claimant proved by a preponderance of the evidence that he suffered a compensable injury on March 9, 2022 that aggravated his pre-existing condition.

Employer referred Claimant to Concentra for treatment of his injuries. As the ATP, Concentra subsequently made referrals to OCR, bringing them into the chain of referrals and also authorized to treat Claimant. Claimant underwent a course of conservative treatment that failed to resolve his symptoms. Claimant ultimately required surgery to repair the left meniscal tear. Based on the totality of the evidence, Claimant has proven by a preponderance of the evidence that treatment for the left knee, including surgery, is reasonable, necessary and related to cure and relieve the effects of the March 9, 2022, work injury.

TTD

To prove entitlement to TTD benefits, Claimant must prove (1) that the industrial injury caused a disability lasting more than three work shifts; (2) that he left work as a

result of the disability and; (3) that 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); *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs v. Indus. Claim Appeals office*, 954 P.2d 637 (Colo. 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" refers to the claimant's inability to perform his regular employment. *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. § 8-42-105(3)(a)-(d), C.R.S.

As found, Claimant became temporarily and totally disabled for a short period of time, during which time he was unable to work because of his injury. Claimant credibly testified that he was not able to work for a week following his surgery. Claimant is entitled to TTD because his disability caused him to leave work, and to miss more than three regular working days. Claimant is entitled to TTD benefits beginning October 3, 2022 until terminated by operation of law.

TPD

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). As found, Claimant was under restrictions that limited his work to 40 hours per week. Claimant credibly testified this prevented him from earning overtime wages following the work injury. The ALJ finds claimant is entitled to TPD benefits from March 10, 2022 through October 2, 2022.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable work injury to his left knee, on March 9, 2022.

2. Claimant is entitled to medical benefits related to treatment of the March 9, 2022 work injury as recommended by his treating physicians.

3. Claimant is entitled to reimbursement for his out-of-pocket expenses related to the treatment and surgery to cure and relieve the effects of his March 9, 2022 work injury.

4. Claimant is entitled to TTD benefits beginning October 3, 2022 until terminated by operation of law.

5. Claimant is entitled to TPD benefits beginning March 10, 2022 until October 2, 2022.

6. Respondents shall pay statutory interest of eight percent on all sums ordered.

7. 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: May 1, 2023

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

STIPULATIONS

At the outset of the hearing, the parties stipulated that the surveillance video and corresponding reports contained at Respondents' Hearing Exhibits J, K, L, and M were admissible without foundational testimony, and that the person featured in the videos is Claimant on the dates referenced therein.

The parties also stipulated that if Claimant is awarded permanent total disability (PTD) benefits, Respondents are entitled to an offset against such benefits based on Claimant's receipt of social security disability income (SSDI) benefits. The parties agreed that the offset shall be based upon the original monthly SSDI entitlement of $1,964.80.

These stipulations were accepted and approved by the ALJ.

REMAINING ISSUES

I. Whether Claimant established that his need for ongoing opioid medication, specifically levorphanol is reasonable and necessary.

II. Whether Claimant established, by a preponderance of the evidence, that he is unable to earn a wage in the same or other employment, and is therefore, permanently and totally disabled as a consequence of his admitted September 15, 2011 industrial injury.

III. Whether Claimant established, by a preponderance of the evidence, that he is entitled to a disfigurement award pursuant to C.R.S. § 8-42-108.

FINDINGS OF FACT

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

1. Claimant sustained an admitted work-related accident on September 15, 2011. At the time of the September 15, 2011 injury, Claimant worked for Employer as a roofing salesperson. As Claimant stepped off a curb while carrying a ladder on the date of injury he "rolled" his right ankle. Claimant reported the injury and medical treatment was provided by the Respondents.

2. Claimant has treated with several authorized providers for the effects of his September 15, 2011 industrial injury, including Dr. Douglas Bradley, Dr. Michael Simpson, Dr. Michael Sparr, Dr. Scott Primack, Dr. Levi Miller, Dr. Haley Burk, Dr.

Tashof Bernton and others. He has also been evaluated in an independent medical evaluation (IME) setting by Dr. Allison Fall, Dr. Rachel Basse, and Dr. George Schakaraschwili. A medical records review has been completed by Dr. Joseph Fillmore and Dr. Kathrine McCraine, both experts in physical medicine and rehabilitation (PM&R). On September 12, 2022, Claimant completed an "Employability Evaluation" with Cynthia Bartmann. Ms. Bartmann authored a comprehensive report outlining her opinions regarding Claimant's ability to earn wages following her evaluation. Her report is dated December 5, 2022 and is found at Exhibit C of Respondents Hearing Exhibits.

3. As noted, Claimant has been treated by a number of physicians. His treatment post injury treatment has been lengthy and complicated by symptoms consistent with Complex Regional Pain Syndrome (CRPS). Indeed, Claimant has undergone three ankle/lower extremity surgeries and he has been diagnosed as having Complex Regional Pain Syndrome (CRPS) in the past.

4. Claimant underwent a functional capacity evaluation ("FCE") on February 27, 2014, during which he demonstrated the ability to stoop and kneel frequently, walk, balance, and climb stairs occasionally. His lifting activities were in the heavy exertional level and his push/pull activities were in the medium level. (Resp. Ex. A, p. 4).

5. On February 28, 2014, Dr. Bradley placed claimant at MMI. He noted that claimant's sural nerve and peroneal nerve had been operated upon. He recommended restrictions of 65 pounds lifting, 35 pounds carrying, 100 pounds pushing, and 50 pounds pulling. Dr. Bradley also recommended post-MMI medical care due to ongoing complaints of pain. (Resp. Ex. E, p. 127).

6. Claimant continued post-MMI care with Dr. Bradley for persistent symptoms in the right lower extremity associated with his September 15, 2011 industrial injury. On March 24, 2015, Dr. Bradley returned Claimant to Dr. Scott Primack for follow-up evaluation. Claimant was also referred to Dr. Tashoff Bernton for completion of autonomic testing.

7. On May 6, 2015, Dr. Scott Primack of Colorado Rehabilitation & Occupational Medicine ("CROM") issued a report noting that Claimant had been through autonomic testing with Dr. Bernton and that this testing was "consistent for someone with complex regional pain syndrome" (CRPS). Dr. Primack also noted that Dr. Bernton suggested that Claimant proceed with a lumbar sympathetic injection[1] and if that injection improved his function including the motion in his ankle, than Claimant would meet the diagnostic criteria for CRPS. Claimant would be diagnosed with CRPS and would receive maintenance medical treatment including additional injection therapy/blocks and prescriptions for levorphanol[2] for the next several years.

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[1] Claimant would go on to receive multiple lumbar sympathetic blocks on a maintenance basis as administered by Dr. Stephen Scheper.

[2] Dr. Miller first recommended Claimant be prescribed levorphanol on November 21, 2017. (Resp. Hrg. Ex. B, pg. 35).

8. On June 5, 2019, Dr. Primack opined that Claimant was not at MMI and needed more blocks (contrary to the opinion expressed by Dr. Rachel Basse in her February 27, 2018, IME report)[3] (Resp. Hrg. Ex. F, p. 135). In addition to addressing the appropriateness of continued injection/block therapy, Dr. Primack commented on the necessity/reasonableness of Claimant's ongoing need for levorphanol. (See generally, Resp. Hrg. Ex. F, p. 135).

9. Claimant has a long history of marijuana use which has complicated his concomitant use of opioid medication to relieve his persistent pain symptoms. Indeed, as far back as November 29, 2017, Dr. Joseph Fillmore, as part of his records review, raised concern about Claimant's "appropriateness for opioids given his regular marijuana use". (Resp. Hrg. Ex. B, pg. 35).

10. On February 13, 2018, Dr. Miller's office recommended that Claimant be weaned off levorphanol given his marijuana use. (Resp. Ex. B, p. 36). During this appointment Claimant reported that marijuana "helps" him sleep so he would rather continue using marijuana. *Id*. In her June 7, 2018 physician advisor report, Dr. McCraine opined that Claimant's use of levorphanol was contraindicated because he had "not shown significant functional gains" and it had not "allowed him to return to work". (Resp. Ex. H, p. 179). Moreover, Dr. McCraine noted that "because the [Claimant] is using marijuana, he should not be also using opioid medication", since these drugs should not be combined. *Id.* Dr. McCranie agreed with Dr. Miller that Claimant's levorphanol should be tapered and discontinued. *Id.*

11. In his June 5, 2019 report, Dr. Primack agreed with Dr. Miller that "opioids and marijuana, in combination, would not be considered reasonable or appropriate care". (Resp. Ex. F, p. 135). Dr. Primack found "no good rationale for the utilization of both substances", noting that "if [Claimant] wants to be maintained on levorphanol, he should test negative for marijuana". *Id*. Conversely, "if [Claimant] wants to just be maintained on marijuana, then he should have his levorphanol eliminated over a three-month timeframe". *Id*.

12. During a follow-up visit with Dr. Miller on June 18, 2020, Claimant reported that levorphanol was "quite beneficial for *pain* relief". (Resp. Hrg. Ex. F, p. 137)(emphasis added). Nonetheless, Dr. Miller noted that Claimant's drug testing was positive for THC raising concern for continued marijuana use. Although recognizing that CBD products (which Claimant's also uses) contain impurities, including THC, Dr. Miller indicated that any THC from CBD products should be at a level to produce trace amounts of THC in Claimant's urine sample and that his tested levels for THC were higher than that. *Id.* Claimant acknowledged an understanding that he needed to stop all THC containing products and Dr. Miller indicated that should future drug testing reveal the presence of THC in higher levels, the levorphanol would be tapered to a stop. *Id.* Claimant's levorphanol was continued at 2 mg. three times/day. *Id*. at p. 138.

[3] See Resp. Ex. B.

13. On January 13, 2021, the results of Claimant's 12/21/2020 urine drug screen were again reported as positive for elevated THC. (Resp. Hrg. Ex. 140). Dr. Miller reviewed the results and wrote that he would start a taper of Claimant's levorphanol prescription to a stop because he was no longer comfortable prescribing opioids. *Id.* Claimant promptly sought a different provider.

14. On January 21, 2021, Claimant visited Dr. Bernton. Claimant voiced "concerns" about Dr. Miller, but the only specific complaint documented was that Dr. Miller was allegedly not listening to him. (Resp. Hrg. Ex. F, p. 142). The ALJ finds it reasonable to infer that Claimant was upset that his subjective complaints had not convinced Dr. Miller to continue prescribing opioids in the face of his continued marijuana use. Although Dr. Bernton described his "full confidence" in Dr. Miller's skills as a physician trained in the "management of [Claimant's] condition," he disregarded Dr. Miller's decision to stop the levorphanol. *Id.* Dr. Bernton admitted "it would be better . . . to look at alternatives". *Id*. at p. 143. Nevertheless the record supports a finding that prescriptions for levorphanol continued.

15. On August 15, 2021, Dr. Haley Burke of CROM issued a detailed report after reviewing Claimant's records. She began treating Claimant in February 2021 after Dr. Miller decided to stop prescribing levorphanol and after Claimant's complaints to Dr. Bernton. Initially Dr. Burke maintained the levorphanol without a full understanding of Claimant's treatment history. (See Resp. Hrg. Ex. F, pp. 148-151). However, after reviewing many years of medical records concerning Claimant's treatment, Dr. Burke noted that there did not appear to be a "clear rationale" for continuing Claimant's levorphanol. Dr. Burke opined that Claimant's symptoms were not typical for CRPS and cited the "minimal to absent" physical examination findings as partial support for this conclusion. *Id.* at p. 150. She opined that levorphanol had not caused any meaningful functional improvement, nor did eliminating it decrease Claimant's function. *Id.* She recorded that using THC with levorphanol violated the practice's general clinical standards (presumably a reference to CROM's internal rules), that THC had provided no demonstrable reduction in pain, and Claimant was "adamant about continuing his marijuana use" and was "dismissive of the . . . risk of continuing marijuana with twice daily dosed levorphanol." *Id.* Dr. Burke recommended terminating the levorphanol after a 3-month taper. *Id.*

16. On September 2, 2021, Claimant told Dr. Burke that it took a long time to recover after doing things like "going out on his boat." (Resp. Hrg. Ex. F, p. 152). He also described having recently attended a concert and taking his children to school. *Id.* Dr. Burke observed that Claimant's reported current functional capacity "[did] not appear to substantially differ compared to his reported state prior to his monthly injections and levorphanol use," noting that his pain scores did not meaningfully change after the levorphanol and blocks were discontinued. *Id.* at p. 154. Claimant tried to convince Dr. Burke that she had agreed to prescribe him levorphanol indefinitely, but she adamantly denied this suggestion, wrote that she would never make such a promise, and refused his request for more opioids. *Id.* at p. 157.

17. On September 30, 2021, Claimant returned to Dr. Burke and reported being worse, but also disclosed walking 4 holes of golf the previous week and being able to cook dinner. (Resp. Ex. F, p. 155). Claimant admitted to continued marijuana use indicating that he uses it for "personal reasons", specifically to cope with past traumas rather than pain control. *Id*. Dr. Buke noted that there were "obvious concerns about behavioral health that may be contributing to [Claimant's] overall clinical picture", for which she recommended psychologic care. Dr. Burke informed Claimant that she was not comfortable continuing his current dose of levorphanol given his marijuana use and advised him that she planned to decrease his levorphanol to ½ tablet every 8 hours at his next visit. On October 1, 2021, Dr. Burke indicated that continued prescriptions for levorphanol were not reasonable or necessary and she recommended reducing and discontinuing this medication. *Id*. at p. 160.

18. On October 22, 2021, Claimant was examined by Dr. Bernton, who did not observe any swelling in his hands or any clinical changes since his prior evaluation. (Resp. Hrg. Ex F, p. 161). Dr. Bernton addressed Dr. Burke's levorphanol tapering recommendation by noting:

> I also reviewed Dr. Haley Burke's opinion dated 10/01/2021 recommending tapering and discontinuing the [Claimant's] levorphanol. While I believe that is an appropriate and clinically reasonable goal, my plan would be to first work on discontinuing blocks, and once that has been (hopefully) accomplished, then we will look at medication and tapering and hopefully discontinuing the levorphanol.

Id. at pp. 161-162.

19. On November 22, 2021, Claimant followed up with Dr. Bernton, and reported discomfort making a fist, but demonstrated full range of motion and the ability fully grip and open the hand. (Resp. Ex. F, p. 164). Claimant reported planning to spend a week in Mexico in December 2021. *Id.* Dr. Bernton reiterated his hopes of someday tapering the levorphanol, but only after seeing whether "we can get him stable without further blocks". *Id.* He then noted that the next block was cancelled due to the vacation. *Id.*

20. Claimant saw Dr. Bernton on January 7, 2022, and reported his "head [had] been ringing" since returning from vacation. (Resp. Hrg. Ex. F, p. 166). Claimant stated that his head symptoms "started on the way home from Mexico when . . . my ears popped and never stopped." *Id.* Physical exam was again negative for swelling, asymmetry of color, or restricted motion. *Id.* Dr. Bernton acknowledged the difficulty of ascribing Claimant's symptoms to CRPS without objective correlation. *Id.*

21. On April 7, 2022, Claimant underwent an IME with Dr. George Schakaraschiwili. After completion of a comprehensive medical records review and physical examination, Dr. Schakaraschiwili opined that most of Claimant's responses to the blocks were non-diagnostic, that Dr. Bernton had not commented on the non-

diagnostic responses. He also noted that Dr. Bernton's exam findings were "significantly greater than those of other evaluators." (Resp. Hrg. Ex. D pp. 89, 91, 92, 99). Finally, he noted that Dr. Fillmore had previously recommended that all blocks be ceased on March 19, 2020 because there was no sustained functional improvement with the blocks and that by March 4, 2022, Claimant's examinations no longer fit the Budapest Criteria for CRPS and the "blocks had not provided any significant long-term relief and that Dr. Burke had not recommended continuing them". *Id*. at p. 96, 105.

22. Dr. Schakaraschiwili's physical exam revealed no swelling, discoloration, temperature changes, tropic changes, hair changes, or nail changes, although there might have been mild swelling in the fingers. *Id*. at p. 106. Dr. Schakaraschiwili' documented that Claimant presented "as quite comfortable during the evaluation until the physical examination commenced," and no finger twitching occurred during the interview, but twitching was seen during the examination. (Resp. Hrg. Ex. D, p. 106). Dr. Schakaraschiwili explained that the previous CRPS diagnosis was questionable due to the prior thermogram findings being inconsistent, the reportedly positive autonomic testing battery results being confounded by peripheral nerve injuries, and the lack of meaningful symptomatic or functional improvement from the blocks. Id. at p. 107. Nonetheless, Dr. Schakaraschiwili performed repeat autonomic battery and infrared stress thermogram testing. The thermogram of the upper extremities and an autonomic testing battery "failed to reveal any evidence of significant sympathetic dysautonomia". *Id*. at p. 108. Similarly, lower extremity testing revealed no clinical signs of CRPS other than potentially decreased range of motion (ROM) in the toes, although Dr. Schakaraschiwili was uncertain whether the decreased ROM was voluntary or due to a peroneal motor injury. *Id.* The thermogram revealed no evidence of temperature asymmetry except in the toes, which showed paradoxical warming (rather than asymmetry), the clinical significance of which Dr. Schakaraschiwili explained is uncertain. *Id.*

23. Based upon Claimant's autonomic and thermogram testing results in combination with the non-diagnostic response to the majority of the blockades directed to the upper/lower extremities, Dr. Schakaraschiwili concluded that Claimant did not meet the Division criteria for CRPS in any extremity at this time. (Resp. Hrg. Ex. D, p. 108).[4] He opined that Claimant's finger twitching is likely "functional, as it has been inconsistently reported in the records and inconsistently observed on [his] evaluation when [Claimant] was distracted." *Id*. at p. 109. Dr. Schakaraschiwili further opined that there is "evidence of significant psychological overlay to the Claimant's presentation and reporting of symptoms", that the record demonstrates that Claimant has "magnified and multiplied symptoms", has an unusual presentation for CRPS, and that there is scant evidence to support Claimant's reports of functional improvement with very "extensive and prolonged treatment". *Id*. In short, Dr. Schakaraschiwili opined that Claimant's reported symptoms "far exceed any objective findings reported on multiple physical examinations," and he was "engaging in activities which would appear inconsistent with his reported functioning, such as traveling to Mexico for vacation . . ." *Id.* Rather than a

[4] As noted in Dr. Basse' February 27, 2018, CRPS can and does burn itself out. (See Resp. Hrg. Ex. B, p. 40).

case of CRPS, Dr. Schakaraschiwili opined that Claimant's lower extremity and toe symptoms "can be almost completely explained by" the peroneal nerve injury and "right ankle sprain, superficial peroneal neuritis, and right sural resection with neuropathic pain." *Id.*

24. Dr. Schakaraschiwili recommended against additional blocks and levorphanol. (Resp. Hrg. Ex. D, p. 109). He opined that the blocks "are operating as placebos," and Claimant's pain scores for the peripheral nerve blocks and the majority of sympathetic blocks are either non-diagnostic or borderline. *Id.* He also concluded that Claimant is likely "psychologically and physically dependent on levorphanol" and that there is "insufficient evidence that the use of this medication is resulting in any functional gains". *Id*. Accordingly, Dr. Schakaraschiwili recommended that Claimant's use of levorphanol be tapered and discontinued. *Id.* Dr. Schakaraschiwili predicted that Claimant would strenuously object and report increased pain and decreased function if the blocks and levorphanol were discontinued, but pointed out that treatment should still be guided by objective clinical findings. *Id.*

25. On May 30, 2022, Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Jack Rook. He told Dr. Rook "it is very painful to walk barefoot," but in the July 2022 surveillance, less than 2 months after the DIME, Claimant is seen walking in stocking feet on a concrete surface on two separate occasions. (See Resp. Hrg. Ex. I, p. 194 and Ex. L). Claimant also reported to Dr. Rook that his blocks had been discontinued (seven months prior to the DIME) by Dr. Burke because of the radiation involved with the fluoroscopy and his continued marijuana use. (Resp. Hrg. Ex. I, p. 194). Dr. Rook also documented that Dr. Bernton had decreased Claimant's levorphanol from three 2 mg tablets per day to two 2 mg tablets per day. *Id.*

26. Claimant and his wife reported to Dr. Rook that during the time his blocks had been discontinued and his levorphanol dosage cut, he had an increase in body pain and a decrease in function. (Resp. Hrg. Ex. I, p. 194). According [Redacted, hereinafter MST], Claimant was so tired throughout the day that that he would just lay around dosing off intermittently. *Id*. at p. 195. In contrast to Drs. Miller, Burke, Primack, McCraine and Schakaraschiwili, Dr. Rook recommended *increasing* Claimant's levorphanol dosage to compensate for the discontinuation of additional blocks. Dr. Rook opined that Claimant's use of THC and CBD products were not contraindicated as these "medications" were not causing adverse side effects and were providing benefits for Claimant including, "some degree of analgesia, improvement in his mood, and [helping] him to deal with his chronic pain condition and associated functional limitations. (See generally, Resp. Ex. I, p. 208-210). Dr. Rook also assigned sedentary-level restrictions and noted that Claimant could lift, carry and push and pull up to 10 pounds occasionally. (Resp. Ex. I, p. 212, 215).

27. On May 31, 2022, Dr. Bernton reviewed Dr. Schakaraschiwili's report. He noted that Dr. Schakaraschiwili performed a repeat autonomic battery and a stress thermogram which he had previously recommended and requested permission to complete. (Resp. Hrg. Ex. F, p. 169). He discussed the negative testing results for CRPS with Claimant and agreed with Dr. Schakaraschiwili that Claimant's levorphanol

should be tapered and he be referred to psychology.[5] *Id*. According to the note from this date of visit, Dr. Bernton left the exam room to prepare the psychology referral and the prescription for a lower levorphanol dose to 3 mg total per day (rather than 2mg twice per day), and upon returning discovered that Claimant had abruptly departed. *Id.* Dr. Bernton also recommended a trial of laser therapy as a "non-habituating, safe and cost effective" alternative to medication to treat Claimant's persistent complaints.

28. On June 14, 2022, respondents filed a final admission, which included an admission for $1,800.00 in disfigurement benefits. (Resp. Hrg. Ex. I, p. 184).

29. On June 21, 2022, Claimant returned to Dr. Bernton. He presented as "quite distraught." (Resp. Hrg. Ex. F, p. 171). Consistent with Dr. Schakaraschiwili's prediction, Claimant reported decreased function and increased pain in response to Dr. Bernton's attempt to taper the opioids. *Id.* Claimant reported recently visiting an ER where he obtained ketamine. *Id.* After treating alleged CRPS for years with unhelpful blocks and opioids, Dr. Bernton admitted he did "not have a diagnosis and that makes it very difficult to continue, particularly narcotic treatment." *Id.* Nevertheless, Dr. Bernton increased the levorphanol dose back to 2 mg twice per day until completion of Claimant's psychological evaluation, which he noted could not be completed with Dr. Hawkins until early August. *Id.* While he did not have frank evidence of malingering, Dr. Bernton noted that he was uncertain to what extent somatoform versus physiologic factors were playing a role in Claimant's presentation. *Id*. at p. 172. In the absence of a psychological evaluation and because of Claimant's reported increase in symptoms and decrease in function, Dr. Bernton opined that it was "medically necessary" to increase Claimant's levorphanol to the level he was taking before the most recent reduction in dosage, at least until Claimant's psychological examination had been completed. *Id*

30. From July 21, 2022, through July 27, 2022, Claimant was surveilled outside of his home over the course of seven (7) consecutive days. During this time, Claimant demonstrated the ability to stand and walk for long periods of time (while wearing tennis shoes, Crocs, and occasionally in stocking feet), drive a large truck and a minivan, lift and carry large boxes and bags with his hands/arms, bend at the waist, push a wheelbarrow, open and close a tailgate on a truck, and use a power washer, garden hose, lift buckets of water and push and pull a small pick-up truck in and out of a garage using his arm and legs. At least on one occasion Claimant push the truck into the garage without the assistance of anyone. (See, generally, Resp. Hrg. Exs. J, L). All of the aforementioned activity was performed without apparent difficulty or overt pain. *Id.*

31. On August 23, 2022, Dr. Bernton noted that Claimant's THC use may cause sleep disruption. (Resp. Hrg. Ex. F, p. 173). He noted that Claimant had been evaluated by psychologist Rebecca Hawkins who opined that somatoform complaints alone did not explain Claimant's ongoing pain. *Id*. Instead, she noted that both a combination of physiologic with secondary psychologic factors were a more probable driver of Claimant's persistent pain complaints. She recommended an evaluation by

[5] Dr. Bernton recommended a referral to psychologist Rebecca Hawkins.

psychiatrist Stephan Moe for pharmacologic management of depression. *Id*. at p. 174. Accordingly, Dr. Bernton opined that he would not "further taper narcotics, as based on all the information available, [Claimant] does have a probable physiologic cause for his pain". *Id*. Contrary to Dr. Schakaraschiwili conclusions, Dr. Bernton opined that the "most likely cause" of Claimant's pain is CRPS. *Id.* Dr. Bernton referred Claimant to Dr. Moe for recommendations of medication management for anxiety and depression and he switched his focus on providing low side effect treatments, including a trial of laser therapy to treat Claimant's reported pain complaints. *Id.*

32. Claimant failed to attend his virtual appointments with Dr. Moe. (Resp. Hrg. Ex. G, p. 178). Dr. Bernton has made no further attempts levorphanol.

33. Claimant underwent an IME with Dr. Allison Fall on September 7, 2022. During this examination, Claimant reported that he is prescribed 2 mg. of levorphanol two times a day. (Resp. Hrg. Ex. A, p. 1). According to Claimant, "[i]t definitely helps". *Id*. He also reported pain relief with laser therapy. *Id*. Claimant reported that he could "work half-a-day doing physical labor such as pulling weeds and cutting grass with a lawnmower," but that he would "pay for it" and have to lay in bed the next day. *Id*. at p. 2. He also reported that while receiving injections/blocks he could work a full day doing things like "[working] on his rental homes, fixing things, and painting." *Id*. at p. 2. Claimant reported that prolonged standing causes his leg to go numb and that walking increases his pain. *Id*. His hands, arms and legs are always achy, he cannot get comfortable and had to change position every five minutes while sleeping. *Id*.

34. Claimant listed his occupation as disabled and reported to Dr. Fall that he has not looked for any type of part time or volunteer work. (Resp. Hrg. Ex. A, p. 8). As noted above, he is receiving social security disability benefits. Physical exam of the hands revealed no hair, skin, color, or temperature changes. *Id.* at p. 9. There was no loss of balance during ambulation and while ambulating, Claimant sometimes favored the right leg and other times the left. *Id*.

35. Dr. Fall reviewed the surveillance from July 2022. She commented that Claimant wore tennis shoes and Crocs sandals, went barefoot, and did a lot of walking with a non-antalgic gate. *Id.* She noted that his activities in the video were inconsistent with the capabilities he reported to her, in that he ambulated much more hesitantly during the IME than in the surveillance video. She also noted that he was not bedridden despite back-to-back days of activity including prolonged standing and walking. (Resp. Hrg. Ex. A, p. 3). Dr. Fall also noted that Claimant's activities in the surveillance seemed to exceed the lifting, pushing and pulling of 10 pounds recommended by Dr. Rook. *Id.* at p. 8.

36. Based upon the discrepancies between Claimant's in-person presentation and his demonstrated capabilities on surveillance video, Dr. Fall opined that his "subjective presentation to providers is not reliable". (Resp. Hrg. Ex. A, p. 9). Dr. Fall also opined that work restrictions are not necessary based upon the activities demonstrated in the video. *Id*. In support, she pointed to the lack of any medical

indication for restrictions and the heightened capacity Claimant demonstrated during the 2014 FCE and in the July 2022 surveillance. *Id.* at pp. 9-10.

37. Dr. Fall agreed with Drs. Miller, Burke, Primack, McCraine and Schakaraschiwili that Claimant's levorphanol should be discontinued. (Resp. Hrg. Ex. A, p. 10). She endorsed a tapering schedule consistent with that recommended by Dr. Burke. *Id.*

38. On September 12, 2022, Claimant underwent a vocational evaluation by Cynthia Bartmann. He again reported getting worse. (Resp. Hrg. Ex. C, p. 61, 66). Claimant told Ms. Bartmann he feels comfortable only at home, which appears demonstrably inconsistent with participation in cruising, vacationing, concert going, fair going and driving. Claimant told Ms. Bartmann he cannot stand or walk for more than 10 minutes "before developing increased pain," which she noted was inconsistent with his activities depicted in the surveillance video. *Id.* at p. 69. Claimant tried convincing Ms. Bartmann he could only drive for 20 minutes, but she noted that Dr. Hawkins documented that he drives from Pueblo to Denver and the January 2023 surveillance confirms that he sometimes drives for more than 90 minutes without apparent difficulty. *Id.* Claimant told Ms. Bartmann he does outdoor work in the morning because heat bothers him. In contrast to this statement, the July 2022 video submitted into evidence shows Claimant active in the midday summer heat. Claimant also reported to Ms. Bartmann that he needs to be in bed following a day of activity, but she noted that he was active on several consecutive days in July 2022 based on the surveillance. He also tried convincing Ms. Bartmann that he has fine motor skill deficits involving the hands, but she observed that Dr. Hawkins has documented his ability to use a pen, a touchscreen, and a smartphone to timely complete MMPI-II-RF testing. *Id.* Ms. Bartmann also pointed out that Claimant handled several items in the surveillance video with no obvious issues. *Id. at 70.*

39. Claimant described several physical capabilities to Ms. Bartmann, including taking his kids to school and completing light chores such laundry and making meals. (Resp. Hrg. Ex. C, p. 66). Notably, he did not disclose owning and managing rental properties to Ms. Bartmann. He did describe being able to perform basic math and needing to do math as a roofing salesman. He told Ms. Bartmann the only modification he needed with [Redacted, hereinafter TR] after his injury, until he stopped working in 2014, was to have a co-worker carry ladders. *Id.* at p. 68. He also confirmed the ability to read, but alleged that his mind wanders after reading about half a page of information. *Id*. at p. 67.

40. Ms. Bartmann observed that all of Claimant's providers have released him to return to work with varying restrictions: Drs. Primack and Fall released him to full duty, Dr. Fillmore released him to "sedentary to light" work, and Drs. Bradley and Rook released him to sedentary duty. (Resp. Hrg. Ex. C, p. 65). Ms. Bartmann observed that Claimant could return to his salesman job within the restrictions recommended by Drs. Sparr, Primack, and Fall. *Id*. at p. 68. She expressed uncertainty regarding why Claimant did not return to work in 2015 after Dr. Sparr released him. *Id.* Ms. Bartmann explained the importance of relying upon objective information in cases like this where

Claimant's subjective reporting has been called into question by medical providers and surveillance. *Id.* at p. 69. She also noted that Dr. Fall is the only physician who reviewed the surveillance. *Id*. at p. 70.

41. As part of her vocational evaluation into whether Claimant was capable of earning wages, Ms. Bartmann performed vocational research. In performing her research, Ms. Bartmann utilized the sedentary-level restrictions recommended by Drs. Rook and Bradley to be conservative. (Resp. Hrg. Ex. C, p. 70). She concluded that Claimant has retained the capacity to earn wages despite his industrial injury. Moreover, she found several suitable jobs, including night auditor, front desk monitor, cashier, and customer service representative. *Id*. at pp. 70-72. She also found a "budtender" position with [Redacted, hereinafter DC], although noted that Claimant would need to lift up to 25 pounds (before any potential accommodations). *Id.* The night auditor position would allow Claimant to sit and stand intermittently, and the cashier position would allow him to use a stool. *Id.* The customer service, night auditor, and front desk monitor positions did not require prior experience. *Id.* Each employer had positions available immediately in Pueblo, except for [Redacted, hereinafter CS] which had an open job in Colorado Springs. *Id.* Ms. Bartmann wrote that these jobs were simply examples of opportunities available to Claimant within his skills and physical abilities as opposed to being an exhaustive list of potential employment opportunities for Claimant. *Id.*

42. On October 4, 2022, Claimant visited Dr. Bernton and described increased pain in both his hands and feet. (Resp. Hrg. Ex. F, p. 176). He reported seeing an ENT for the alleged tinnitus, who concluded there is "nothing wrong with" his ears. *Id.* Dr. Bernton again recorded alleged "slight swelling of the hands," but no discoloration or hyperalgesia. *Id.*

43. On December 1, 2022, Claimant visited Dr. Bernton and reported significant improvement following a recent session of laser therapy. He described a 50% decrease in his pain levels, better sleep, and significant functional improvement regarding the ability to stand and engage in unspecified activities outside of the house. (Clmt's. Hrg. Ex. 1, p. 5).

44. On January 12, 2023, Claimant was re-evaluated by Dr. Bernton, who noted that with additional laser therapy, Claimant enjoyed a "significant reduction in pain levels from a 7-8/10 to a 3-4/10 and that he was able to "do some raking outside with a friend", which is something he had been unable to do since his blocks had been stopped. (Clmt's. Hrg. Ex. 1, p. 9). Dr. Bernton recommended that Claimant move forward with rental or purchase of a laser unit and once Claimant had the laser in hand, he (Dr. Bernton) anticipated moving forward with a tapering of Claimant's levorphanol. *Id*.

45. Procurement of a laser for home use was authorized and on January 20, 2023, Claimant was instructed on its use.

46. Claimant was surveilled on his trip from Pueblo to Denver on January 20, 2023. (See generally, Resp. Hrg. Ex. K, M). The ALJ has reviewed this video in its entirety. In the video, Claimant is seen moving fluidly without any assistive devices or signs of pain. (Resp. Hrg. Ex. M). Claimant operated his vehicle for over 3 hours on this date. (Resp. Hrg. Ex. K, p. 227).

47. On February 23, 2023, Claimant visited Dr. Bernton and described decreased pain and increased function with use of his home laser. (Clmt's. Hrg. Ex. 1, p. 15). He also reported to Dr. Bernton that Dr. Hawkins had released him from her care as she "could not help him anymore". *Id.* In reading Dr. Hawkins note, Dr. Bernton opined that it did not seem to indicate that she was unwilling to see Claimant, but rather that he needed to utilize the coping skills she had covered with him in previous sessions and when he was willing to try this she would see him again. *Id.* at p. 15-16.

48. On February 27, 2023, Claimant reported "significant" improvement with the use of his home laser. (Clmt's. Hrg. Ex. 1, p. 17). Although his sleep pattern had improved, Claimant reported that he did not feel "a lot" better emotionally. *Id*. He continued to struggle with anxiety and he had not changed his medication regime. *Id.* Dr. Bernton recommended another referral to Dr. Moe. *Id*. He also indicated that he would not "change medications at this point". *Id.* at p. 18.

49. Claimant testified that he has tried to wean himself from his levorphanol, noting that if he does not take his medications he experiences severe pain and a decrease in his function. Claimant testified that he becomes irritable if his pain increases and he is afraid of the impact that a tapering and discontinuation of levorphanol will have on his mental state. Claimant testified that he trusts Dr. Bernton as he believes that Dr. Bernton is looking out for his best interests. Claimant testified that he is afraid that he will not be able to treat with Dr. Bernton in the future if he is tapered from levorphanol.

50. Claimant testified that his pain symptoms are unpredictable but that he always has some kind of symptoms. He estimated that he could currently perform a desk job up to 8 hours per day 3 days per week meaning that he would likely have to call off work up to a minimum of two times a week. Claimant described swelling in his hands that impairs his ability to grip and grasp items, but he reported that he is ambidextrous so he can use his left hand to write for 5-10 minutes.

51. Claimant testified that he cannot tolerate anything touching the area surrounding the location of his injury and subsequent surgeries. Consequently, Claimant testified that he wears shorts, even in the wintertime. This is confirmed by the admitted surveillance video tape. He also testified that he experiences symptoms in his feet. Consequently, he wears tennis shoes or Crocs for footwear.

52. Claimant admitted on cross-examination that he has not applied for any job positions since leaving his employment with Respondent-Employer. He also admitted that he continues to take levorphanol 3 times daily (which indicates that he is

actually taking 6 mg per day, not 4 mg as reported by Dr. Bernton) and uses marijuana daily.

53. Claimant vaguely testified that the large boxes he lifted and carried on July 24, 2022, were allegedly filled with light items like paper plates "or something like that." He had an uncertain memory of what exactly was in the box, which the ALJ finds demonstrates a general lack of concern for specific weights and lifting restrictions. He also testified that his driveway slopes away from his garage about 2 inches per 12 feet, which indicates that on one point he pushed the small pick-up truck slightly uphill by himself.

54. At the hearing, Respondents' counsel asked Claimant if he owns and manages rental property. Claimant admitted that he owes three rental properties but maintained that his involvement with these properties is limited to oversight of maintenance issues. Indeed, Claimant testified that his wife fields calls from their tenants and the oversight of their issues is his responsibility. He denied working on the properties. Instead, Claimant testified that he might assist by buying project supplies or by touching up a painted wall or sweeping a floor, or otherwise assisting a "tiny bit". Claimant testified that the last time he worked for the rental business was in October 2022, when he drove a friend to [Redacted, hereinafter HD] to purchase a thermostat. According to Claimant, his friend installed the new thermostat. Finally, Claimant admitted to overseeing a central air/furnace replacement project which he described as going by and looking at the repairs/replacement after they were completed. Claimant testified that he does not do yardwork for his rental properties, but uses a riding mower to mow his lawn, most recently 2 weeks prior to the hearing. Claimant testified that he uses his smartphone to make purchases with [Redacted, hereinafter AZ].

55. Dr. Fall testified that work restrictions should be assigned on a medical safety basis and Claimant does not need any. She also testified that Claimant has the capacity to drive, lift up to 25 pounds, and perform all of the jobs described in Ms. Bartmann's report. Dr. Fall explained that she takes subjective complaints into account, but restrictions should generally not be assigned based on subjective reports of pain or limitation. Dr. Fall testified that there is no medical reason that Claimant cannot work 8 hours per day or several days in a row.

56. Dr. Fall testified that CRPS sometimes resolves over time, which she has personally observed in several cases. Dr. Fall testified that she completed a standard physical exam of Claimant, which took longer than the 5 minutes he alleged. She further testified that Claimant's physical examination findings do not support a current diagnosis of CRPS, but she would not assign him restrictions regardless. She explained that she has experience treating CRPS and ankle injuries similar to Claimant's, and assigning work restrictions to CRPS patients goes against treatment protocol where activity and exercise is promoted, so it is often worse to assign CRPS and chronic pain patients restrictions.

57. Dr. Fall testified that levorphanol is an opioid prescribed for moderate to severe pain and can result in irritability, tolerance, dependence, and addiction. She

further testified that Claimant is likely dependent on levorphanol based on the increased symptoms he reported when his doctors attempted to taper this opioid, which she explained is an expected reaction. Dr. Fall opined that doctors do not understand how opioids interact with THC, so most physicians do not recommend them together. Dr. Fall recommended a slightly different tapering schedule than the one set forth in her report because Claimant's daily dosage had increased after her IME from 2mg twice daily to 2mg three times daily. Dr. Fall testified that she now recommends tapering Claimant from 3 doses of 2mg per day to 2 doses of 2mg per day over 2 weeks, and then moving forward with the tapering schedule in her report.

58. In the face of potential psychological overlay and Claimant's continued daily marijuana use, the ALJ finds continued prescriptions for levorphanol problematic and contraindicated. In this case, the totality of the evidence supports a finding that Claimant's need for ongoing levorphanol is no longer reasonable or necessary. Indeed, the evidence presented persuades the ALJ that Claimant has likely become dependent upon levorphanol over the course of 5 years without receiving any objectively perceivable benefit from it. Contrary to the warnings set forth in the Medical Treatment Guidelines and CROM's internal standards, the evidence presented supports a finding that Claimant has continued to receive prescriptions for opioids (levorphanol) despite his daily marijuana use and a lack of improvement in his function state. Indeed, while Claimant has reported that the levorphanol helps his pain, there has been little overall improvement in function. Consequently, it appears that Claimant's use of levorphanol is currently being prescribed solely for pain control.

59. While Claimant's fear that his treatment with Dr. Bernton will cease if he is tapered from levorphanol appears sincere, his adamant refusal to stop using marijuana while also using opioids, and doctor-swapping whenever his access to opioids is threatened, bolster the conclusion that additional prescriptions for levorphanol are inappropriate. Nearly every doctor who has treated or evaluated Claimant has recommended that the levorphanol be tapered and terminated. Indeed, Drs. Miller, Burke, Fillmore, Primack, McCraine, Basse and Schakaraschiwili all agree that levorphanol should ultimately be discontinued. Dr. Bernton has repeatedly acknowledged the validity of these colleagues' opinions, but he has failed to commandeer this goal for over 2 years while Claimant adjusted to the cessation of his blocks and more recently a trial of laser therapy. Given that Claimant has not had any injection/block treatment for a lengthy period of time (at least 7 months prior to his May 30, 2022 DIME with Dr. Rook) and has experienced "significant" symptom improvement with laser therapy, Dr. Bernton again anticipated, as recently as January 12, 2023, moving forward with tapering of Claimant's levorphanol. Nonetheless, Dr. Bernton has not initiated a tapering schedule.

60. Based upon the evidence presented, the ALJ is convinced that the anticipated tapering has probably not occurred because of Claimant's reported emotional state and anxiety (according to Dr. Bernton's February 27, 2023, report). Nonetheless, the record presented supports a finding that Claimant has failed to employ the full range of emotional coping strategies suggested by Dr. Hawkins and has failed to

follow through with his referrals to Dr. Moe. Accordingly, it does not appear that Claimant is interested in addressing his emotional dysregulation.

61. Based upon the evidence presented, the ALJ is convinced that Claimant's continued use of levorphanol is no longer reasonable and should be discontinued. Nonetheless, as Claimant has been using opioid medications for a lengthy period of time, the ALJ credits the opinions of Drs. Miller, Burke, Fillmore, Primack, McCraine, Basse and Schakaraschiwili to find that it is medically contraindicated to abruptly cut him off of this opioid altogether. Rather, per the opinions of his doctors, including Dr. Bernton, Claimant will require a reasonable period of time to wean himself from his levorphanol. The ALJ defers to the medical expertise of Dr. Bernton in setting a tapering schedule to ensure that discontinuation of this medication is accomplished safely. Nevertheless, the tapering shall commence.

62. The ALJ credits the unrebutted testimony of Ms. Bartmann to find that Claimant retains the capacity to earn wages. Ms. Bartmann was the only vocational expert to render opinions and found several suitable jobs within the most restrictive limitations assigned by Drs. Bradley and Rook, including some jobs which can be done from home. Ms. Bartmann's opinions are supported by the record evidence, including Claimant's testimony that he retains the physical capacity to work a desk job up to 8 hours per day 3 days per week. Moreover, it is difficult to reconcile Claimant's reports of balance problems, fatigue, tinnitus, and an inability to stand or walk for more than a few minutes with his observed capacity on surveillance video. Indeed, the video tape clearly demonstrates that Claimant is active and over the course of several consecutive days during which he demonstrated the capacity to push/pull a truck, power wash this vehicle, lift and carry large boxes, bags and buckets of water, stand and walk for prolonged periods, bend and drive a motor vehicle for extended periods. Based upon the evidence presented, the ALJ finds the 2014 FCE and the July 2022 and January 2023 video the most objective evidence of Claimant's capacities, which appear much greater than he admits.

63. The ALJ finds that as a result of his admitted industrial injury, Claimant was awarded $1,800.00 in disfigurement benefits by Respondents. (Resp. Ex. I, p. 180, 184). At hearing, the ALJ observed the claimed disfigurement, specifically swelling of the hands bilaterally. During visual inspection the ALJ noted a perceptible swelling about the hands/fingers bilaterally, especially over the dorsum of the hands. Although mild to moderate in nature, this swelling is noticeable and alters the appearance of Claimant's hands. Accordingly, the ALJ finds that Claimant is entitled to a disfigurement award.

CONCLUSIONS OF LAW

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

General Legal Principles

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

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

Claimant's Entitlement to Ongoing Prescriptions for Levorphanol

C. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents still retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

D. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due

to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the ALJ credits the opinions of Drs. Miller, Burke, Fillmore, Primack, McCraine, Basse and Schakaraschiwili to find and conclude that the current open ended prescriptions for levorphanol are unreasonable. Here, there is a dearth of objective evidence to support a conclusion that Claimant's continued use of levorphanol has produced an adequate analgesic effect to improve Claimant's functional status. Consequently, Drs. Miller, Burke, Fillmore, Primack, McCraine, Basse and Schakaraschiwili make a convincing argument that Claimant should be weaned from this medication. The relief Respondents seek, a tapering schedule for levorphanol, is not unique. In *Wesley v. King Soopers, Inc.*, W. C. No. 3-883-959 (ICAO Nov. 28, 2003), the ALJ "determined the claimant should be tapered from Oxycontin," and therefore issued an order which tapered the respondent's liability for the opioid. A Panel of the Industrial Claims Appeals Office affirmed because the ALJ's order "merely determined the respondent's liability to pay for medication" pursuant to a tapering schedule rather than restricting the doctor's ability to prescribe. Similar results were reached in *Cortez v. Mostek*, W.C. No. 3-378-336 (ICAO Mar. 12, 2007) and *Freeman v. Platte Valley Medical Center*, W.C. No. 4-942-096-01 (ICAO May 4, 2016).

E. The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); *See also*, *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo.App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: "All health care providers shall use the Guidelines adopted by the Division". *Hall v. Industrial Claims Appeals Office,* 74 P.3d 459 (Colo.App. 2003). "Accordingly, compliance with the Guidelines is mandatory for medical providers." *Chrysler v. Dish Network*, W.C. No. 4-951-475-002 (ICAO, July 15, 2020). In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. Section 8-43-201(3)(C.R.S. 2020). Indeed, Rule 17-4 (A) acknowledges that "reasonable medical care may include deviations from the Guidelines in individual cases." *Chrysler v. Dish Network*, *supra.* Nonetheless, the Guidelines carry substantial weight and should be adhered to unless there is evidence justifying a deviation. *See Hall v. Industrial Claim Appeals Office, supra*; *See Logiudice v. Siemans Westinghouse*, W.C. No. 4- 665-873 (ICAO, January 25, 2011).

F. The ALJ may also consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse, supra.* Guidelines concerning the assessment and treatment of complex regional pain syndrome and chronic pain have been prepared by the Colorado Department of Labor and Employment, Division of Worker's Compensation (Division) and are enforceable under the Division's Rules of Procedure. *See* 7 CCR 1101-3.

G. These Guidelines contain several warnings regarding the use opioids to treat chronic pain. The guidelines provide that opioid use should be "clearly linked to improvement of function, not just pain control," including the ability to work, remain alert for 10 hours per day, and participate in normal social activities. Rule 17, Exhibit 9, p.169; Rule 17, Exhibit 7, p. 95. Patients should usually be tapered unless reasonable levels of activity are maintained. *Id.* Reasons for termination of opioid management, referral to addiction treatment, or for tapering opioids (tapering is usually for use longer than 30 days) include, but are not limited to: "Lack of functional effect at higher doses, non-compliance with other drug use, drug screening showing use of drugs outside of the prescribed treatment or evidence of noncompliant use of prescribed medication, excessive sedation, or lack of functional gains. Rule 17, Exhibit 9, p. 103.

H. Marijuana is illegal under federal law and cannot be recommended under the Guidelines. Rule 17, Exhibit 9, p. 83. Dependence is a physiological phenomenon which is expected with continued use of opioids. *Id. at p.95.* Opioid use for over 90 days is associated with significantly increased risk of developing opioid use disorder. *Id. at p.96.* No long-term studies establish the efficacy of using opioids for more than one year. *Id. at p.95.* There is no evidence that any particular long-acting opioid is more effective than another, or more effective than other types of medications, in improving function or pain. *Id. at p.95.* Generally, tapering is accomplished by decreasing the dose by 10% per week over 6 to 12 weeks. *Id. at 105.* Crucial to this case, the Guidelines explain that a patient's dependence need not deter physicians from appropriate use of opioids. *Id.*

I. As found, Claimant continues to use marijuana daily and his increased doses of levorphanol have not been linked to an improvement in function. Moreover, the ostensible reasons for waiting to taper Claimant's continued use of levorphanol, i.e. waiting for an adjustment to the cessation of injection therapy (blocks) and the procurement and use of a laser for home treatment have been accomplished. Claimant's concern over the tapering and discontinuation of the opioid he has been taking for several years is understandable. Nonetheless, Claimant has not taken full advantage of the resources available to him to address the emotional components, including his anxiety surrounding his condition and the tapering of his opioid medication. Based upon the evidence presented, the ALJ is persuaded that tapering Claimant's levorphanol is appropriate because Claimant's use of levorphanol no longer meets the conditions for continued consumption the under the Medical Treatment Guidelines. In short, continued prescriptions for levorphanol no longer appear reasonable or proper.

Claimant's Entitlement to Permanent Total Disability Benefits

J. Under the applicable law, a claimant is permanently and totally disabled if he/she is unable to "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo.App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo.App. 1995). In *McKinney*, the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from

receiving permanent total disability benefits. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for purposes of the statute. See *also, Christie v. Coors Transportation*, 933 P.2d 1330 (Colo. 1997).

K. Moreover, there is no requirement that Respondents locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc*., W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (December 1998); *Beavers v. Liberty Mutual Fire Ins. Co.*, W.C. No. 4-163-718 (January 13, 1996), aff'd., *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996)(not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). To the contrary, a claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that he/she is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998). As long as a claimant can perform any job, even part time, he/she is not permanently totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (February 9, 1995). Nonetheless, when determining whether a claimant is capable of earning wages, the ALJ must consider the claimant's unique "human factors", including age, education, work experience, overall physical/mental condition, the labor market where claimant resides and the availability of work within claimant's restrictions, among other things. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The crux of the test is the "existence of employment that is reasonably available to the claimant under his or her particular circumstances." *Id*. at 558. This determination must be made on a "case-by-case basis," and "will necessarily vary according to the particular abilities and surroundings of the claimant (e.g. whether and how far the claimant is able to commute)." *Id*. at 557.

L. For example, in *Duran*, the court considered various factors, including the claimant's education, work history, transferable skills, physical restrictions and level of day-to-day activities. *Duran v. MG Concrete Inc.*, *supra*. In *Duran*, the ALJ credited the respondents' vocational expert, who identified jobs available to the claimant within his restrictions, and concluded that he was capable of earning wages as a janitor or deliverer. *Id*. Therefore, the ALJ denied Claimant's claim for PTD. Similarly, in *Hazard-Ross v. HIS of Colorado Springs, W.C. Nos.* 4-2321-227 & 4-279-308 (ICAO June 6, 2005), the ALJ credited the vocational expert, who testified that numerous jobs were available to the claimant, and concluded that the claimant failed to show that she was unable to earn wages in employment reasonably available to her. Accordingly, the ALJ denied her claim for PTD benefits.

M. Considering the human factors involved in the instant case[6], the ALJ is not convinced that Claimant is incapable of earning any wages in other employment.

[6] Claimant is 44 years-old, speaks English, attended school through the 8th grade and lives in the Pueblo area, which is a large metropolitan area with a variety of employment options according to Ms. Bartmann.

Rather, while it is probably true that Claimant would need accommodation (carrying ladders and heavy materials) in returning to his former occupation and similar positions, the representative sampling of sedentary to light duty type positions identified by Ms. Bartmann as falling within Claimant's physical capabilities present a number of perspective job positions existing in the local labor market affording Claimant the opportunity to earn a wage. Furthermore, the ALJ is not persuaded that Claimant's age and education, in combination with his physical restrictions completely preclude his ability to earn a wage. Outside of a failed attempt to return to roofing work, it does not appear that Claimant has submitted any applications for employment. As such, the ALJ finds that Claimant has not attempted even a rudimentary job search. In this regard, the ALJ credits the report and unrebutted testimony of Ms. Bartmann to conclude, that while it may not be easy for Claimant to secure employment, his human factors combined with his work experience will help him compete for and secure employment as identified by Ms. Bartmann. Accordingly, Claimant has failed to demonstrate, by a preponderance of the evidence, that he is permanently totally disabled as a consequence of his September 15, 2011 work injury.

Disfigurement

N. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement", as used in the statute, contemplates that there be an "observable impairment of the natural person." In this case, the ALJ concludes that there is an observable alteration in the natural appearance of the structure and skin covering the hands bilaterally. Accordingly, the ALJ concludes that Claimant has suffered a visible disfigurement entitling him to additional benefits pursuant to Section 8-42-108 (1), C.R.S. Respondents recognized the alteration in the appearance of Claimant's hands and accounted for a $1,800.000 disfigurement award in the Final Admission of Liability (FAL) filed June 14, 2022. The ALJ concludes that this disfigurement award is reasonable and appropriately compenses Claimant for the visible disfigurement described above.

ORDER

It is therefore ordered that:

1. Additional prescriptions for levorphanol are no longer reasonable or necessary. However, Respondents shall provide and pay for continued levorphanol based on a tapering schedule to be determined by Dr. Bernton. Respondents' liability to provide and pay for such opioid medication upon completion of Claimant's tapering schedule will terminate.

2. Claimant's request for permanent total disability benefits is denied and dismissed.

3. Claimant has proven that he is entitled to a disfigurement award. The ALJ concurs with Respondents award of $1,800.00 in disfigurement benefits. If not already paid, Respondents shall pay said disfigurement award forthwith.

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

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

DATED: May 23, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-183-731-002

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on June 28, 2021.

2. Whether Claimant established by a preponderance of the evidence an entitlement to reasonably necessary medical benefits to cure or relieve the effects of a compensable industrial injury.

3. Whether Claimant established by a preponderance of the evidence that cervical facet injections recommended by Dr. Sacha are reasonably necessary to cure or relieve the effects of a compensable industrial injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a PET/CT Technologist. Part of Claimant's job duties involve working in and around a mobile PET unit (essentially, a large trailer). The Mobile PET unit has a motor-driven garage-style door on one end with a lift. On June 28, 2021, Claimant was walking backward pulling a wheelchair into PET unit through the garage door from the lift when she was struck in the back of the head by the closing door. Claimant testified that she was "folded forward" by the force of the door. Claimant testified that she was immediately dizzy, disoriented, and nauseous from the incident.

2. Claimant sought treatment that day at the Swedish Medical Center emergency room, and was evaluated for head and neck pain. Claimant reported she felt her neck was hyperextended, and that she was experiencing nausea and tenderness in her neck and thoracic areas. Claimant reported a history of migraines with nausea and vomiting, and chronic pain. Imaging studies were negative for acute issues. She was diagnosed with a head injury and neck pain and advised to follow up with her primary care provider. (Ex. 4)

3. On June 30, 2021, Claimant began treatment with authorized treating provider Carol Dombro, M.D., at Concentra. At the initial visit, Claimant reported experiencing headaches, dizziness, photophobia, memory issues, neck pain and left posterior shoulder pain. Claimant reported a medical history significant for multiple prior concussions (the last being in 2009). Dr. Dombro diagnosed Claimant with a closed head injury, cervical strain, acute thoracic strain, and post-concussion syndrome. She recommended Claimant start physical therapy for her neck and upper back. (Ex. 6).

4. Over the next two to three weeks, Claimant returned to Concentra reporting improvement in her neck and upper back with physical therapy, and continued

headaches, with photophobia, nausea and vomiting. On July 13, 2021, Claimant was referred to John Sacha, M.D., for a physiatry evaluation. (Ex. 6).

5. Claimant saw Dr. Sacha on July 19, 2021, reporting headaches into the occipital and periorbital areas, intermittent dizziness, nausea and vomiting, intermittent light sensitivity, some forgetfulness and feeling "foggy." Based on his examination, Dr. Sacha diagnosed Claimant with cervical facet syndrome, whiplash associated disorder, occipital neuralgia, and adjustment disorder. He found no evidence of a closed head injury, but noted he could not rule out the possibility of a mild concussion. He recommended adjusting Claimant's medications, a trial of chiropractic treatment, and adding IMS needling to her physical therapy. He indicated that a cervical MRI should be considered if Claimant did not improve. (Ex. 8).

6. Claimant continued to see Dr. Dombro in July, August and September 2021, reporting continued post-concussion symptoms, including headaches, nausea and dizziness. Claimant reported her dizziness and neck pain had improved with treatment, and her headaches were less intense. Claimant was referred for chiropractic care on July 19, 2021. By August 24, 2021, Claimant reported dizziness only when she changed positions rapidly, and that physical therapy and chiropractic were helping her neck pain. (Ex. 6). Dr. Dombro placed Claimant on work restrictions, gradually increasing from four hours per day to six hours per day at the beginning of September 2021. (Ex. 6).

7. On September 13, 2021, Claimant saw Dr. Dombro, reporting essentially unchanged symptoms. Claimant indicated that she was "trying to get back into normal life" and wanted to restart kickboxing and kayaking. At this visit, Dr. Dombro indicated under the heading "Functional Restoration and Status of Healing" that Claimant "is approximately 50% of the way toward meeting the physical requirements of her job." She recommended continued physical therapy for Claimant's neck, and to continue treatment with chiropractic and Dr. Sacha. Dr. Dombro recommended increasing Claimant's work hours to eight hours per day at the following visit, but continued to impose work restrictions including limiting patient care to three hours per day, and remaining seated for the remainder of the day. Dr. Dombro also indicated Claimant "may not work in safety sensitive position." (Ex. O).

8. During July and August 2021, Claimant saw Dr. Sacha for telemedicine visits. Claimant reported continuing headaches, and improving with therapy. (Ex. 8).

9. On September 9, 2021, Claimant saw Dr. Sacha reporting ongoing dizziness and nausea when her neck was in extension. Dr. Sacha recommended a cervical MRI, that was performed on September 14, 2021. Dr. Sacha reviewed Claimant's MRI on September 16, 2021, and opined that it was consistent with post-traumatic cervical facet syndrome. He recommended bilateral C2-5 facet injections, which he characterized as both diagnostic and therapeutic. (Ex. 8 & 5).

10. On September 28, 2021, Insurer submitted Dr. Sacha's request for authorization for C2-5 facet injections to Edie Sassoon, M.D. Dr. Sassoon opined the requested injections were supported for Claimant's clinical presentation, and "reasonable to help

identify the pain generator and assist with a plan of care for diagnostic and therapeutic purposes." (Ex. 3). Notwithstanding Dr. Sassoon's certification of the reasonableness of the treatment, Insurer did not authorize the treatment.

11. On October 11, 2021, Claimant saw Dr. Dombro. At that time, Claimant had returned to work up to 6 hours per day, and reported "near daily headaches," feeling unsteady when she looks down, persistent nausea and dizziness when she tipped her head backward. Dr. Dombro noted that the "adjustor has directed us to close the case," and placed Claimant at MMI effective October 11, 2021, without work restrictions. Dr. Dombro opined that Claimant was "at functional goal, not end of healing," and recommended Claimant follow up with a neurologist "about her post concussive [headaches] and other symptoms." The ALJ finds Dr. Dombro's determination of MMI to be based on directive from Insurer, rather than an assessment of Claimant's condition. Her statement that Claimant was at MMI is inconsistent with Claimant's continued report of symptoms, and the recommendation that she seek further care for post-concussive headaches. (Ex. 6).

12. On November 11, 2021, Respondents filed a Notice of Contest, asserting that Claimant's injuries were not work-related. (Ex. A).

Claimant's Medical History

13. Claimant has a significant medical history for migraine headaches, Ehlers-Danlos syndrome, motor vehicle accident, and a prior worker's compensation claim after she was assaulted at work in May 2017.

14. Claimant testified that Ehlers-Danlos is a connective disorder that causes her a constant level of pain. She testified that the symptoms she experiences from flare-ups of Ehlers-Danlos are typically extra pain in one joint, lasting 2 to 3 days. She testified that she has not had Ehlers-Danlos-related symptoms in her neck. Claimant has been treated with medications and therapy for flareups, and did not have any work restrictions due to Ehlers-Danlos on June 28, 2021. Claimant testified, credibly, that following her June 28, 2021 injury, she experienced symptoms that she did not have previously, including balance and stability issues, memory and recall issue, nausea, pain in her head, neck and upper spine, photophobia, and visual hallucinations. She testified that while she does experience nausea with migraines, it is different than she experienced after June 28, 2021. With respect to her desire to kayak and kickbox, Claimant testified that she floated in a kayak and her husband towed her with a rope. She also testified that when she did attempt kickboxing, it was limited, and she did "side activities" and did not actually "kickbox." Claimant's testimony was credible.

15. From May 25, 2017 through September 7, 2017, Claimant was treated at Gonzaba Occupational Medicine & Therapy Center in San Antonio, Texas, for neck, back, shoulder and wrist pain following her work-related assault. At her final visit, September 7, 2017, the treating physician noted no tenderness or pain, and full range of motion. Claimant was released from care and released to full duty at work. (Ex. I).

16. From June 3, 2016 to January 30, 2019, Claimant received chiropractic care from Keith Taylor, D.C. and Brad Chudnik, D.C., at Pecan Valley Chiropractic in San Antonio, Texas. The chiropractic records from Pecan Valley are nearly word-for-word the same for each of the 59 visits Claimant attended, regardless of the provider. The records do not document specific subjective complaints, and the objective findings, assessment and plan are identical at nearly every visit. The ALJ finds the chiropractic records are not reliable and are not credible evidence of the symptoms Claimant reported or the treatment performed, if any. (Ex. J).

17. On May 21, 2018, Claimant saw Bernice Gonzalez, M.D., at Vital Life Wellness Center., for a minor petechial hemorrhage, back pain caused by Ehlers-Danlos syndrome and arthritis, migraines, and GERD. She did not examine or treat Claimant for neck pain. (Ex. N).

18. On May 6, 2020, Claimant began seeing Emily Aaron, M.D., at Denver Internal Medicine. At the initial visit, Claimant was seen for back pain and review of medication for her migraines. Claimant reported a history including Ehlers-Danlos, migraines, slipping on ice in April 2020, a prior car accident, and being attacked at work several years earlier. Dr. Aaron diagnosed Claimant with migraines and low back pain and referred Claimant for physical therapy. Claimant returned to Dr. Aaron on June 3, 2020 for a follow up, regarding her migraines, low back pain, and experiencing heart palpitations. Claimant's next documented visit with Dr. Aaron was January 27, 2021, where Claimant reported chronic pain and joint pain due to Ehlers-Danlos, increasing for the previous 3 months, TMJ pain, and chronic fatigue. She reported a change in her migraines (experiencing different visual sensations). Dr. Aaron adjusted Claimant's migraine medication, and prescribed Celebrex and tramadol for Claimant's chronic Ehlers-Danlos-related pain. Dr. Aaron did not diagnose complaints of neck pain at any visit. (Ex. H).

19. Claimant's most recent documented visit with Dr. Aaron was on October 14, 2021. At that visit, Dr. Aaron diagnosed claimant with intractable migraine, cervical radiculopathy, post concussive syndrome, and dizziness. Dr. Aaron referred Claimant to Dr. Sacha, and for physical therapy. (Ex. H).

Carlos Cebrian, M.D. (Record Review)

20. On October 7, 2022, Carlos Cebrian, M.D., performed a record review at Respondents' request, and issued a report. (Ex. F). Based on his review, Dr. Cebrian opined that Claimant had a work-related scalp contusion and cervical strain, but also opined that Claimant's cervical spine pain was unrelated, indicating her cervical spine pain was preexisting. He further opined that Claimant did not have a traumatic brain injury. He indicated that "[s]hort-term treatment under the 6/28/2021 claim was appropriate, however the persistence of complaints is no longer proximately related to the 6/28/2021 claim but is due to her preexisting conditions." He found Claimant was at MMI by October 11, 2021, indicating that her report of wanting to try kickboxing and kayaks "is a reflection that she was feeling better." He then opined that Claimant's ongoing complaints were "very similar to" and causally related to her preexisting conditions. He indicated that

claimant required no maintenance care and that the facet injections recommended by Dr. Sacha were not causally related to the Claimant's work injury. (Ex. F).

21. Dr. Cebrian's opinion is not persuasive or credible. Dr. Cebrian based his MMI opinion primarily on a notation in Dr. Dombro's medical record that Claimant wanted to try kickboxing and kayaking, indicating that "this desire is a reflection that she was feeling better." He also indicated Claimant's congoing complaints were "very similar" to her preexisting conditions. However, his opinion fails to account for the fact that Dr. Dombro placed Claimant at MMI because she was directed to do so by Insurer, despite also noting that Claimant "was not at end of healing" and recommended additional treatment with a neurologist about her then-existing post-concussive headaches and other symptoms. In this context, the need for ongoing medical treatment for headaches is inconsistent with MMI, and was not a medical decision by Dr. Dombro, but a decision by an insurance adjuster.

22. Dr. Cebrian's opinion that Claimant's symptoms after October 11, 2021 were "very similar" to her post-June 28, 2021 symptoms, is neither credible nor supported by credible evidence. The evidence reflects that Claimant's medical treatment in the year before June 28, 2021 with Dr. Aaron was for wrist pain, migraine treatment, evaluation of heart palpitations, weight loss counseling, and chronic joint pain due to her Ehlers-Danlos syndrome. No credible evidence was admitted that Claimant reported experiencing ongoing neck pain on June 28, 2021, or that she had reported neck pain to any provider in the three years before her injury.

23. On November 21, 2022 Dr. Dombro responded to a letter from an unidentified party, indicating that she agreed with Dr. Cebrian's assessment that Claimant had reached MMI, noting that Claimant's case was "closed" in October 2021. Dr. Dombro further opined that Claimant had no permanent impairment. No evidence was admitted indicating Dr. Dombro saw or examined Claimant at any time between October 11, 2021, and November 21, 2022. (Ex. G).

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. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential 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).

Claimant has established by a preponderance of the evidence that she sustained a compensable work-related injury arising out of the course of her employment with Employer on June 28, 2021. Claimant was struck by the mobile unit door on June 28, 2021, and immediately reported the incident and timely sought treatment. The admitted medical records demonstrate Claimant was not actively treating for neck pain or head-injury related symptoms when she was injured, and that she had not been treated or complained of similar symptoms for more than three years. The last credible evidence of Claimant reporting and receiving treatment for neck pain was September 2017, at Gonzaba. Although Claimant has a history of migraines and Ehlers-Danlos syndrome, no credible evidence was admitted demonstrating that Claimant's post-June 28, 2021 symptoms were the same or caused by her preexisting conditions. Moreover, no physician has credibly opined that Claimant did not sustain a work-related injury.

Medical Benefits (General & Specific)

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 her industrial injury. Claimant has further established that the cervical injections recommended by Dr. Sacha are reasonable and necessary to cure or relieve the effects of her injury. Insurer's "peer reviewer," Dr. Sassoon agreed that the treatment was indicated, reasonable and necessary. As found, Dr. Cebrian's opinion is neither credible nor persuasive. The ALJ finds more persuasive the opinions of Dr. Sacha and Dr. Sassoon that the treatment is reasonable, necessary, and related to her work injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury arising out of the course of her employment with Employer on June 28, 2021.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's injury.

3. Respondents shall pay for the C2-5 facet injections recommended by Dr. Sacha.

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: May 23, 2023

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

ISSUES

I. Whether the Division Independent Medical Examiner's (DIME) opinion has been overcome clear and convincing evidence regarding maximum medical improvement.

II. Whether Claimant has shown by a preponderance of the evidence that Claimant's permanent partial impairment should be converted to a whole person impairment.

III. Whether Claimant proved by a preponderance of the evidence that his average weekly wage should be increased.

IV. Whether Claimant has proven by a preponderance of the evidence that he has a disfigurement.

STIPULATIONS

The following Stipulations were approved and accepted by the Administrative Law Judge:

1. The issue of Permanent Total Disability was bifurcated and the issue preserved for a future determination.

2. The record would be held open for the parties to take the deposition of Dr. Brian Mathwich later in the day on April 6, 2023.

3. If Claimant was determined to be at MMI, the impairment rating of 21% left upper extremity determined by Cathy Smith, M.D and accepted by Dr. Mathwich, was accepted by the Respondents. However, Respondents continued to dispute that the 21% extremity impairment should be converted to the 13% whole person impairment.

4. If Claimant was determined to be at MMI, Respondents accepted liability for maintenance medical care pursuant to the recommendations of the primary authorized treating physician, Dr. Cathy Smith.

FINDINGS OF FACT

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

A. Generally

1. Claimant started working for Employer beginning on June 8, 2020. On July 8, 2020, when one of the cows jumped before Claimant was in position with the chain at the piston, a piece called a shackle, fell on him, specifically hitting his head, left ear, and clavicle on the left side. Claimant is left hand dominant.

2. Claimant sustained a left clavicle fracture. He received medical care including a surgery which involved a plate and six screws. He was also provided physical therapy and injections for neck pain.

3. After approximately a year, they took the plate and screws out since there was a lump causing an abscess. When they took the plate out, they filed down the protrusion in order for it to help with the pain and allow it to fuse.

4. Claimant described that he had pain from the base of his ear, down the neck, going down the curve of his shoulder and into his shoulder blade. Claimant also motioned from the shoulder joint to approximately mid bicep or halfway down between the shoulder joint to the elbow. Claimant stated that he also had pain in the upper chest area up to the height of the clavicle.

5. Claimant continued to have problems with lifting weight with the left upper extremity and he avoids doing it. He overcompensates with this right upper extremity. For example, he has to make up to four different trips to the laundromat when he goes to wash clothes, as he can lift with the right but when he is required to lift with both hands, he cannot lift very much with the left upper extremity. When doing activities of daily living, he sometimes has to push his left arm up with his right hand just to be able to reach for something, like to wash his hair. He also has limitations caused by pain in his arm and there are some parts of his back, he just cannot reach. He also explained that he had problems driving, he has to move his whole body to see if there are any vehicles on his left side in order to change lanes. He does not have the same problems moving his head to the right. He also has problems sleeping on his left side, which is the side he usually slept on, due to the pain. It has forced him to have to start sleeping on his back. He also has to put a pillow beneath his left arm to minimize the pain.

6. Claimant continued to perform his home therapy or exercise program, continued using the TENS Unit and also used a pulley system to exercise his arm. He stated that he would like to get the care recommended by Dr. Mathwich in the hopes that it would be more aggressive and help him with his upper extremity. Claimant stated he had not returned to either Dr. Smith or Dr. Bear since the last injection that they did for his neck. He recently had an incident where the pain was so bad he went to the emergency room at UCHealth in Greeley.

B. Medical Records

7. On July 8, 2020 Claimant was taken to the Greeley UCHealth emergency freestanding clinic where Claimant reported a meat hook fell on his shoulder, which caused significant pain to the left collar bone. He denied any head injury, or other associated injuries. Dr. Nicklaus Brandenhoff, a consulting physician, noted that Claimant had a left closed, minimally displaced midshaft clavicle fracture.

8. The CT taken on the same day and read by Dr. Paul Johnson, showed a minimally displaced fracture of the mid left clavicle with a distal fracture fragment displaced inferiorly by 3 mm and a small amount of adjacent soft tissue hemorrhage.

9. Dr. Brandenhoff noted that the wound overlying the clavicle was superficial and not a deep wound and it did not extended to the fracture. Claimant denied numbness, tingling, shortness of breath, hitting his head or other injuries. Dr. Brandenhoff stated

Claimant was limited to no lifting with the left upper extremity until cleared by orthopedics. Claimant was sent home with a sling and medication.

10. Claimant was first seen by Dr. Robert Bear, orthopedic surgeon, on July 10, 2020 and examined Claimant's x-rays that showed a displaced midshaft clavicle fracture. He recommended an open reduction and internal fixation surgery, which Claimant agreed to.

11. Dr. Bear performed surgery on July 21, 2020, an open reduction with internal fixation of the clavicle. The major fragments were aligned and secured anatomically with a reduction clamp. A plate was applied to the superior aspect of the clavicle and secured with multiple screws compressing across the fracture site.

12. Dr. Bear saw Claimant in follow up on August 1, 2020. Claimant reported having a lot more pain than what he anticipated, and reported diffuse numbness around the incision, and while he demonstrated fairly normal range of motion of the elbow, wrist and hand, Claimant was very guarded about moving the shoulder beyond 45° in any direction. He ordered x-rays and stated that the left clavicle showed the fracture was in anatomic alignment with no sign of hardware loosening.

13. Claimant was evaluated at the UCHealth Occupational Med Clinic on August 4, 2020. They took a history that Claimant was assigned to the "shackled position" when a shackle jammed on the chain, which caused the shackle to fall approximately 6 feet. Dr. Smith documented as follows:

> He [Claimant] reports he heard the jam in the chain and attempted to get out of the way but was struck on the left side of his hard hat, then the left ear with the shackle landing forcefully against his left clavicle.
>
> He reports he experienced immediate pain following the incident but had to "keep working" since the chain was continuing to move. This was a witnessed event and when it became obvious he was having difficulty using his left arm his supervisor was notified and he was taken to health services for further evaluation. Per the records from health services he was found to have swelling and deformity over the clavicle associated with an abrasion. At that point the arm was immobilized and he was sent for further evaluation at the UCH emergency room.…. [Claimant] reports he continues to have pain over the clavicle which she (sic.) rates as a 6/10 at best and an 8/10 at worst he is continuing to use hydrocodone 4 times per day. He has been unable to ice the area on a consistent basis due to his living situation. Pain at this point is reported to be localized over the left clavicle, left axilla, left upper anterior chest wall. Pain is reported to increase with deep breathing, motion of the shoulder greater than a few degrees. He is continuing to use the sling for comfort. [Claimant] reports he is noticing some numbness and tingling into the left hand over the index, middle and ring fingers. He also reports he has noted some discomfort and "soreness" at his left ear but specifically denies any headache or neck discomfort.

Dr. Smith noted that Claimant did not exhibit pain behavior. She documented Claimant had discomfort with palpation of the upper anterior chest wall and into the left axilla, but did not notice specific tenderness with palpation of the left shoulder however range of motion was restricted to only a few degrees in all planes due to pain over the clavicle. She provided instructions to continue his home exercise program, ice the chest/shoulder

twice a day, and use narcotics sparingly and ibuprofen for most pain. He was returned to work with restrictions of using a sling at work and no use of the left hand and arm. They also discussed return to work issues and he was specifically advised if he was asked by his supervisor to do activities that were outside of his restrictions he was to contact health services for further clarification. They also discussed Dr. Smith's request to health services to ice his left upper chest at least twice during his work shift.

14. By September 10, 2020 Dr. Smith referred Claimant to Dr. Reichhardt for a physiatric consult for possible EMG/NCV to determine whether Claimant's complaints could be due to trauma at the brachial plexus, as Claimant had continued swelling in the area of the brachial plexus in conjunction with numbness and tingling and pain in his left hand. Dr. Smith also stated that she had counsel Claimant.

> We reviewed at length continued severe complaints in the area of his clavicle fracture with increased swelling both in the supraclavicular, infraclavicular areas and in the left hand associated with numbness and tingling. We again reviewed anatomy and physiology and he was advised there may be multi-factorial reasons for his continued significant pain complaints. Due to the area of the fracture and continued swelling in the area of the brachial plexus in conjunction with numbness… significant pain and restriction in range of motion of his shoulder may not only be due to the clavicle fracture but also due to developing adhesive capsulitis which he will be more susceptible to developing due to his diabetes. We reviewed Dr. Baer's report and recommendations to begin physical therapy to improve his range of motion at the shoulder and hopefully release adhesions. If he is indeed felt to have adhesive capsulitis and therapy is not helpful in reducing the adhesions advised may require injections at the shoulder or possible manipulation under anesthesia once his clavicle fracture has healed to the point the procedure would not cause additional problems at the fracture site. Again he was advised of the importance of continuing with passive[1] range of motion exercises at home in an attempt to prevent these adhesions from worsening. We discussed his continued complaints of pain at the left ear and he was advised since his physical exam is completely normal…

15. Dr. Bear saw Claimant on October 1, 2020 noting that Claimant had a very slow recovery and far more pain that he expected or anticipated, though better than the prior month. He noted that Claimant was very sensitive to palpation, but could elevate and abduct beyond 90°. The x-rays showed a healing fracture and intact hardware. He stated that Claimant needed to be aggressive with range of motion and strengthening. He also recommended that Claimant stop using the sling and try to use his arm as normally as possible.

16. On October 5, 2020 Dr. Smith stated Claimant did feel pain and range of motion of the shoulder had improved after 6 visits of physical therapy. On exam she noted that he had no pain behavior, his alignment of the head, neck and mid back showed a slight forward chin thrust but position of the left shoulder had improved, with significantly decreased trigger points, discomfort with palpation of the upper anterior chest wall and into the left axilla, mild pain is reported over the AC joint, CC joint, subacromial space and

[1] This ALJ infers that passive range of motion is motion that is carried out with the assistance of another individual or therapist, or through use of mechanical or assistive devices. Active range of motion is that which an individual carries out on their own.

anterior lateral shoulder. Active range of motion was restricted. He continued to have restrictions and physical therapy. Claimant stated he was "very pleased with my progress." Dr. Smith noted on exam that Claimant had improved range of motion.

17. Claimant was first evaluated by Gregory Reichhardt, M.D. for a physiatric evaluation on October 8, 2020. He performed an EMG/NCV exam, which should results consistent with mild median neuropathy at the wrist without axonal involvement. The study was negative for left ulnar neuropathy at the wrist or elbow, left axon loss cervical radiculopathy or brachial plexopathy. His impressions were of left clavicular facture, left arm numbness related to mild carpal tunnel syndrome which was not likely related to the work injury and depression. He recommended a cervical MRI to rule out cord compression, considering urinary symptoms of incontinence or lack of full voiding.

18. However, by the following exam on October 29, 2020, Claimant had increasing symptoms and pain behaviors, but thought muscular spasm and tightness was decreased. He was counselled to obtain an air mattress as sleeping on a couch was not sufficiently supportive and likely the reason for increase in subjective symptoms. They reviewed his improved ROM and she continued physical therapy. He was also counselled to see his primary physician regarding his diabetes since his A1C level was at 13.

19. Dr. Smith continued to report that on exam Claimant exhibited decreased triggers on palpation of the left side of the neck, upper back and periscapular area with minimal bracing and decreased muscle tone. On November 23, 2020 Claimant continued to report symptoms over the upper anterior chest wall, but had increased ROM to approximately 120°flexion up from 90° of previous exams. Since Dr. Bear had recommended an MRI of the shoulder due to Claimant's continued unexplained complaints, and Dr. Reichhardt recommended one of the cervical spine, she ordered them. She also, again, counselled Claimant to see his primary care provider for his uncontrolled diabetes.

20. On November 11, 2020 Claimant's passive range of motion was 145° for flexion, 145° for abduction, 45° for internal rotation and 65° for external rotation.

21. On November 27, 2020 Dr. Andrew Mills at UCHealth read the MRI scan of the cervical spine as showing moderate diffuse disc bulge with superimposed right paracentral disc extrusion causing significant mass effect on the thecal sac at the C5-6 level with mild to moderate central stenosis as well as moderate to severe right-sided neural foraminal narrowing and moderate left-sided neural foraminal narrowing. He also noted mild diffuse disc ossified bulge and facet arthropathy that resulted in mild to moderate central stenosis at the C6-7 level with mild left sided and moderate right sided neural foraminal narrowing.

22. By December 15, 2020 Claimant had made some functional progress in physical therapy. Mr. Todd Smith, Claimant's physical therapist at Pro Active Physical Therapy, noted that Claimant had made progress in PT, showing active flexion at 125° and passive flexion to 150°, with passive internal rotation at 47°and external rotation at 67° (compared to the September 16, 2020 numbers of active flexion of 25°, passive flexion to 50°, passive internal rotation at 25° and external rotation of 15°).

23. By December 17, 2020 Claimant reported that the pain was not constant and on exam he had minimal discomfort with palpation of the shoulder and upper chest. By January Dr. Smith sent Claimant for a functional capacity evaluation in anticipation of maximum medical improvement and an impairment rating being performed. Around this time, Employer terminated Claimant due to having been on modified duty in excess of 180 days. Despite being off work, Claimant reported on February 10, 2021 that he was approximately 15% worse, including radiating pain into his neck and behind his ear, especially with rotating his head to the left and difficulty with colder temperatures. Dr. Smith found limitation of motion of the cervical spine and the shoulder as well as tenderness to palpation over the left clavicle tough it was not associated with any swelling. Dr. Smith noted as follows:

> It does appear he is performing his independent home exercise program as instructed by the therapist and can reproduce these exercises. We reviewed possible aggravating factors for his increased perception of pain and loss of range of motion. He was advised electrical stimulation in therapy may have been keeping the symptoms under much better control and now that he is at home and has not received his home unit may be experiencing increase in myofascial tightness. After shared decision making agreed he will continue with his independent home exercise program on a daily basis as instructed by his physical (sic.) to maintain range of motion and we will again contact his claims adjuster as to authorization for the home trial of the e-stim. We reviewed his recent follow-up evaluation with Dr. Reichhart (sic.) and recommendation for cervical spine injections by Dr. Quickert. I placed a telephone call to Dr. Reichhart (sic.) to discuss the epidural steroid injections in the cervical spine. His opinion and I agree is to determine whether his continued shoulder symptoms are related to his neck or related to his fracture at the clavicle. If he does not respond to the injections with decreased pain and increased function at the shoulder periscapular area then would determine continued dysfunction in this area is related to his clavicle fracture. I therefore agree with Dr. Reichart's (sic.) recommendations for the cervical spine injections for diagnostic as well as therapeutic clarification.

24. The December 19, 2020 MRI scan of the left shoulder was positive for mild subscapularis tendinosis, mild supraspinatus tendinosis and mild partial-thickness articular surface fraying in the infraspinatus. Dr. Joseph Carabetta noted that there was no effusion or bursitis noted and no significant osteoarthritis in the glenohumeral joint or acromioclavicular osteoarthritis.

25. Dr. Bear reevaluated Claimant on December 23, 2020 noting that Claimant continued to show a slow recovery outside the norm, with decreased sensation diffusely about the incision and even extending to the lateral shoulder. On exam he recorded Claimant had pain with abduction beyond about 115°, though passively, Dr. Bear could get up to 140° or 150° fairly well. He was also tight to internal rotation beyond about L3. He also reviewed the MRI of the shoulder that showed very mild degenerative tears in the supraspinatus and infraspinatus, but no labral tear, and no significant intraarticular pathology. He stated that Claimant's symptoms were more likely coming from his neck than the shoulder. Dr. Bear opined that "[H]e really has no reason to be limited related to his shoulder. I would recommend he obtain follow up with a spine specialist and we can see him back as needed."

26. Several of Dr. Smith's reports noted that Claimant continued working through 2020 and discussed his work restrictions. On January 20, 2021 Dr. Smith specifically mentioned that Claimant was no longer working as there was no available work for him within his work restrictions. She specifically documented that he had been "sent home" weeks ago having reached his 180 days of modified duty work. This language is repeated multiple times in reports that followed including February 10, March 10, April 7, May 12, June 17, 2021 and so on.

27. On February 8, 2021 Claimant returned to Dr. Reichhardt to discuss the MRI results. Claimant reported that Dr. Bear had discharged him and had recommended that he return to have a cervical spine evaluation. Examination of the cervical spine revealed tenderness to palpation about the cervical and periscapular area, decreased cervical range of motion, and Spurling's sign resulted in pain radiating along the upper trap into the shoulder, but not further down the arm. He had tenderness to palpation over the left shoulder, and decreased left shoulder range of motion. Dr. Reichhardt reviewed the findings of the cervical MRI and opined that they needed to rule out C5 or C7 radiculopathy and possible brachial plexopathy associated with Claimant's clavicle facture and a negative EMG. Ultimately they agreed on a cervical epidural steroid injection. Dr. Reichhardt referred Claimant to Dr. Quickert for consideration of the ESIs at multiple levels. On February 23, 2021 Dr. Reichhardt recommended a left C5-6 ESI. He stated that "[I]f this is nondiagnostic, I would recommend consideration of a left C6-7 ESI. If these are both negative, that would suggest that his left arm and hand symptoms are related to a brachial plexus injury associated with the clavicle injury."

28. Claimant was evaluated by Dr. John Raschbacher on March 5, 2021 upon Respondents' request for an independent medical evaluation. He took a history consistent with Claimant's testimony and reviewed the available medical records. Upon exam, Dr. Raschbacher noted poor effort with left shoulder internal and external rotation against resistance and a positive Tinel's. Claimant had tenderness of the AC and SC joints and ROM testing showed 160° flexion on the right and only 91° on the left, internal rotation at 53° on the left and external rotation at 29°.

29. Dr. Reichhardt attended Claimant on March 16, 2021 noting that Claimant continued to have pain over the neck and parascapular area with pain radiating down the later aspect of the upper arm. On physical exam, he noted Claimant demonstrated multiple periscapular trigger points. He noted that Claimant did not have much tenderness over the neck itself, but primarily over the periscapular area. He had significant tenderness to palpation over the clavicle. He had decreased shoulder range of motion, and positive Hawkins' impingement sign. Dr. Reichhardt proceeded with a trial of trigger point injections to see if he could help Claimant keep some of his symptoms calmed down while waiting for approval of the TF ESIs.

30. Claimant returned to Dr. Smith on April 7, 2021. He continued to have unchanging ongoing symptoms of the neck, left shoulder and chest anteriorly with increasing pain when he was sleeping, reaching with his arm and with cold weather. Claimant continued to report loss of range of motion, compared to when he was in a formal physical therapy program. However, on exam, Dr. Smith noted that his active range of motion continued to be approximately 110° flexion and 90° abduction, though painful. Dr. Smith continued to emphasize the importance of his HEP, which he seemed

to be performing as he was able to reproduce the exercises as well as applying ice and heat to the shoulder followed by stretching to relieve tightness.

31. On May 10, 2021 Dr. Reichhardt noticed on exam that Claimant had tender ness to palpation over the distal clavicle and a bony prominence just inferior to the distal clavicle. He also noted decreased range of motion of the left shoulder. Dr. Reichhardt ordered a left clavicle x-ray and stated he would have Claimant follow up with Dr. Bear.

32. The x-ray, as read by Dr. Scott Campbell at Banner Imaging Greeley on May 10, 2021, showed ORIF of left mid clavicle fracture performed chronically, with a healed fracture, mild degenerative arthrosis of the AC and CC joints and a humeral head that appeared to be aligned with the glenoid but did not find any acute osseous abnormalities.

33. Claimant was evaluated by Dr. Smith again on May 12, 2021. On exam she continued to note that Claimant had a trigger with palpation over the left stemocleidomastoid musculature from the clavicle to the posterior auricle, over the mid left cervical spine and at the tip of his left scapula. He had limitations of range of motion of the cervical spine more pronounced to the left side. Claimant had left shoulder pain with palpation over the AC joint, CC joint[2] and subacromial space with pain reported over the lateral upper arm. Active range of motion was approximately 120° flexion and 90° abduction which were reported to be painful. On this day, Dr. Smith reported that Claimant was able to shrug his shoulders, pinch his shoulder blades and rotate his shoulders with less restriction and discomfort. Dr. Smith diagnosed closed displaced fracture of shaft of left clavicle with delayed healing, adhesive capsulitis of left shoulder, numbness and tingling in left hand, contusion of auricle of left ear.

34. Dr. Smith continued to recommend alternating ice and heat to the left clavicle and periscapular area, continue exercises, medications, e-stim use, follow his restrictions and should follow up with Dr. Reichhardt. His symptoms were worse at the following visit on June 17, 2021, the day right after his hardware removal surgery.

35. Claimant was evaluated by Julie Quickert, APRN on June 2, 2021 who diagnosed cervical region radiculopathy. She noted that Claimant was referred for evaluation and consideration of left cervical ESI. On exam, she noted that Claimant had tenderness with palpation of the left cervical spine and shoulder area, generally reduced ROM of C-spine and had limited upward extension of the left shoulder, had increased pain with all movements, weakness on left upper extremity compared to right and a positive Spurling's on the left. Dr. Quickert recommended a left C5-6 TF ESI. She proceeded to administer a fluoroscopy guided transforaminal epidural steroid injection at the left C5-6 level.

36. On June 3, 2021 Dr. Reichhardt stated that Claimant continued with left infraclavicular area pain, and tenderness to palpation over the left cervical area, extending out over the left shoulder. They discussed the findings on the clavicle x-ray, which did not demonstrate concerning findings, though he was tender definitely over the area of his

[2] This ALJ infers from the medical records that AC is acromiclavicular ligament and CC is the coracoclavicular ligament which support and stabilize the acromioclavicular joint.

fracture and subsequent ORIF. He noted Claimant had hardware removal planned with Dr. Baer which he opined was reasonable in light of the exam.

37. Dr. Bear noted on June 16, 2021 at the OCR Loveland Surgery Center that Claimant's left shoulder has a well-healed incision, with some prominence of the hardware over the clavicle. Claimant had pain with passive or active motion of the shoulder beyond about 90° and even some pain with rotation with the elbow at his side. Passively, could get the shoulder almost to full elevation and abduction. There was no impingement or mechanical block of motion. At that point, Dr. Bear stated the he did not know what else to do to help Claimant other than remove the hardware, and proceeded with the left clavicle hardware removal.

38. On June 28, 2021 Dr. Bear noted that Claimant continued to have symptoms out of proportion, recommended physical therapy and discharged Claimant from his care to return only on an as needed basis.

39. One month post-op, on July 20, 2021 Dr. Smith report Claimant continued to hold his left shoulder in a very rounded position and guarded, with increased forward chin thrust. The pain was from the left side of the neck to the upper back, periscapular area and the upper anterior chest wall over the clavicle at the pectoralis and axilla. Claimant's range of motion was significantly restricted with only 45° of flexion and abduction and passive motion to 120°, though grip strength was improved from the prior visit. These numbers further deteriorated as noted by Mr. Smith, the Pro Active therapist, who was unable to get Claimant to do active ROM and passive ROM for flexion was only 45°, abduction of 55°, internal rotation of 15° and external rotation of only 10°.

40. Dr. Reichhardt evaluated Claimant on August 25, 2021 noting that Claimant reported doing about 40% better, with less pain and numbness of his left arm though he noted pain over the left shoulder primarily with overhead activities. On physical exam he noted improved range of motion, with tenderness to palpation over the lateral aspect of the left shoulder, periscapular and left clavicle. He continued to recommend the ESIs.

41. On August 31, 2021 Dr. Smith noted on exam, which was a significant improvement over the prior month's visit:

> No pain behavior is exhibited during the evaluation today. And alignment has significantly improved and he is no longer holding the left shoulder in a rounded and guarded position and has much less forward chin thrust. His gait is normal. No pain is reported today with palpation at his neck, upper back, periscapular area and the upper anterior chest wall. He does complain of discomfort with palpation over the left clavicle, but previous triggers over the pectoralis and in the axilla have resolved. Range of motion or the cervical spine is essentially full except for restriction with left rotation which is painful. Range of motion of the left shoulder is significantly improved and he now has active forward flexion to approximately 160° and abduction to approximately 140°.

Dr. Smith stated that she disagreed with Dr. Raschbacher's conclusions that Claimant sustained a "usual" injury to the clavicle. She did, however agree that typically loss of range of motion at the shoulder is not associated with clavicle fractures. However due to Claimant's underlying diabetic condition he was more prone to developing adhesive capsulitis due to immobilization of his shoulder following the surgery.

42. Dr. Reichhardt noted on September 27, 2021 that Claimant again reported improvement in symptoms, with less pain at 3/10. He noted that Claimant had roughly a normal cervical spine range of motion.

43. By September 28, 2021 Claimant had regained some motion showing passive ROM only at 180° for flexion, abduction of 180°, internal rotation of 65° and internal rotation of 86°.

44. On October 7, 2021 Dr. Smith found that Claimant's range of motion of the left shoulder was again much improved showing active forward flexion to approximately Range of motion of the left shoulder was significantly improved and he now showed active forward flexion to approximately 180° forward flexion and abduction to approximately 170°.

45. It was not until December 2, 2021 that Claimant had increased and recurrent problems with triggers over the left pectoralis and in the axilla as well as a nodule over the clavicle in the area of his previous hardware. He had more restricted range of motion of the cervical spine and less range of motion of the left shoulder with 80° forward flexion and abduction to approximately 90°. Dr. Smith reviewed at length with Claimant his independent home exercise program and it appeared he had been performing up to 60 repetitions for each of his exercises at one time. He was advised that the significant amount of repetitions may have been contributing to his escalation of myofascial pain. After shared decision making and review of his exercises they agreed he would decrease repetitions to no more than 15-20 at one time and complete more sets throughout the day to reach his 60 repetitions in 1 day.

46. Then, by January 24, 2022[3], Mr. Smith tested Claimant's ROM and the numbers again declined to 105° flexion, abduction of 90°, internal rotation of 40° and external rotation of 70°--all passive range of motion only.

47. Claimant was attended by Eric Hoffman, PA-C on February 3, 2022, who noted that Claimant had finished 4 visits with physical therapy since the last visit. His symptoms had not improved since then and noted that physical therapy had been beneficial since he reported worsening of his pain since his last visit. Upon consulting Dr. Smith, Mr. Hoffman advised Claimant to finish out his last 2 visits and then return for an impairment rating.

48. Dr. Smith conducted an impairment evaluation on April 12, 2022 noting that Claimant was at maximum medical improvement. They discussed his continued escalation of symptoms at that time with no particular aggravating factors. She determined that therapy and work hardening were not of benefit at that time. She provided a 21% extremity impairment that converted to a 13% whole person impairment rating after adjustment for the contralateral side.

49. Dr. Smith also set out that Claimant required maintenance care including alternating ice and heat, frequently, continue with the e-stim treatment and to continue his home exercise program. She provided restrictions of no lifting greater than 15 lbs. No carrying, pulling, pushing greater than 15 lbs. She also cautioned Claimant that he

[3] With a hiatus of PT for approximately four months, from September 28, 2021 to January 24, 2022.

should avoid reaching overhead, away from the body and no use of the left arm for prolonged or repetitive reach away from the body or above chest level.

50. On May 20, 2022 Respondents filed a Notice and Proposal and Application for a DIME to challenge the ATP's rating.

51. On September 21, 2022 Dr. Brian Mathwich issued a Division Independent Medical Evaluation report regarding Claimant. Claimant reported to Dr. Mathwich that he had pain in the left anterior neck along "sternocleidomastoid, the posterior left trapezius and deltoid muscle, and along the clavicle area. He also states he has numbness in the first three fingers of the left hand which he reports began immediately after the injury." He noted on exam that there was some deformity of the clavicle bone consistent with fracture, a well healed surgical scar, and mild atrophy of the supraspinatus muscle. He noted a somewhat inconsistent exam given examination and distracted pain responses. Dr. Mathwich diagnosed left clavicle status post ORIF and subsequent hardware removal left shoulder adhesive capsulitis, resolved ear contusion, and myofascial neck pain. At the time of the DIME Dr. Mathwich recommended Claimant be afforded the choice of proceeding with manipulation under anesthesia for the left shoulder adhesive capsulitis or hydrodilatation injections. He noted that, if Claimant chose to proceed with the treatment then he was not at MMI, otherwise MMI and impairment were as established by Dr. Smith, as range of motion was inconsistent.

52. Dr. Mathwich noted that Claimant had exhibited significant pain behaviors and pain avoidance throughout his treatment and cited this avoidant behavior likely caused the adhesive capsulitis. He made recommendations of work restrictions of no extended reach or overhead work with the left arm and no lifting greater than five pounds. He further recommended a maintenance program as assigned by Dr. Smith.

53. Claimant medical records were reviewed a second time by Dr. Raschbacher on January 9, 2023 specifically addressing Dr. Mathwich's DIME report. Dr. Raschbacher opined that Claimant's lack of range of motion as mentioned by Dr. Mathwich were tantamount to malingering behavior. He stated that it was not medically reasonable to expect a positive response on a subjective basis, or on a functional basis, to further intervention or treatment of the shoulder for adhesive capsulitis or any other condition.

54. On January 30, 2023 Dr. Bear stated that Claimant did not do well post operatively as he had an abnormally slow recovery and much higher than expected pain. Following work up he found there was no neuropathy or radicular nerve compression. Claimant continued to be significantly stiff despite physical therapy and release of all restrictions. He opined that manipulation under anesthesia would not offer Claimant any significant benefit as he would likely re-experience post-manipulation stiffness due to ongoing pain and lack of effort to regain motion. He further opined that much of his stiffness came from lack of effort due to low pain tolerance, though he could have had compounding neurogenic pain and nerve injury.

C. Deposition Testimony

55. Dr. Brian Mathwich testified by deposition on April 6, 2023. Dr. Mathwich was designated by the Division of Workers' Compensation as the DIME physician in this matter, which was conducted on September 21, 2022. Dr. Mathwich explained that

Claimant suffered a clavicular fracture, left comminuted.[4] Claimant underwent surgical repair with an open reduction with internal fixation with some hardware. Claimant continued to have pain after the procedure. Claimant was placed at maximum medical improvement (MMI) as of April 12, 2022 with a 21% extremity rating that converted to 13% whole person impairment. After reviewing the medical records, conducting an examination, Dr. Mathwich found Claimant not to be at MMI as he should be offered either hydrodilatation injection or manipulation under anesthesia to treat the adhesive capsulitis, but deferred to the treating orthopedist as to which procedure to offer.

56. Dr. Mathwich received supplemental record just immediately before the deposition took place, including a report from Dr. Beard stating that he recommended against any treatment of the adhesive capsulitis as he would likely re-experience postmanipulation stiffness due to ongoing pain and likely lack of effort to regain shoulder motion.

57. Following review of Dr. Bear's report, Dr. Mathwich changed his opinion as Dr. Beard knew Claimant better and since Claimant had showed significant issues with delayed recovery, lack of improvement, and pain behaviors during exam. He stated that Claimant would then be at MMI on April 12, 2022 as Dr. Smith placed him at MMI. He also agreed with Dr. Smith's rating.

58. The DIME physician explained that Dr. Bear did not specifically address the hydrodilatation, which is injecting a saline solution into the shoulder joint specifically. He noted that the recommendation was to have aggressive physical therapy immediately after the procedure. He noted that Clamant had a history of avoidance so if Claimant did not put full effort into the mobilization of the shoulder, he would be in the exact same place he was at the time of his exam, the treatment being of little benefit. He noted that physicians work under the policy of "do no harm" and sometimes that means being careful that they do not over treat.

59. When asked about Dr. Beard's note that stated Claimant might have a compounding neurologic pain and nerve injury, he questioned the diagnosis as the EMG did not show any sign of brachial plexus nerve branch injury, which are the nerves flowing just underneath the surgical site. Further, Claimant did not respond to the C5-6 transforaminal epidural steroid injection, which also indicated that it was not likely Claimant had a nerve injury.

60. Dr. Mathwich opined that because the injury was to the clavicle itself, which is connected to the trunk of the body and Claimant had neck complaints so it made sense that Claimant's rating be considered a whole person impairment.

61. He also agreed that maintenance care was appropriate as recommended by Dr. Smith, including continuing his home exercise program, e-Stim three to four times per day for two years and then just taking Ibuprofen and Tylenol for pain control.

D. Wage Records

57. Wage records provided by Respondents do not show whether the wages are gross wages or net wages paid to Claimant. Neither do they specify whether the "End

[4] Dr. Mathwich described this as fractured in pieces and displaced.

of IN period" denoted the day an employee was paid or the end of the pay period. Claimant began working on June 8, 2020, a Monday. Because wages are often paid with one week kept in arrears and neither party had a witness testify one way or the other what the appropriate wage calculation should be, this ALJ has had to analyze multiple payment methods.

58. If the wages are considered from check dated June 14, 2020 through July 5, 2020, the wages could be averaged to $686.54. Also, other holidays were paid except July 4, 2020, so this ALJ presumes that the records provided were not complete wage record.

59. If the wages are considered without that first period, as it is unusually smaller, the average wage would be $783.68.

J	K	
End of IN period	Amount	
6/14/2020	$	387.60
6/21/2020	$	637.44
6/28/2020	$	646.00
7/5/2020	$	646.00
6/21/2020	$	4.36
6/14/2020	$	3.15
6/21/2020	$	9.69
6/28/2020	$	19.38
7/5/2020	$	16.23
6/14/2020	$	4.36
6/21/2020	$	31.50
6/28/2020	$	273.07
7/5/2020	$	67.36
Total earnings	$	2,746.14
Averaged Wage	$	686.54

H	I	
End of IN period	Wages	
6/21/2020		$637.44
6/28/2020		$646.00
7/5/2020		$646.00
6/21/2020		$4.36
6/21/2020		$9.69
6/28/2020		$19.38
7/5/2020		$16.23
6/21/2020		$31.50
6/28/2020		$273.07
7/5/2020		$67.36
Total earnings	$	2,351.03
Averaged Wage	$	783.68

60. This ALJ also calculated the wages Claimant potentially earned from June 8, 2020 through the last pay period shown on the wage records of December 27, 2020. This was most likely the last pay period because there are mentions in the medical records that Claimant had exhausted his 180 days of modified work and was terminated. The cumulative wages show Claimant earned a total of $21,864.46, which divided by 202 days and multiplied by 7 days of the week would average out $757.68. However, this does not account for the days Claimant was off work due to his two surgeries, if any, and nothing in the general admission stated the time he was off or if he was off for any considerable period of time in 2020 after his work injury.

Disfigurement

61. During the hearing, Claimant showed his surgical scar, which was approximately four and one half inches long, with the scar going from the top of the clavicle midway from the neck and the glenohumeral joint, toward the upper chest area along the bottom of the clavicle. One portion of approximately two inches of the scar was raised and discolored and approximately one quarter inch wide at the widest. There was a significant indentation below the clavicle, perpendicular to the surgical scar. Lastly, comparing the left injured side to the right, there is significant muscle tone on the right and significant lack of muscle tone on the left injured shoulder.

E. Ultimate Findings

62. As found, the DIME physician's, Dr. Mathwich's, "true opinion" was that Claimant was at maximum medical improvement as of April 12, 2022. This occurred after the second surgery to remove the hardware and after he participated in two different sessions of physical therapy from July 22, 2021 through September 30, 2021 and January 24, 2022 to February 9, 2022. Dr. Mathwich agreed with Dr. Smith's opinion that Claimant's symptoms continued to escalate at that time with no particular aggravating factors. This opinion was bolstered by Dr. Smith's determination that therapy and work hardening were not of benefit at that time. While Dr. Mathwich stated originally that Claimant required treatment for the adhesive capsulitis, upon seeing Dr. Bear's report noting that Claimant would not benefit from manipulation under anesthesia and would likely re-experience post-manipulation stiffness due to ongoing pain and lack of effort to regain motion, Dr. Mathwich changed his mind and found that Claimant was at maximum medical improvement. Claimant, not Respondent, had the burden to prove by clear and convincing evidence and overcoming Dr. Mathwich's true opinion that Claimant had reached MMI as of April 12, 2022. Claimant failed in that regard.

63. Dr. Smith provided an impairment of 21% upper extremity impairment which converted to a 13% whole person impairment rating after adjustment for the contralateral side. Claimant argued that the impairment should appropriately be a whole person impairment. Respondents deny that is the case. As found, in this case, from the totality of the evidence, there is a wide variety of testimony and medical records clearly documenting that Claimant continuously complained of pain in the chest area, the clavicle area, the neck and the upper back. As also found, what was more persuasive was that Dr. Mathwich explained the physiology of the clavicle, the attachments and the location as well as stating that Claimant's impairment was appropriately located on the upper body and torso. Claimant has shown by a preponderance of the evidence that Claimant has

an impairment of the whole person and is appropriately set out as 13% of the whole person.

64. Average weekly wage is hard to calculate given the limited information provided in this matter. As found, based on the totality of the evidence, this ALJ determines that the fair approximation of the Claimant's wages is to calculate the period of June 8, 2020 through December 27, 2020, for an average weekly wage of $757.68. Claimant has proven by a preponderance of the evidence that Claimant's AWW is $757.68.

65. Claimant has a significant scar that is normally exposed to the public. His scar is on his clavicle and includes the surgical scar, a significant indentation below the clavicle and loss of muscle tone as compared to the right shoulder and upper torso. Claimant has proven by a preponderance of the evidence that he is entitled to an award for his disfigurements.

66. Testimony and evidence inconsistent with the above findings is not credible and not persuasive, or is not relevant to the issues heard.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See

Bodensieck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Overcoming the DIME

The DIME physician's findings concerning the date of MMI and the degree of permanent medical impairment are binding on the parties unless overcome by clear and convincing evidence. Sections 8-42-107(8)(b) (III) & (8)(c), C.R.S. 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 *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo.App. 1998).

If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000); In *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175 (May 25, 2005) aff'd, *Resources One, LLC v. Industrial Claim Appeals Office,* 148 P.3d 287 (Colo.App. 2006); *Stephens v. North & Air Package Express Services,* W. C. No. 4-492-570 (February 16, 2005); *Clark v. Hudick Excavating, Inc.,* W. C. No. 4-524-162 (November 5, 2004). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998). A DIME physician's findings of MMI, permanent impairment, and causation consist not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330-331 (Colo.App. 2005)(ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video); J*arosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo.App. 2002)(noting that DIME physician retracted original permanent impairment rating after viewing videotapes showing the claimant performing activities

inconsistent with the symptoms and disabilities she had reported); *In re Claim of Fabjancic*, 112118 WC 5-050-580-01, ICAO (November 21, 2018)

Once the ALJ determines the DIME physician's true opinion concerning MMI and impairment, then the party seeking to overcome that "true opinion" bears the burden of proof by clear and convincing evidence. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra; In re Claim of Jones*, WC 5-034-047-001, ICAO (August 27, 2019).

Once the ALJ determines the DIME physician's true opinion, it may be appropriate to reassign the burden of proof to overcome by clear and convincing evidence the DIME physician's finding of MMI. *Viloch v. Opus Northwest, LLC*, W. C. No. 4-514-339 (June 17, 2005); *Gurule v. Western Forge,* W. C. No. 4-351-883 (December 26, 2001); *In re Claim of Gagnon*, WC 4-971-646-03, ICAO (February 6, 2019).

Here, it is undisputed that the DIME physician had originally stated that Claimant was not at MMI as Claimant should be afforded the opportunity to have treatment for the adhesive capsulitis of the left shoulder. However, during the deposition, and after considering Dr. Bear's, the surgeon's, January 2023 assessment, Dr. Mathwich changed his opinion and stated that Claimant had reached MMI as of April 12, 2022. Dr. Bear's opinion was that manipulation under anesthesia was not an appropriate treatment for Claimant, as it would not offer Claimant any significant benefit since he would likely re-experience post-manipulation stiffness due to ongoing pain and lack of effort to regain motion. Considering this opinion and when considering his unsuccessful surgeries and his inability to progress in his functional abilities were also persuasive. Dr. Mathwich's opinion is supported by Dr. Smith's opinion that Claimant's uncontrolled diabetes made Claimant more susceptible to developing adhesive capsulitis and during treatment Claimant failed to cooperate and obtain care from his PCP for his diabetes. Beginning on October, 2020 Dr. Smith counselled Claimant to see his primary physician regarding his diabetes since his A1C level was at 13[5], and he had run out of medication. This did not promote the idea that Claimant was proactive in his care and treatment. Further, the physical therapy notes from Mr. Smith (therapist) showed that Claimant was not benefiting from care as the range of motion numbers continued to get worse. As found, Claimant's January 24, 2022 passive range of motion was significantly worse than those measurements taken over a year before on November 11, 2020. Therefore, the burden of proving by clear and convincing evidence that Dr. Mathwich was incorrect, shifted from Respondents to Claimant as the opinion provided by Dr. Mathwich at his deposition is found to be his true opinion.

Claimant continued to argue that Dr. Mathwich's original opinion was correct as Claimant continued to worsen and required further medical care including but not limited to manipulation under anesthesia or hydrodilatation injections which involves injecting saline in the injured area. It is clear here that Dr. Bear was provided the report from the DIME physician for his consideration, which he answered on January 23, 2023, specifically stating that no further treatment would alleviate Claimant's symptoms and could make it worse. The DIME physician deferred to the orthopedic surgeon's opinion, in this regard and this ALJ is not persuaded to do otherwise. It is clear from the medical

[5] An A1C of 6 or higher is considered uncontrolled.

records that whenever Claimant started a new treatment modality, that he would have significant worsening before he began getting better. As found, the single factor that has been most significant in the Claimant recovery has been time, not the treatment provided and this ALJ is not persuaded that any further formal treatment by the providers would be intended to relieve the Claimant of his injuries, but would only maintain the progress he has made thus far. This ALJ finds and concludes that Claimant was at MMI as of April 12, 2022 and continues to be at MMI. Claimant has failed to prove by clear and convincing evidence that Claimant was is not at MMI.

C. Conversion

Claimant seeks to convert his 21% left upper extremity impairment rating to a 13% whole person rating. When evaluating whether a claimant has sustained a scheduled or a 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), C.R.S. If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under Sec. 8-42-107(8), C.R.S.

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 or 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). Limitations on overhead reaching can also constitute functional impairment beyond the arm in appropriate cases. E.g., *Brown v. City of Aurora*, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004). 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. The surgery performed by Dr. Bear was directed to anatomical structures proximal to the "arm," including the open reduction and internal fixation of the displaced midshaft clavicle fracture. Dr. Bear performed the surgery on July 21, 2020, and the major fragments of the clavicle were aligned and secured anatomically with a reduction clamp. A plate was applied to the superior aspect of the clavicle and secured with multiple screws compressing across the fracture site. Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. See, e.g., *Martinez v. Albertson's LLC*, supra at ("The [claimant's] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint"); see also *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021). This is supported by multiple medical records of Claimant's complaint to providers of pain and limitations of the neck, and upper back and chest muscles. More important, Claimant credibly described pain and associated functional limitation in areas proximal to his arm such as the pain in the neck that was caused by simple movements of the arm. This pain affects his ability to engage in various activities, including overhead reaching or simply sleeping on his left side and Claimant is left hand dominant. Claimant also explained that he has problems driving, he has to move his whole body to see if there are any vehicles on his left side in order to change lanes. This is a function of the neck being restricted by his injury not his upper extremity. The preponderance of persuasive evidence shows Claimant's functional impairment extends beyond his "arm at the shoulder."

Dr. Smith provided a 21% scheduled rating, which converts to a 13% whole person impairment. This opinion, with regard to impairment, is affirmed by the DIME physician as he believed that the rating provided by Dr. Smith was appropriate considering Claimant's injuries. Claimant has clearly and convincingly shown that Claimant's impairment is not a scheduled injury or impairment, and that Claimant is entitled to a whole person impairment rating. Claimant is entitled to PPD benefits based on Dr. Smiths' and Dr. Mathwich's impairment of 13% whole person rating.

D. Average weekly wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 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. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid to the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to

alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993).

The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007). An AWW calculation is designed to compensate for total wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *Sec.* 8-42-102, C.R.S.

Respondents argued that Claimant is not entitled to the increased average weekly wage as a strict view of the wage records of the four weeks prior to his work related injury would be most representative. However, this ALJ declines to view Claimant's wages in that manner. Claimant persuasively argued that the first week is not representative of his wages in the following three weeks. Neither, in this ALJ's view, is it representative of the wages Claimant earned following his injury, while Claimant was working in the break room, cleaning tables while under work restrictions for approximately 180 days until his modified work time was terminated. Considering that Claimant continued to earn wages while on modified duty at a rate that was closer to Claimant's calculation than respondents' calculation, this ALJ made the determination that the manner to fairly calculate Claimant's average weekly wage was to take the full time Claimant worked dividing that by the amount of days and multiplying it by the week for an average weekly wage of $757.68. Claimant has proven that he is entitled to an increase in the calculation of his average weekly wage to $757.68 and a temporary total disability rate of $505.12.

E. Disfigurement

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." A disfigurement is an observable impairment of the natural appearance of a person, including a limp. See *Arkin v. Industrial Commission*, 358 P.2d 879, 884, 145 Colo. 463, 472 (Colo. 1961); *Piper v. Manville Products Corp*., W.C. No. 3-745-406 (July 29, 1993); *Josefiak v. Green and Josefiak, P.C.,* W.C. No. 3-783-081 (March 12, 1987); Marcelli v. Echostar Dish Network, W.C. No. 4-776-535, ICAO (August 30, 2012); *In re Claim of Nagle,* W.C. No. 5-105-891 (July 24, 2020). Claimant has an observable disfigurement of the left shoulder caused by both the surgical scar and the deformity of the indention immediately below the clavicle bone. He further has disfigurement caused by loss of muscle tone on the left side compared to his right shoulder. Claimant testified consistent with this ALJ's observations. This ALJ finds and concludes that Claimant is entitled to compensation due to the observable disfigurements. Claimant has proven by a preponderance of the evidence that Claimant's disfigurements caused by the July 8, 2020 should be compensated and Claimant is entitled to $3,000.00 for the disfigurement.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant reached maximum medical improvement as of April 12, 2022 as opined by both Dr. Mathwich and Dr. Smith. Claimant failed to overcome Dr. Mathwich's opinion.

2. Respondents shall pay medical benefits, pursuant to the stipulation of the parties, to maintain Claimant at maximum medical improvement pursuant to Sec. 8-42-107(8)(f), C.R.S. This is a general award of benefits pursuant to *Grover*.

3. Respondents shall pay for permanent partial disability benefits based on Dr. Smith's 13% whole person impairment beginning as of April 12, 2022.

4. Claimant's average weekly wage is $757.68 and his temporary total disability benefit rate is $505.12. Respondents shall pay any retroactive TTD benefits due.

5. Respondents shall pay Claimant $3,000.00 for his disfigurement award.

6. Respondents are entitled to offset any overpayment from permanent partial disability benefits.

7. Respondents shall pay interest of eight percent (8%) on all amounts that were not pay when due.

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

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

DATED this 24th day of May, 2023.

Digital Signature

By: Elsa Martinez Tenreiro

Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

Elsa Martinez Tenreiro

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-222-305-001

ISSUES

- Did Claimant prove entitlement to Temporary Disability Benefits?
- Did Respondents prove Claimant was responsible for termination of his employment?
- The issue of Average Weekly Wage was reserved pending a potential stipulation.

FINDINGS OF FACT

1. Claimant was employed by [Redacted, hereinafter TT] for approximately seven years prior to his date of injury. He sustained admitted injuries on October 18, 2022 while prying a bearing out of a wheel. At the time of the injury he was the store manager. He sought treatment at Concentra on November 3, 2022. He reported pain in his lower back, the base of his neck, his right pectoral muscle and his left knee. He was given restrictions of clerical work only, no lift, carry, push or pull greater than 5 pounds. (Claimant's Exhibit 4, p. 16).

2. Claimant was seen at Concentra on November 8, 2022 and November 14, 2022 and his restrictions did not change. The restrictions were later change to 15 pounds, approximately on December 6, 2022. Claimant's normal job duties normally entail lifting parts that weigh more than 15 pounds. He testified that "There's not much in the store as far as selling parts that weighs under 15 pounds".

3. Following his injury, the Claimant was scheduled to go on vacation for about a week and he took the vacation at his home.

BACKGROUND

4. [Redacted, hereinafter ST] owned two auto parts stores. One in [Redacted, hereinafter RF], Colorado and one in [Redacted, hereinafter LJ] Colorado. He bought the LJ[Redacted] store from [Redacted, hereinafter CT] in October of 2004. He opened the RF[Redacted] store in January 2015.

5. Claimant was initially hired to be a counter person at the LJ[Redacted] store. He had previous experience working for [Redacted, hereinafter NA] for 15 or 16 years and also had experience working for [Redacted hereinafter CA].

6. After "not too long", ST[Redacted] approached Claimant to be the manager of the LJ[Redacted] store so he could go back and forth between the two stores. He did in fact promote him to store manager. As a manager, he oversaw personnel, made sure

the store was open and closed, checked the inventory when it came in every weekday, handled returns, and special orders. According to ST[Redacted], Claimant ". . . did a very good job, honestly."

7. Prior to Claimant's injury, ST[Redacted] had a situation at the RF[Redacted] store where he had a lot of inventory missing. Because of this missing inventory, he dismissed all of his employees at that store. He testified "I told them I was missing product, so I let them all go. I couldn't – I couldn't pinpoint any one of them. I had my suspicion, but I just let them all go". Because of this incident, ST[Redacted] had all the employees sign the form contained in Respondents' Exhibit which included the rule that "NO PRODUCT OR EQUIPMENT BELONGING TO THE STORE TO LEAVE STORE WITHOUT AN INVOICE (WILL FIRE ON SPOT)".

8. Sometime prior to his work injury, ST[Redacted] had a suspicion that Claimant was involved in a missing case of Freon. However, he could not prove it.

TERMINATION

9. When he went back into work after his vacation, he told ST[Redacted], the owner, that his work-related injuries were still hurting and he needed to go see a doctor. At that time, ST[Redacted] confronted him and asked if he had removed an item from the store. The Claimant admitted he did and ST[Redacted] said "You did it without my authorization." Claimant didn't know he had to have authorization since he was the manager. ST[Redacted] said "your penalty for taking this item out of the store without my authorization will be one-week suspension without pay." ST[Redacted] testified that when confronted about the item, which was identified as an electronic distributor, Claimant said he F-ed up and repeatedly apologized. Claimant denied that he said this during their conversation, but did admit that he took the distributor and returned it when asked.

10. Sometime after his injury, Claimant was terminated by his employer. He testified that he was unaware he had been terminated from his employment until he was notified by a representative of the insurer on November 8, 2022.

11. After he was told of his termination by the [Redacted, hereinafter TS] agent, he went in on November 9th and said "You know, you could have called me and let me know that I was terminated." According to Claimant, ST[Redacted] forgot to tell him but did confirm he was terminated. Contrary to his unverified Answers to Interrogatories, he did not voluntarily resign his employment.[1]

12. Claimant had taken a distributor home to see if it would work on a vehicle. Claimant testified that it was not uncommon to take a part home as long as the employees were honest and brought it back or put it on their bill. Prior to his termination, he was unaware of anyone being terminated for taking parts out of the store.

[1] In addition to this discrepancy between the unverified Answers to Interrogatories and Claimant's testimony is the reference to prior right shoulder surgeries which occurred 8 years ago and 12 years ago. Claimant denied any prior right shoulder surgeries.

13. Respondents' Exhibit F is a documents dated November 2, 2018 with numerous "Rules". Claimant was shown Exhibit F of Respondents' exhibits. He denied that it contained his signature.[2] He did not recall the rule contained on the exhibit that employees were not to remove items from the store. Claimant later elaborated with respect to whether this was the store policy not to take parts home without an invoice that "It had never been before". (Transcript p. 35, l. 19). When he previously took parts home, such as a water pump on one occasion and two sets of brakes on another occasion, he would write the part down on a piece of paper at his terminal. If he kept the part, he would add the cost to his bill/sales invoice and pay for the part.

14. When Claimant was asked about how inventory was handled, he said it was an ongoing process that the employees would do when they were not busy with other duties. Everybody in the store would do inventory. Sometimes there would be overages or minuses. They would adjust the inventory sheet to reflect the actual parts inventory.

15. ST[Redacted] also testified that sometimes there were discrepancies between the computer inventory and the stock on the shelf. There were multiple reasons for the discrepancies including incorrect warehouse scans, mix-ups in product numbers, delivery of incorrect totes containing product to his store, glitches in the system including product actually in Claimant's RF[Redacted] store instead of his LJ[Redacted] store, and theft.

16. Respondents' Exhibit K is a Part Ledger Report for two distributors, one that was added and one that was deleted on October 15, 2022. Although not explicit, ST[Redacted] implied that that Claimant changed the inventory information for the one distributor to the other model since it was only ST[Redacted] or the Claimant would change the inventory count. (Transcript pp. 78 - 79, ll. 24 – 22). When asked about Exhibit K, ST[Redacted] testified that his initials appear as the employee who changed the inventory for the part in question. His initials appear on every inventory change regardless of which employee made the change. I find that based on this testimony, it is impossible to determine with any probability if Claimant made the inventory change from T1845 to the T1829 distributor as implied by Respondents.

17. ST[Redacted] testified that he could have accommodated the restrictions that Claimant had of no lifting, carrying, pushing or pulling greater than 5 pounds, clerical work had he not been terminated. (Transcript pp. 100 to 101, ll. 25 – 4). ST[Redacted] did not actually offer any modified job to Claimant within these restrictions.

18. Claimant received unemployment benefits of $426 per week beginning 24 days prior to the hearing. Claimant was uncertain of the period the unemployment benefits covered.

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[2] ST[Redacted] said this document came from Claimant's personnel file, but did not provide any testimony that the signature on the form was the Claimant's.

CONCLUSIONS OF LAW

A. Generally

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

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

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

B. Temporary Total Disability

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

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." A claimant's responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or was responsible for the

separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

It is well established that a claimant who voluntarily resigns his job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2008); *Kiesnowski v. United Airlines*, W.C. No. 4-492-753 (May 11, 2004); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (April 24, 2002). I conclude that on Claimant's testimony, which is credible, Claimant did not voluntarily resign his job.

Claimant proved that he was unable to return to work due to his restrictions and is entitled to temporary disability beginning on November 3, 2022. Following his treatment at Concentra on November 3, 2023 he received restrictions which prevented him from performing his usual job duties. He was not offered modified job duties following the imposition of these restrictions.

Respondents have failed to sustain their burden of proof that Claimant was responsible for his termination of employment. I find the Claimant's testimony regarding the permissibility of taking parts home without first billing themselves to be credible. Due to the inaccurate inventory records and lack of persuasive direct evidence that Claimant intended to take the distributor without paying for it, I conclude that Claimant was not responsible for his termination. I also conclude that Respondents' Exhibit F is suspect since it does not contain Claimant's name on the document and Claimant denies that it contains his signature, despite the testimony from ST[Redacted] that the document came from his personnel file. It is also questionable from the perspective that it contains many rules that are unrelated to removal of product from the stores if it was intended to primarily address the missing inventory from the RF[Redacted] store, as testified by ST[Redacted]. I conclude that it does not credibly prove that Claimant was prohibited from removing any parts from the store without an invoice. Claimant's testimony regarding the routine practice of routinely taking parts home and then later returning the part or paying for it to be more credible.

ORDER

It is therefore ordered that:

1. Claimant is entitled to TTD from November 3, 2022 until terminated by law.

2. The award of TTD is subject to any applicable offset including unemployment benefits.

3. Respondents are liable for interest at the rate of 8 percent per annum on all benefits 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 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: May 24, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-131-773-003

ISSUE

Whether Claimant has presented substantial evidence to support a determination that future medical treatment in the form of a permanent Spinal Cord Stimulator (SCS) implant as requested by Authorized Treating Physician (ATP) Charles Sisson, M.D. will be reasonably necessary to relieve the effects of her July 18, 2019 admitted industrial injury or prevent further deterioration of her condition.

FINDINGS OF FACT

1. Claimant worked for Employer as a teacher's aide for special needs children. On July 18, 2019 Claimant was on a field trip with students. She was playing miniature golf with a seven-year-old buy. The child threw a golf ball at Claimant that struck her on the right cheek. He then punched her in the chest and right wrist. Claimant put her hands up to protect herself but was struck on the wrist five or six times. She immediately noticed pain in her face and right wrist, and later developed pain in her chest.

2. Later on July 18, 2019 Claimant visited UCHealth Urgent Care for an examination. Her right wrist was tender, swollen, and exhibited limited range of motion. X-rays of Claimant's right wrist did not show any evidence of fracture or dislocation.

3. Claimant subsequently received medications and underwent physical therapy. Although her face and chest pain resolved after approximately one month, she continued to suffer right wrist symptoms.

4. On August 19, 2019 Claimant visited Timothy Prater, M.D. at Front Range Orthopedics and Spine for an evaluation of her right wrist. Claimant reported moderate to severe right wrist pain that felt dull and achy. Although Claimant had been using a wrist splint, movement aggravated her symptoms. Dr. Prater assessed possible Complex Regional Pain Syndrome (CRPS) in the absence of objective testing. He specified that Claimant exhibited significant pain that was out of proportion to physical findings with profound hypersensitivity. Dr. Prater prescribed medications and recommended continued physical therapy.

5. After additional physical therapy and diagnostic testing, Claimant visited ATP Eric Shoemaker, D.O. at Ascent Medical Consultants on September 17, 2019. Dr. Shoemaker reviewed Claimant's medical records and conducted a physical examination. He noted that Claimant's right wrist MRI demonstrated only some soft tissue edema along the dorsum of the wrist in the region of the blunt impact. Examination demonstrated allodynia without evidence of pseudomotor changes. A triple bone scan revealed some findings consistent with CRPS. Dr. Shoemaker recommended desensitization training

exercises in addition to continued physical therapy. He also suggested QSART and objective CRPS testing.

6. Claimant was subsequently diagnosed with CRPS. She underwent stellate ganglion blocks on November 21, 2019, January 16, 2020, and March 12, 2020. Based on the success of the first two injections, there was discussion of a possible Spinal Cord Stimulator (SCS) trial.

7. Claimant received psychological care and cognitive behavioral therapy for her adjustment disorder with mixed anxiety, depressed mood and pain. She was ultimately referred to psychiatry for her Post Traumatic Stress Disorder (PTSD). An initial psychiatric evaluation was completed March 3, 2020.

8. On May 18, 2020 Claimant attended a telehealth evaluation with ATP Charles Bradley Sisson, M.D. He diagnosed Claimant with CRPS and chronic pain syndrome. Dr. Sisson recommended an SCS trial. He discussed the risks and benefits of an SCS trial with Claimant and answered her questions.

9. On May 19, 2020 Dr. Sisson requested authorization for a SCS trial. Respondents denied the request.

10. On June 23, 2020 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian determined Claimant's testing was not consistent with a diagnosis of CRPS. Furthermore, he reasoned that, even if Claimant suffers from CRPS, a SCS is not warranted. Dr. Cebrian explained that Claimant is quite functional and does not meet the clinical indications for SCS placement based on her low pain levels and good functional activities. He also commented that implantation of an SCS is a major surgery with possible complications.

11. On August 6, 2020 Claimant reached Maximum Medical Improvement (MMI) for her July 18, 2019 industrial injuries. On August 17, 2020 Claimant received a 4% psychological impairment rating from Gary Gutterman, M.D.

12. On August 13, 2020 Claimant returned to Dr. Shoemaker for an examination. After explaining that Claimant satisfied the criteria for a CRPS diagnosis under the Colorado Division of Workers' Compensation Medical Treatment Guidelines (*Guidelines*), he referenced that Robert Watson, M.D. disagreed with the diagnosis. Dr. Shoemaker then noted that the question of whether Claimant suffers from CRPS is distinct from whether a SCS trial is appropriate. He explained that Claimant "clearly has significant and functionally limiting chronic upper extremity pain that has been recalcitrant to all forms of conservative care. A spinal cord stimulator trial is appropriate and reasonable in this setting regardless of the presence or absence of CRPS."

13. On October 1, 2020 Dr. Shoemaker determined that Claimant should have received an impairment rating for her CRPS. He thus assigned an 8% whole person impairment. Claimant's maintenance medical care included medications and psychiatric follow-up with Dr. Gutterman. Dr. Shoemaker also continued to recommend a SCS trial.

14. On December 10, 2020 Claimant returned to Dr. Shoemaker for an evaluation. Dr. Shoemaker reiterated that Claimant was a candidate for a SCS trial based on her "functionally limiting chronic upper extremity pain that has been recalcitrant to all forms of conservative care." He continued to recommend a SCS trial "as has been recommended and offered by Dr. Sisson though this has apparently been denied by the insurance carrier."

15. Respondent challenged Claimant's impairment rating and sought a Division Independent Medical Examination (DIME).

16. On February 4, 2021 Claimant underwent a DIME with David Orgel, M.D. Dr. Orgel determined that she satisfied the criteria for CRPS based on a positive bone scan and a stress thermogram. He also remarked that Claimant's good response to sympathetic blocks was suggestive of CRPS. Dr. Orgel noted that Claimant's activity level was affected by her pain complaints, especially with more extensive use of her right hand such as baking or making crafts. He reasoned that Claimant reached MMI on August 6, 2020. Dr. Orgel agreed with the 8% whole person impairment rating for CRPS assigned by Dr. Shoemaker and the 4% psychological impairment rating given by Dr. Gutterman.

17. Based on Claimant's limited ability to engage in hand-intensive activities, Dr. Orgel concluded a SCS trial was reasonable. He explained that "if she is fully counseled on the pros and cons of the spinal cord stimulator a trial is reasonable. She should have significant improvement in function not pain related to this intervention for it to be placed permanently." He noted that Claimant's condition precluded hand-intensive activities. However, based on her overall improvement, he questioned "whether she would really benefit from the spinal cord stimulator."

18. On August 3, 2021 Claimant visited Dr. Sisson for an evaluation. Dr. Sisson recounted that he discussed treatment options with Claimant including a SCS trial implant for her CRPS. He then referred Claimant for a psychological evaluation prior to a SCS trial. Dr. Sisson specifically noted "[t]enatively consider SCS however need to rule out any secondary gain issues with pre op clinical psyche formal evaluation."

19. In March of 2022 Respondent approved Claimant's request for a SCS trial. Dr. Sisson subsequently placed the SCS and Claimant commenced the trial.

20. On April 15, 2022 Claimant attended a permanent SCS pre-op call with Dr. Sisson. He remarked that Claimant had obtained approximately 80-90% symptom-relief with the SCS trial. Dr. Sisson discussed the risks and benefits of a permanent SCS with Claimant. He then sought authorization for placement of a permanent SCS.

21. Claimant has presented substantial evidence to support a determination that future medical treatment in the form of a permanent SCS implant as requested by ATP Dr. Sisson is reasonably necessary to relieve the effects of her July 18, 2019 admitted industrial injury or prevent further deterioration of her condition. Initially, Claimant injured her right wrist while on a field trip with students. She received

conservative medical care that did not relieve her symptoms. Objective testing subsequently revealed Claimant suffered from CRPS.

22. On May 19, 2020 ATP Dr. Sisson sought authorization for a SCS trial but Respondents denied the request. On August 13, 2020 Dr. Shoemaker noted that the question of whether Claimant suffers from CRPS is distinct from whether a SCS trial is appropriate. He explained that Claimant "clearly has significant and functionally limiting chronic upper extremity pain that has been recalcitrant to all forms of conservative care. A spinal cord stimulator trial is appropriate and reasonable in this setting regardless of the presence or absence of CRPS." On December 10, 2020 Dr. Shoemaker continued to recommend an SCS trial "as has been recommended and offered by Dr. Sisson though this has apparently been denied by the insurance carrier." Based on Claimant's limited ability to engage in hand-intensive activities, DIME Dr. Orgel also concluded a SCS trial was reasonable. He explained that "if she is fully counseled on the pros and cons of the spinal cord stimulator a trial is reasonable. She should have significant improvement in function not pain related to this intervention for it to be placed permanently."

23. On August 3, 2021 Dr. Sisson referred Claimant for a psychological evaluation. In March of 2022 Respondents approved Claimant's request for an SCS trial and Dr. Sisson placed the device. On April 15, 2022 Dr. Sisson remarked that Claimant had obtained approximately 80-90% relief during the trial. He then sought authorization for placement of a permanent SCS.

24. In contrast to the opinions of ATP's Dr. Sisson and Dr. Shoemaker as well as DIME Dr. Orgel endorsing a SCS trial, Dr. Cebrian reasoned that, even if Claimant suffers from CRPS, a SCS is not warranted. Dr. Cebrian explained that Claimant is quite functional and does not meet the clinical indications for SCS placement based on her low pain levels and good functional activities. He also commented that implantation of an SCS is a major surgery with possible complications.

25. Despite Dr. Cebrian's opinion, the record reveals that Claimant has presented substantial evidence to support a determination that future medical treatment in the form of a permanent SCS will be reasonably necessary to relieve the effects of her industrial injury or prevent further deterioration of her condition. The record reveals that Claimant received conservative care that did not reduce her CRPS pain or improve her right arm function. Specifically, Claimant suffers functionally limiting chronic upper extremity pain that has been refractory to conservative care. As noted by Dr. Sisson, Claimant obtained approximately 80-90% relief during the SCS trial. Based on Claimant's dramatic symptom-relief, there is much less of an impediment in her functional ability to engage in hand-intensive activities. Because the SCS trial was successful, implantation of a permanent SCS is warranted. Accordingly, Claimant's request for implantation of a permanent SCS is granted.

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. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of her condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988).

5. The *Guidelines* were propounded by the Director pursuant to an express grant of statutory authority. *See* §8-42-101(3.5)(a)(II), C.R.S. It is appropriate for an ALJ to consider the *Guidelines* in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); *see Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the *Guidelines* are a reasonable source for identifying diagnostic criteria). The *Guidelines* are regarded as accepted professional standards of care under the Workers' Compensation Act. *Rook v. Indus. Claim Appeals*

Off., 111 P.3d 549 (Colo. App. 2005). In *Hall v. Indus. Claim Appeals Off.*, 74 P.3d 459 (Colo. App. 2003) the court noted that the *Guidelines* shall be used by health care practitioners when furnishing medical treatment under the Workers' Compensation Act. *See* §8-42-101(3)(b), C.R.S. Nevertheless, the *Guidelines* expressly acknowledge that deviation is permissible.

6. The *Guidelines* specify that a "SCS may be most effective in patients with CRPS I or II who have not achieved relief with oral medications, rehabilitation therapy, or therapeutic nerve blocks, and in whom the pain has persisted for longer than 6 months." W.C.R.P. 9(H)(1)(a). The *Guidelines* provide a list of surgical indications for a SCS. A SCS is appropriate for patients who exhibit the following:

> persistent functionally limiting radicular pain greater than axial pain who have failed conservative therapy including active and/or passive therapy, pre-stimulator trial psychiatric evaluation and treatment, medication management, and therapeutic injections.

W.C.R.P. 17 Exhibit 9(H)(1)(c). Moreover, before surgical intervention, the patient and treating physician should identify functional goals and the likelihood of improving the ability to perform activities of daily living or work duties. W.C.R.P. 17 Exhibit 9(H).

7. The *Guidelines* note that "[i]t is particularly important that patients meet all of the indications before a permanent neurostimulator is placed because several studies have shown that workers' compensation patients are less likely to gain significant relief than other patients." W.C.R.P. 17 Exhibit 9(H)(1)(a). A trial is considered successful if the patient experiences a 50% decrease in radicular or CRPS pain and "demonstrates objective functional gains or decreased utilization of pain medications." Functional improvement includes: "standing, walking, positional tolerance, upper extremity activities, increased social participation, or decreased medication use." W.C.R.P. 17 Exhibit 9(H)(1)(c)(iii).

8. As found, Claimant has presented substantial evidence to support a determination that future medical treatment in the form of a permanent SCS implant as requested by ATP Dr. Sisson is reasonably necessary to relieve the effects of her July 18, 2019 admitted industrial injury or prevent further deterioration of her condition. Initially, Claimant injured her right wrist while on a field trip with students. She received conservative medical care that did not relieve her symptoms. Objective testing subsequently revealed Claimant suffered from CRPS.

9. As found, on May 19, 2020 ATP Dr. Sisson sought authorization for a SCS trial but Respondents denied the request. On August 13, 2020 Dr. Shoemaker noted that the question of whether Claimant suffers from CRPS is distinct from whether a SCS trial is appropriate. He explained that Claimant "clearly has significant and functionally limiting chronic upper extremity pain that has been recalcitrant to all forms of conservative care. A spinal cord stimulator trial is appropriate and reasonable in this setting regardless of the presence or absence of CRPS." On December 10, 2020 Dr. Shoemaker continued to recommend an SCS trial "as has been recommended and offered by Dr. Sisson though

this has apparently been denied by the insurance carrier." Based on Claimant's limited ability to engage in hand-intensive activities, DIME Dr. Orgel also concluded a SCS trial was reasonable. He explained that "if she is fully counseled on the pros and cons of the spinal cord stimulator a trial is reasonable. She should have significant improvement in function not pain related to this intervention for it to be placed permanently."

10. As found, on August 3, 2021 Dr. Sisson referred Claimant for a psychological evaluation. In March of 2022 Respondents approved Claimant's request for an SCS trial and Dr. Sisson placed the device. On April 15, 2022 Dr. Sisson remarked that Claimant had obtained approximately 80-90% relief during the trial. He then sought authorization for placement of a permanent SCS.

11. As found, in contrast to the opinions of ATP's Dr. Sisson and Dr. Shoemaker as well as DIME Dr. Orgel endorsing a SCS trial, Dr. Cebrian reasoned that, even if Claimant suffers from CRPS, a SCS is not warranted. Dr. Cebrian explained that Claimant is quite functional and does not meet the clinical indications for SCS placement based on her low pain levels and good functional activities. He also commented that implantation of an SCS is a major surgery with possible complications.

12. As found, despite Dr. Cebrian's opinion, the record reveals that Claimant has presented substantial evidence to support a determination that future medical treatment in the form of a permanent SCS will be reasonably necessary to relieve the effects of her industrial injury or prevent further deterioration of her condition. The record reveals that Claimant received conservative care that did not reduce her CRPS pain or improve her right arm function. Specifically, Claimant suffers functionally limiting chronic upper extremity pain that has been refractory to conservative care. As noted by Dr. Sisson, Claimant obtained approximately 80-90% relief during the SCS trial. Based on Claimant's dramatic symptom-relief, there is much less of an impediment in her functional ability to engage in hand-intensive activities. Because the SCS trial was successful, implantation of a permanent SCS is warranted. Accordingly, Claimant's request for implantation of a permanent SCS is granted.

ORDER

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

1. Claimant's request for implantation of a permanent SCS is granted.

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

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

within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 24, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-197-757

ISSUES

I. Whether Respondents proved by a preponderance of the evidence the General Admissions of Liability ("GALs") filed by the Respondents may be withdrawn.

II. Whether Claimant proved by a preponderance of the evidence the left hip replacement requested by the authorized treating medical providers at Panorama Orthopedics is reasonable, necessary and causally related treatment.

FINDINGS OF FACT

1. Claimant is 74 years of age. Claimant has worked for Employer for three years as a delivery specialist. Claimant's job entails driving a truck and delivering parts to customers.

2. Claimant testified that while working for Employer on November 3, 2021, he stepped out of his delivery truck, walked a few feet, and slipped on ice, which caused him to do the splits. Claimant testified he stood up and again slipped and did the splits. Claimant testified he reported the incident to his manager that same day and requested to see a doctor. He testified Employer made an appointment for him for November 8, 2021. Claimant continued to work leading up to his initial appointment.

3. Claimant presented to authorized provider AFC Urgent Care on November 8, 2021. He completed a Worker's Compensation Registration Form for AFC Urgent Care on that date. In the section titled "Specific Details of Accident" Claimant wrote "Stepped Wrong." (R. Ex. K). Claimant testified he wrote he "stepped wrong" on this document because that was what essentially happened. Claimant reported to Devin Pinaroc, NP that he "stepped wrong" at work twice last Wednesday and that his pain was gradually worsening. Claimant complained of pain in the left groin radiating to the anterior left thigh along with some pain below the left gluteus. NP Pinaroc noted there was no trauma or fall. On examination, NP Pinaroc noted decreased range of motion in the right hip with pain. His assessment was unspecified injury of the left hip. NP Pinaroc completed a Physician's Report of Worker's Compensation Injury stating that the objective findings were consistent with a history and/or work-related mechanism of injury/illness. Claimant was prescribed a muscle relaxer and released to modified duty.

4. On November 9, 2021 [Redacted, hereinafter MM] completed an Employer's First Report of Injury in which she listed the body part affected listed as "abdomen" and the nature of the injury/illness as "strain". She wrote, "TM slipped on gravel, didn't fall to the ground. TM almost did the splits, strained his L leg/upper thigh." (R. Ex. J). Claimant testified he did not provide that information to MM[R and that and the First Report of Injury is inaccurate.

5. Claimant returned to AFC Urgent Care on November 15, 2021 with continued left hip and left leg pain. On examination NP Pinaroc noted decreased range of motion to left hip and tenderness to touch of the iliac crest. Claimant underwent an intra-articular injection to his left hip. His temporary work restrictions were increased to no lifting, no crawling, and short drives. NP Pinaroc referred Claimant for a left hip MRI.

6. On November 29, 2021 NP Pinaroc noted that a recent MRI of the left hip showed degenerative changes of the hip, strains of muscles in the left hip/pelvis/glute, and 6cm aneurysm in L common iliac artery. He noted the MRI showed grade 2 and grade 1 strain of the muscle in hip/glute. Exam again demonstrated decreased range of motion in the left hip. NP Pinaroc assessed Claimant with an aneurysm of the iliac artery and strain of muscle, fascia and tendon of the left hip, and unspecified injury of the left hip. He referred Claimant to the Vascular Institute of the Rockies for evaluation of the aneurysm of the iliac artery.

7. Claimant saw Lauren Eller, PA-C at Vascular Institute of the Rockies on December 2, 2021. She noted a history of abdominal aortic aneurysm repair in May 2016. PA-C Eller noted that approximately one month ago Claimant slipped and fell onto his left leg. Claimant complained of left hip pain secondary to an iliopsoas strain during the fall. PA-C Eller's assessment was an abdominal aortic aneurysm without rupture and aneurysm of the left iliac artery. She sent Claimant for CT scan of the abdomen and pelvis for surgical disposition.

8. Claimant presented to Alan Y. Synn, M.D. at Vascular Institute of the Rockies on December 13, 2021. Dr. Synn noted that the CT scan showed a large left distal common iliac artery aneurysm, small right distal common iliac artery aneurysm and an incidental pancreatic mass. He scheduled Claimant for surgery for the aneurysm.

9. Claimant continued to report left hip and groin pain. He underwent a second intra articular injection to his left hip on January 3, 2022.

10. On February 8, 2022 Claimant underwent a bifurcated iliac endograft repair of left common iliac artery aneurysm, performed by Dr. Synn.

11. On February 16, 2022 Claimant saw Kevin Ralls, FNP at AFC Urgent Care. He complained of pain in his left hip and left knee. FNP Ralls noted a prior medical history of knee replacement. He referred Claimant to an orthopedic surgeon for evaluation of the left hip.

12. On the referral of FNP Ralls, Claimant presented to Abby Price PA-C at Panorama Orthopedics & Spine Center on February 25, 2021. PA-C Price noted Claimant's pain began in September 2021, at which time he had an aneurysm and sustained a fall at work. Claimant reported pain in his groin radiating into his buttock. He stated he had no pain prior to his work injury. PA-C Price noted that x-rays of the left hip and pelvis demonstrated severe narrowing of the femoroacetabular joint with an area of what appeared to be avascular necrosis at the rim of the acetabulum within the femoral head. Left knee x-rays demonstrated a stable left knee total arthroplasty. PA-C Price

diagnosed Claimant with primary osteoarthritis of left hip and avascular necrosis of bone of the left hip. She wrote,

> Given the patient's acute groin pain following his injury at work in September 2021, I would recommend that we proceed with left total hip arthroplasty in the future. With the acuity of his symptoms we also discussed the option of an ultrasound guided intra-articular injection into the left hip to postpone operative intervention, providing that he receives good symptom relief from this injection. He will follow up with Dr. Patel following this injection to discuss further treatment options. He will maintain his current work restrictions per his work comp provider.

(Cl. Ex. 8, p. 160).

13. On March 15, 2022 Claimant underwent an intraarticular cortisone injection of the left hip for osteoarthritis.

14. Claimant returned to PA-C Price on April 1, 2022. He reported that his groin pain had fully resolved following the injection on 3/15/2022, but that he developed a new pain in his lower back and left SI joint. Given Claimant's recent CT scan showing degenerative changes of the lumbar spine and his prevalent symptoms, PA Price recommended that Claimant follow-up with a member of spine team for evaluation of the lumbar spine. She noted, "We discussed that we can continue to perform cortisone injections into his left hip joint every 4+ months providing that he experiences symptoms relief for 4 months or longer. He will likely be a candidate for a left total hip arthroplasty in the future." (Cl. Ex. 8, p. 170).

15. On July 20, 2022 Claimant reported to FNP Ralls that physical therapy was helping a little and that he reported feeling stronger in the hip and could now stand without needing the arm rest assistance and could stretch a little bit further.

16. At a follow-up evaluation with PA-C Price on July 29, 2022, she noted that the last injection performed on 3/15/2022 provided Claimant with significant symptom relief but only for two days. Claimant had been attending physical therapy and performing home exercises without significant improvement and wanted to discuss having a left total hip arthroplasty. X-rays of left hip demonstrated end-state joint space narrowing of the femoroacetabular joint with collapse of the femoral head. PA-C Price's impression was grade IV osteoarthritis of the left hip.

17. On July 29, 2022 Claimant was scheduled to undergo a left total hip arthroplasty on October 7, 2022 with Nimesh Patel, M.D.

18. On September 30, 2022 Timothy S. O'Brien, M.D. performed an Independent Medical Evaluation ("IME") at the request of Respondents. Regarding the mechanism of injury, Dr. O'Brien noted, "on November 3, 2021, he was walking on [Employer's] icy parking lot and slipped twice. He did the splits both times and went to the ground both times. He states at the fall was witnessed not only by customers but also by fellow staff members." (R. Ex. A, p. 001). Claimant reported that he was completely pain free prior

to the incident and never had treatment for any left hip pain. Dr. O'Brien examined Claimant and reviewed medical records, including undated radiographs on Claimant's telephone of what appeared to be bone-on-bone contact and a significant area of osteolysis or bony defect in the superior femoral head on the left hip.

19. Dr. O'Brien opined that Claimant did not sustain any left hip injury and that Claimant's onset of left hip pain while at work on November 3, 2021 was a manifestation of his personal health. Dr. O'Brien explained that the work incident was minor. He wrote,

> The only type of injuries to accelerate and (*sic*) osteoarthritic hip and result in the premature need for a total hip replacement are those that cause and (*sic)* intra articular fracture or a dislocation. Merely slipping on the ice and having one leg move laterally is not an injury mechanism. There's simply not enough energy generated as the result of this incident such that its dissipation into the hip joint would overcome the injury threshold and result in new tissue breakage or yielding. Therefore, no injury could occur.

(R. Ex. A, p. 006).

20. Dr. O'Brien opined that it was expected for Claimant to experience hip pain when his left leg moved laterally after slipping, considering Claimant's significant pre-existing osteoarthritis and avascular necrosis of the left hip. Dr. O'Brien explained that it takes years for such radiographic appearance to become evident. Dr. O'Brien stated that osteoarthritis always manifest itself with gradually progressive symptoms over the course of years. He opined that, while it is possible Claimant truly did not note left hip pain until his slipping episode on November 3, 2021, it was so unlikely in his experience that it is virtually impossible. Dr. O'Brien noted that records from Panorama prove Claimant has a long-standing history of osteoarthritis of multiple musculoskeletal areas in his body, including age-appropriate degenerative spondylolisthesis of his low back, a total ankle replacement, and a total knee replacement. He opined that Claimant thus has a genetic predilection for developing arthritis in his musculoskeletal joints. Dr. O'Brien noted that it was highly likely prior medical records mentioned some history of prior left hip pain.

21. Dr. O'Brien further opined that, even if Claimant did not have hip pain until November 3, 2021, the reason for total hip replacement is due to Claimant's longstanding degenerative process and not the November 3, 2021 work incident. Dr. O'Brien opined that Claimant was an inconsistent historian, noting that at different times Claimant reported falling to the ground and not falling to the ground. He concluded that Claimant was a candidate for a left total hip replacement long prior to the work incident, which did not accelerate or aggravate Claimant's underlying arthritis or the need for surgery. Dr. O'Brien opined Claimant is a candidate for a total hip replacement but that the need for surgery is unrelated to the work incident.

22. On October 19, 2022 Claimant was evaluated by FNP Ralls at AFC Urgent Care, who still gave the opinion that Claimant's mechanism of injury was work-related, noting:

> Pt states that he received results of Independent Ortho review which suggests that he should not have his recommended THA covered by WC ins Pt was able to bring records in for copy as they were not in the chart initially. The rationale by the reviewing provider was that the pt likely had OA/DJD prior to his injury and since that is a chronic process, it is not part of his injury. Pt still doing PT. …

(Cl. Ex. 6, pp.117-119).

23. On October 27, 2022 Claimant filed an Application for Hearing requesting left hip replacement requested by ATP Abby Price at Panorama Orthopedics.

24. On November 23, 2022 Respondents filed a Response to the October 27, 2022 Application for Hearing challenging the requested surgery and moving to withdraw their previously filed GALs.

25. Respondents filed two general admissions on the claim. One was filed on March 3, 2022, and the other was filed on October 10, 2022. As reflected in these general admissions, temporary total disability and medical benefits were admitted. Respondents paid $11,584.62 in temporary total disability between the time of February 8, 2022 through the period of August 15, 2022.

26. At a physical therapy appointment with & Sport Physical Therapy on December 27, 2022, Claimant reported that he hurt his hip while playing indoor basketball with his grandson. Claimant reported that he checked his grandson with his left hip and pivoted and was very sore.

27. On February 15, 2023 Claimant saw Justin Burkhardt, PA at AFC Urgent Care reporting persistent left hip/groin symptoms. He was doing well with current work restrictions. Exam revealed mild diffuse tenderness to palpation/stiffness on range of motion and ambulation of the left hip. Claimant ambulated with the assistance of a cane. Claimant was to continue physical therapy and modified duty.

28. Claimant testified at hearing that prior to the work injury, he had no left hip complaints, limitations or treatment. Claimant testified that his 2009 work injury did not involve his hips. He testified that he has been experiencing pain since the work injury and now walks with a cane, which he did not use prior to the work injury. Claimant stated he experienced only a couple days of relief from the injections. He testified he understands the risk of the recommended surgery and wants to undergo the surgery to relieve his pain and improve his function.

29. Dr. O'Brien testified at hearing on behalf of Respondents as Level II accredited expert in orthopedic surgery. He testified consistent with his IME report and continued to opine Claimant did not sustain any injury to his left hip on November 3, 2021 and that the need for a hip replacement is not work-related. Dr. O'Brien testified that Claimant's diagnoses are avascular necrosis and severe end-stage arthritis, which he explained takes many months or years to develop and are not work-related. Dr. O'Brien testified that to confirm a work-related injury, we would need imaging obtained right before and

after the work injury to confirm any objective changes. He explained that intraarticular fractures and dislocations are the only events traumatic enough to accelerate the Claimant's condition. Dr. O'Brien testified that Claimant's initial examination did not suggest a true injury in terms of tissue breaking or yielding. He testified that prior aneurysms, multiple arthritic joints and replacements indicate a genetic predilection unrelated to Claimant's employment. Dr. O'Brien opined that there was no objective contemporaneous evidence of any injury. He testified that Claimant was a candidate for hip replacement prior to the work incident.

30. Dr. O'Brien further testified that the recommended surgery is reasonable and indicated. He acknowledged that there are no medical records indicating prior left hip complaints and that Claimant was able to perform his job prior to the work incident. Dr. O'Brien testified that the November 29, 2021 MRI was likely overread as muscle strains and, even if Claimant did sustain muscle strains as a result of the November 3, 2021 work incident, there was no evidence on MRI or CT scan of any injury to the hip joint. He explained that a strain is self-healing and would not require treatment.

31. The only prior medical records offered as evidence were an October 13, 2010 Division Independent Medical Examination ("DIME") report by Stanley Ginsburg, M.D. regarding an August 10, 2009 work injury to left shoulder and left knee, and a November 16, 2017 Colorado Heart & Vascular record. Neither record documents any prior left hip complaints, diagnoses or treatment.

32. The ALJ finds the opinions of Claimant's treating providers at AFC Urgent Care and Panorama Orthopedics, as supported by Claimant's credible testimony and the medical records, more credible and persuasive than the opinions and testimony of Dr. O'Brien.

33. Respondents failed to prove it is more probable than not Claimant did not sustain a compensable work injury entitling Respondents to withdraw their GALs.

34. Claimant proved it is more probable than not the total left hip replacement recommended by the medical providers at Panorama Orthopedics is causally related to the November 3, 2021 work injury and reasonably necessary to cure and relieve its effects.

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).

Withdrawal of an Admission of Liability

When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Section 8-43-201(1), C.R.S. provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, WC 4-754-838-01 (ICAO, Oct. 1, 2013).

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). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017).

Respondents argue Claimant did not sustain a compensable work injury resulting in the need for treatment. Respondents point to a "minor" mechanism of injury, inconsistencies in Claimant's reports regarding the mechanism of injury, and Claimant's significant pre-existing degenerative conditions. As found, the preponderant evidence does not establish Claimant did not sustain a compensable work injury. The ALJ is not persuaded that Claimant's description of the mechanism of injury as documented in the records and testified by Claimant is so disparate that it completely undermines his credibility. Claimant credibly testified that he did not have any prior left hip complaints, treatment or limitations. No persuasive evidence was offered to the contrary. Assuming, arguendo, Claimant did suffer from some form of prior left hip pain, he was not undergoing any treatment and able to perform his job duties without restrictions for multiple years leading up to the work injury. There is no evidence of a prior recommendation for left hip treatment or surgery.

Claimant's treating providers at AFC Urgent Care have opined that Claimant's condition and need for treatment are work-related. While Claimant has significant pre-existing left hip conditions, the totality of the evidence demonstrates it is more likely than not the work injury caused disability and the need for treatment. Accordingly, Respondents are not entitled to withdraw their GALs.

Medical Treatment

Respondents are liable for related medical treatment that is reasonable and necessary relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S.; *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant proved it is more probably true than not the recommended total left hip replacement is causally related to the work injury and reasonably necessary to cure and relieve its effects. Claimant has undergone conservative treatment in the form of diagnostic injections and physical therapy with no significant relief. The recommended surgery is to relieve the ongoing symptoms in Claimant's left hip, which were caused by the work injury and have been present since such time. While Dr. O'Brien disagrees the surgery is causally related, he did opine that the surgery is reasonable and indicated. The opinions of Claimant's treating providers regarding the causal relatedness of Claimant's condition are more credible and persuasive than that of Respondents' IME physician Dr. O'Brien in this matter. Based on the totality of the evidence, Claimant has met his burden to prove that the recommended left hip surgery is reasonably necessary and causally related medical treatment.

ORDER

It is therefore ordered that:

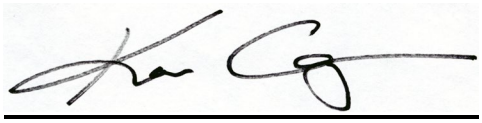
1. Respondents failed to prove by a preponderance of the evidence Claimant did not sustain a compensable work injury. Respondents' request to withdraw the their General Admissions of Liability is denied and dismissed.

2. Claimant proved preponderance of the evidence that the recommended left hip replacement is reasonable, necessary and causally related to Claimant's November 3, 2021 work injury. Respondents are liable for the recommended surgery.

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: May 25, 2023



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. WC 5-150-929-002

ISSUES

- Whether Respondents have proven by a preponderance of the evidence that Claimant committed a willful violation of a safety rule pursuant to Section 8-42-112(1)(b) that resulted in his industrial injury?

FINDINGS OF FACT

1. Claimant was involved in a motor vehicle accident ("MVA") on October 14, 2020 in the course and scope of his employment with Employer. Claimant was taken from the accident scene to St. Mary's Hospital Emergency Room ("ER") via ambulance. At the ER, Claimant reported he was driving his semi-trailer on 1-70 at about 70 miles per hour and he did not remember what happened, but he went off the road, flipped and the vehicle caught on fire. Claimant was referred for a computed tomography ("CT") scan of his cervical spine and head along with a CT scan of his chest and abdomen. Claimant's urine drug screen was positive for opiates and benzodiazepines, but Claimant reported he had a prescription for these due to prior back pain from a week ago.

2. According to the police report, Claimant was the driver of the truck and lost control of the truck and raveled off the right side of the road, colliding with a guardrail and a concrete barrier along with a light pole. The trailer rolled ¼ times and became disconnected from the semi-truck before coming to a final rest on its right side on the right side of the roadway. The accident report indicates that the semi caught fire and came to a final rest facing east inside a tunnel. According to a witness report, the semi drifted to the right and struck the guard rail and concrete wall, then bounced back toward the left lane before the trailer swiped the wall causing it to slam into the side of the tunnel.

3. Claimant completed a "Driver's Statement and Exchange of Information" form from the Colorado State Patrol that stated, "No clue what happened." According to the Palisade Police Department Emergency Medical Service ("EMS") report, Claimant reported he was taking a drink from his Pepsi and then he hit the brakes and the truck crashed. The EMS report further indicated that Claimant reported that all of his medications were in his truck.

4. Claimant was taken to St. Mary's Hospital Emergency Room ("ER") where the responding Colorado State Patrol Officer, Officer [Redacted, hereinafter NN], spoke to Claimant. Claimant reported to Officer NN[Redacted] that he had not consumed any alcohol or illegal drugs, but had taken a lot of medications. Officer NN[Redacted] noted that Claimant's speech was slurred and incoherent and Claimant was falling asleep between talking to Officer NN[Redacted].

5. Officer [Redacted, hereinafter JN] secured a blood draw to test for medications at the emergency room. According to the results of the blood draw, Claimant had carisoprodol, meprobearnate, 7-Aminoclonazepam, clonazepam, alprazolam and hydrocodone in his system. No alcohol or illegal drugs were noted in Claimant's system. The blood draw was taken a bit under 2 hours after the MVA.

6. According to Claimant's medical records from Primary Care Partners, Claimant was being prescribed alprazolam, amlodinpine, clonazelpam, fluticasone, hydrocodone-acetaminophen, ibruprofen, narcan, omeprazole, rizatriptan benzoate, sumatriptan succinate, and tizanidine. Claimant was not prescribed carisoprodol by Primary Care Partners. Ms. Lintemoot, a senior forensic scientist for the Colorado Bureau of Investigation testified at hearing that she did not see a prescription in Claimant's medical records for the carisoprodol.

7. On October 15, 2020, following the MVA, Claimant's wife called Primary Care Partners and reported that all of Claimant's medications were in the cab of his truck and had caught fire and requested that the medications be refilled.

8. Testimony was presented from Ms. Lintemoot at hearing. Ms. Lintemoot testified that Claimant's levels of medications were on the upper therapeutic level according to the results of the blood draw. Ms. Lintemoot testified that based on the levels demonstrated in the blood draw, if Claimant had taken only the prescription drugs the day prior to the accident, and not the day of the accident, Claimant would have had a lethal level of Clarisoprodal in his system. Ms. Lintemoot testified she reviewed the witness statements which described Claimant's vehicle drifting out of his land as it went into the tunnel and struck a stationary object (the concrete wall). Ms. Lintemoot opined that this would be consistent with a driver operating a motor vehicle after consuming central nervous system depressants. Ms. Lintemoot testified on cross-examination that she could not testify conclusively as to what caused the accident.

9. Ms. Lintemoot testified that Claimant's report that he took the medication only at bedtime was inconsistent with the instructions for taking the prescriptions from Claimant's primary care physician.

10. The medical records from Primary Care Partners establish that Claimant's wife called July 21, 2020 and reported that Claimant's new depression medication was working fine but causing Claimant to be drowsy. Claimant was advised to decrease his medication to 10mg four times per day.

11. Claimant testified at hearing in this matter that on the date of the accident, he left his house at approximately 5:00 a.m. and drove one hour and fifteen minutes to the work site at the Rifle Airport to pick up his load. Claimant denied taking medications on the date of the MVA and testified he only took the prescription drugs while off duty. Claimant testified he did not believe he had all of his medications in the cab of his truck.

Claimant testified he did not report to the emergency room that he did not know what caused the accident.

12. Claimant testified he did not know that he was not allowed to take prescription medications while operating a tractor trailer truck. Claimant testified he did receive the Employee Personnel and Safety Program from Employer. Claimant acknowledged that it was his responsibility to know the laws pertaining to federal motor carriers.

13. Claimant testified the accident occurred when the brakes on the truck locked up due to an automated braking system. Claimant testified he had complained to the employer about the automated braking system prior to the MVA, as the braking system would be applied on any bump in the road.

14. Claimant presented the testimony of Dr. Guess, a pharmacist. Dr. Guess testified he had reviewed the hospital reports and Dr. Scott's IME report. Dr. Guess testified that based on the medication levels contained in the blood draw, he could not say when Claimant took the medications. Dr. Guess testified that the fact that Claimant's hydrocodone level was significantly his, but there was no detection of hydromorphone (which is metabolized from hydrocodone), he could not explain why Claimant's hydrocodone levels were so significantly high.

15. Dr. Guess testified that it was his opinion that the results of the blood test showed medication levels consistent with when Claimant said he had taken the medications. Dr. Guess noted that Claimant's high levels of hydrocodone were not consistent with Claimant's testimony that he took the medications the night before, but noted that he would trust the patient's report of having taken the medication the night before. Dr. Guess further testified that while the level of the other prescription drugs were not necessarily consistent with Claimant's testimony of when he consumed the drugs, he could not state that Claimant would have been impaired at the time of the MVA.

16. On cross-examination, Dr. Guess noted that based on the results of the blood draw, Claimant was not within the therapeutic level with regard to the hydrocodone. Dr. Guess testified that this did not mean that the use of hydrocodone affected Claimant's level of consciousness. Dr. Guess testified that the level of hydrocodone would most likely not be intoxicating for an opioid dependent user, but could be intoxicating for an opioid na'ive patient.

17. Dr. Guess further testified that the Carisoprodol levels were consistent with Claimant having taken the prescribed drugs within 10 hours of the accident and Claimant had these drugs in his system while driving, but that did not mean that Claimant was impaired at the time of the accident.

18. Respondents presented the testimony of [Redacted hereinafter DA], the terminal manager for Employer. DA[Redacted] testified that after Claimant was hired and passed a

drug test, Claimant was provided with a copy of Employer's safety handbook. DA[Redacted] testified that Employer's safety policy would have required Claimant to report to Employer any prescription drugs that represent a controlled substance Claimant was taking while employed with Employer. DA[Redacted] testified he was never made aware that Claimant was being prescribed controlled substances by his physician.

19. DA[Redacted] testified that under the Employer's safety policy, along with the Federal Motor Carrier Safety Association regulations, a driver is not allowed to operate a vehicle if he has taken a controlled substance identified as a non-scheduled I substance unless the substance is prescribed by a licensed medical practitioner who is familiar with the driver's medical history and has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

20. There is no credible evidence that Claimant was ever advised by a physician with Primary Care Partners, or from anywhere else, that he could safely operate a commercial motor vehicle while taking the prescribed medications. In fact, in a follow up appointment with his primary treating physician at Primary Care Partners, Dr. Hulst noted that he was unaware that Claimant was driving a semi-truck while on the medications that were prescribed to him. On that date, Claimant reported to Dr. Hulst that Claimant never takes his medication during the day or while driving and did not believe they impact his driving or function.

21. Claimant's testimony that he was not taking the medical while operating the semi-truck is found to be not credible. The ALJ credits the testimony of Ms. lintemoot that the levels of narcotic medication in Claimant's system at the time of the blood draw was inconsistent with Claimant's report of taking the medications the previous evening.

22. Notably, Claimant reported that to the EMS immediately after the accident that his medications were inside the truck when it caught on fire. Claimant's wife contacted Primary Care Partners the day after the accident and reported that all of Claimant's medications were inside the truck that had caught on fire. Claimant's testimony that he did not believe that all of his mediations were in the truck is found to be not credible in light of the reports to Primary Care Partners and the EMS after the accident. The fact that the Claimant's medications were inside the cab of his truck at the time of the accident represents further evidence that Claimant was taking the medication while operating the semi-truck. Otherwise, there would be no logical reason that Claimant would have the medications in the cab of his truck at the time of the accident.

23. The ALJ credits the testimony of Ms. Lintemoot over the testimony of Dr. Guess and Claimant and finds that Claimant violated a safety rule by consuming schedule I medications without the instruction from a licensed medical professional that the use of the medication would not adversely affect Claimant's ability to safely operate a commercial motor vehicle.

24. Claimant also argues at hearing that there is insufficient evidence that consumption of the narcotic medication led to Claimant's MVA and subsequent injury. The ALJ is not persuaded. The ALJ notes that the police reports from Officer JN[Redacted] indicate that Claimant's speech at the hospital was slurred and incoherent. The ALJ credits the testimony of Ms. Lintemoot that Claimant's presentation at the emergency room was consistent with Claimant having consumed central nervous system depressants as being credible. The ALJ further credits the testimony of Ms. Lintemoot that the description of Claimant's accident as veering out of the lane of travel and striking a stationary object as being consistent with operating a motor vehicle after consuming central nervous system depressants as being credible and persuasive and finds that Respondents have proven by a preponderance of the evidence that Claimant violated a safety rule which resulted in Claimant sustaining the injury in this case.

25. The ALJ also credits the testimony of Ms. Lintemoot and notes that the evidence establishes that Claimant had in his system carosopridol, for which Claimant did not have a prescription. The ALJ therefore finds that in addition to the prescription medications that Claimant was being prescribed, Respondents established that it is more probable than not that Claimant had also consumed a non-prescribed prescription medication at the time of the accident. The ALJ finds that the presence of non- prescribed prescriptions in Claimant's system is further credible evidence of the willfulness of Claimant's conduct.

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 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).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8- 43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* WC 4-559- 275 (ICAO, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimanfs conduct. *See In re Heien;* WC 5-059-799-01 (ICAO, Nov. 29, 2018). However, a safety rule that is not enforced by the employer will not be enforced by the Workers' Compensation system. *Burd v. Builder Services Group Inc.,* WC 5-085-572 (ICAO, July 9, 2019).

5. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* WC 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately per1ormed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer,* WC 4-495-198 {ICAO, Oct. 20, 2003). 'Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez,* WC 4-561-352 (ICAO, Apr. 29, 2004). An employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric,* WC 4-418-465 (ICAO, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.; see* 2 *Larson's Workers' Compensation Law,* §35.04. Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.,* 907 P.2d at 719.

6. As found, the ALJ credits the testimony of Ms. Lintemoot and finds that Respondents have established that Claimant violated a safety rule by consuming level I controlled substance medications and operated a commercial motor vehicle which led to the MVA resulting in Claimant's injuries. As found, the medical reports and accident reports entered into evidence at hearing establish that it is more probable than not that Claimant's prescription medications were in the cab of the semi-truck when the accident occurred.

7. As found, the testimony of Ms. Lintemoot that Claimant consumed prescription medications before operating the commercial vehicle is found to be credible. As found, the testimony of Ms. Lintemoot that Claimant's actions resulting in the accident, drifting out of the lane of traffic and colliding with a stationary object, are consistent with operating a motor vehicle after consuming central nervous depressants is found to be credible and persuasive.

8. Due to the fact that Respondents have established that Claimant volitionally violated a safety rule which led to Claimant's injury, Respondents may reduce Claimant's non-medical benefits by 50% pursuant to Section 8-42-112(1)(b), C.R.S.

ORDER

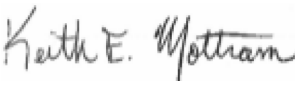
It is therefore ordered that:

1. Respondents may reduce Claimant's non-medical benefits by 50% based on Claimant's failure to follow a safety rule adopted by the employer for the saftety of the employee pursuant to Section 8-42-112(1)(b), C.R.S.request to overcome the finding of the DIME physician that Claimant is not at MMI is denied.

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

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

DATED: May 26, 2023



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

ISSUES

I. Whether Claimant provided clear and convincing evidence to overcome the opinion of Division Independent Medical Examination ("DIME") physician Dr. Orgel regarding maximum medical improvement ("MMI") and permanent impairment.

II. Whether Claimant proved by a preponderance of the evidence treatment of the cervical spine, thoracic spine, abdomen, vision or psychological conditions is reasonable, necessary and causally related.

III. Whether Claimant proved by a preponderance of the evidence post-MMI medical treatment he received at UC Health and with various other providers is authorized treatment.

ISSUES HELD IN ABEYANCE

Claimant endorsed permanent total disability ("PTD") as an issue on his Application for Hearing. At the start of the hearing, Claimant represented to the Court he was unprepared to proceed on the PTD issue. Over Respondents' objection, the ALJ placed the issue of PTD in abeyance.

FINDINGS OF FACT

1. Claimant is a 43-year-old male who worked for Employer as a carpenter.

2. Claimant has a prior diagnosis of bipolar disorder. On December 7, 2015, Claimant was admitted to the Medical Center of Aurora for unspecified psychosis. Marita Keeling, M.D. documented a past medical history of chronic neck pain, noting Claimant had a biking injury in 2004. She noted that, despite Claimant's chronic pain, he remained able to work as a carpenter and did not take any medication for his pain. Diagnoses included bipolar disorder, other chronic pain and cervicalgia. (*R. Ex. H*).

3. Claimant sustained an admitted industrial injury to his lumbar spine while working for Employer on November 11, 2020.

4. Claimant underwent treatment at authorized provider Concentra. On December 4, 2020 Claimant presented to Hanna Bodkin, PA-C with an injury to his lower back. Regarding the mechanism of injury, Claimant reported that while working on November 11, 2020 he leaned over, felt a pop in his lower back, and collapsed. He further reported that on December 2, 2020 he experienced another painful right lower back pop while working. No thoracic or cervical spine complaints were noted. PA Bodkin gave an

assessment of a lumbar sprain and derangement of the right sacroiliac ("SI") joint. She referred Claimant for physical therapy and an x-ray of the lumbar spine. (*R. Ex. D, Bates 25-28*).

5. Claimant underwent a lumbar x-ray on December 4, 2020, which Maximina Boutelis, M.D. interpreted. Dr. Boutelis noted findings were normal and the examination was unremarkable. (*R. Ex. I, Bates 175*).

6. Claimant began physical therapy at Concentra on December 7, 2020. Janice Scott, PT noted Claimant's chief complaint as right lumbar spine pain. PT Scott noted 20 degrees active range of motion of left thoracolumbar side bending and 15 degrees active range of motion of right thoracolumbar side bending. No thoracic or cervical spine complaints are noted. Treatment was administered to Claimant's lumbar spine. Claimant attended additional physical therapy sessions at Concentra on December 9, 11, 18, and 28, 2020, focused on Claimant's lumbar spine. (*R. Ex. D*).

7. Claimant continued to complain of low back pain to PA Bodkin at a follow-up evaluation on December 9, 2020. Claimant was worried he sustained more than just a muscle sprain. No thoracic or cervical spine complaints are noted. (*Id. at Bates 30*).

8. On December 24, 2020 Claimant presented to Carrie Burns, M.D. at Concentra with complaints of lower back pain and right SI joint pain radiating into his buttocks. Claimant reported suffering a thoracic injury with compression fractures in 2004. Exam of the thoracic spine was normal. Dr. Burns referred Claimant for a lumbar MRI and chiropractic care. (*Id. at Bates 36-38*).

9. Claimant attended another physical therapy appointment with Darwin Abrams, PT at Concentra on December 28, 2020. Claimant alleges he sustained a hernia while performing exercises during this physical therapy appointment. The record from this session contains no note of any reported abdominal issue. (*Cl. Ex. 4, PDF-1 p. 27 of 368*). Claimant testified he reported the issue to the physical therapy office after PT Abrams had already completed the session and left.

10. Claimant underwent a lumbar spine MRI on December 30, 2020. Only one page of the MRI report is located in the record. Stanislav Poliashenko, M.D. interpreted the MRI and noted trace degenerative retrolisthesis of L5 on S1 with otherwise anatomic alignment, no aggressive osseous lesions, intact vertebral body heights, mild degenerative disc height narrowing and L4-L5 and L5-S1, and not suspicious paraspinal soft tissue lesions or ligamentous edema. (*Id. at PDF-1 pg. 29 of 368*).

11. The physical therapy record from December 30, 2020 notes Claimant reported that at his last physical therapy session a leg lift exercise seemed to cause pain in his abdomen like an abdominal strain. *(Id. at PDF-1 p. 30 of 368*).

12. Claimant attended a follow-up evaluation with PA Bodkin on January 11, 2021. Claimant reported decreased back pain but that he experienced severe anxiety his first

night back on medication. He informed PA Bodkin that, on December 24, 2020, he vomited so hard it made his stomach muscles hurt. He further reported that during physical therapy on December 26, 2020 he felt a tearing and upper abdominal pain and developed a ripple in his upper stomach. Claimant's abdominal pain had since decreased. On examination PA Bodkin noted mild tenderness of the abdomen. She referred Claimant for physiatry and psychological evaluations. (*R. Ex. D, Bates 40-43*).

13. On January 15, 2021 PT Abrams noted Claimant reported slight improvement but continued complaints regarding his upper abdominal area. Claimant thought it might be a strain or a tear from stretching. PT Abrams noted he encouraged Claimant to consider going to a physician to clarify the issue but Claimant stated he did not have insurance. (*Cl. Ex. 4, PDF-1 pp. 44-45 of 368*).

14. On January 20, 2021 Claimant presented to the emergency department at the Medical Center of Aurora with complaints of insomnia, anger and anxiety. The provider noted a history of bipolar affective disorder. Claimant reported recent stressors included a back injury and work issues. He further reported that he had been undergoing physical therapy for his back injury and developed abrupt epigastric abdominal pain while doing leg lifts. On examination, Eric Hill, M.D. noted tenderness over xiphoid with no palpable hernia. Dr. Hill opined there was no evidence of hernia on exam. Dr. Hill discharged Claimant. (*Id. at PDF-1 pp. 46-62 of 368*).

15. On January 21, 2021 Claimant saw his primary authorized treating physician ("ATP") Frederic Zimmerman, D.O. at Concentra. Dr. Zimmerman noted a similar mechanism of injury as reported to PA Bodkin. Claimant reported having an abdominal strain that occurred during one of his physical therapy sessions, with some paresthesias and abnormal feeling in the abdominal region. Claimant's current symptoms were right-sided lumbosacral pain radiating to the upper buttock and perisacral region. There was no radiating pain in the lower extremity. Standing pain was greater than sitting pain. Dr. Zimmerman noted an MRI of the lumbar spine dated 12/30/2020 identified minimal disk degeneration at L4-L5 and L5-S1 level with minimal disk bulge on the left side of L4-L5 with no central or neural foraminal stenosis. Facet arthrosis was noted at L4-5 and L5-S1 levels bilaterally and mild to moderate bilateral neural foraminal stenosis was noted at the L5-S1 level. There was no spinal canal stenosis at any level. Dr. Zimmerman provided the following assessment: lumbar strain with standing extension based pain; minimal degenerative changes noted on MRI with no neurologic compromise; situational anxiety and adjustment/anger disorder with previous history of mood disorder; and acute worsening of chronic insomnia. Dr. Zimmerman referred Claimant for a right L5-S1 facet injection plus right SI joint steroid injection for diagnostic and therapeutic purposes. He also referred Claimant for psychological counseling. (*Id. at PDF-1 pp. 63-66 of 368*).

16. On January 28, 2021 Claimant presented to clinical neuropsychologist J. Edward Cotageorge, Ph.D. for a psychiatric diagnostic evaluation. Dr. Cotageorge noted Claimant reported chronic and ongoing pain in his upper back that was primarily due to an old injury. Dr. Cotageorge did not note any review of Claimant's prior records

or any history of bipolar disorder. Dr. Cotageorge gave the following presumptive diagnoses: chronic pain disorder due to trauma, and adjustment disorder with anxiety and depressed mood. He recommended Claimant undergo further psychological evaluation and begin cognitive behavioral therapy. (*Id. at PDF-1 pp. 75-80 of 368).*

17. On February 3, 2021 Claimant underwent a right L5-S1 intraarticular facet steroid injection and right SI joint steroid injection performed by Dr. Zimmerman. (*Id. at PDF-1 p. 81 of 368*).

18. On February 17, 2021 Claimant attended his third chiropractic session at Denver Sport & Spine for low back treatment. The record from this appointment indicates two prior sessions had occurred, the notes from which were not offered as evidence. Claimant complained of low back pain, neck pain, SI pain and upper back pain. Jason Gridley, D.C. noted, *inter alia*, intersegmental fixation, restricted motion, adjacent paraspinal hypertonicity, asymmetry, stiffness in right T10-11, L1, thoracolumbar region and right SI, bilateral L3-5, S1. Restricted motion was found bilateral at C5-7. There was mild restriction and discomfort with thoracic and lumbar facet load. He diagnosed Claimant with segmental and somatic dysfunction of the cervical, thoracic and lumbar regions and muscle spasm of the back. (*Id. at PDF-1 pp. 89-90 of 368*).

19. Claimant attended a follow-up evaluation with Dr. Zimmerman on February 18, 2021. Dr. Zimmerman noted Claimant had a diagnostic response to the injections as well as a greater than 50% therapeutic response to the injections. Claimant also saw PA Bodkin on February 18, 2021, reporting that he felt 60-70% better but that he now noticed constant pain on the left, with numbness and tingling down his left leg. (*Id. at PDF-1 pp. 91-95 of 368*).

20. On March 18, 2021 PA Bodkin referred Claimant to an orthopedic spine physician. (*Id. at PDF-1 p. 103 of 368*).

21. On March 31, 2021 Claimant presented to Maria Kaplan, PA at Orthopedic Centers of Colorado for low back pain with radiation into the right lateral hip as well as intermittent left lower extremity numbness and tingling. PA Kaplan reviewed x-rays and an MRI of the lumbar spine. She referred Claimant for bilateral L5-S1 translaminar lumbar epidural steroid injection to help with his back and leg pain. PA Kaplan noted that the majority of Claimant's symptoms were right-sided, however there was foraminal narrowing on the left-hand side at L4-L5 and L5-S1. (*Id. at PDF-1 pp. 106-107 of 368*).

22. Claimant attended a second psychological evaluation with Dr. Cotageorge on April 7, 2021. His report again does not note any reported history of bipolar disorder. Dr. Cotageorge noted that his screening showed no evidence of bipolar disorder symptoms at that time. He recommended Claimant attend eight sessions of cognitive behavioral therapy. (*Id. at PDF-1 pp. 110-115 of 368*).

23. At a follow-up evaluation with PA Bodkin on May 3, 2021, PA Bodkin noted Claimant's reported frustrations with his progress and what he felt was a lack of

treatment. She referred Claimant to Evalina Levina Burger, M.D. at UC Health for a second opinion regarding Claimant's lower back area and derangement of the right SI joint. (*Id. at PDF-1 pp. 114-119 of 368*).

24. Claimant continued to attend multiple physical therapy sessions at Concentra at which ongoing low back pain was noted. (*Cl. Ex. 4, PDF-1*).

25. On July 14, 2021 Claimant presented to Dr. Burger and Emily Broeseker, NP at Orthopaedic Spine Center at UC Health. The record notes NP Broeseker saw and examined Claimant with Dr. Burger. Claimant endorsed pain in his back, SI joint, hip and right leg. NP Broeseker reviewed lumbar spine x-rays obtained that same day noting no dynamic listhesis, no instability and possible mild degenerative disc disease at L4-L5 and L5-S1. She noted she was unable to review Claimant's lumbar MRI because the system was down. NP Broeseker opined Claimant's clinical picture did not indicate a nerve injury and, with his response to dry needling, it was likely muscle inflammation. She provided Claimant handouts regarding stretching and muscle strengthening and noted a referral to pain psychology may be needed. (*Id. at PDF-1 pp. 147-156 of 368*).

26. On July 14, 2021 Claimant underwent lumbar x-rays interpreted by Michael Durst, M.D. Dr. Durst's impression was lower lumbar disc degeneration with associated facet arthrosis and no sagittal listhesis or dynamic listhesis. (*R. Ex. I, Bates 179*).

27. PA Bodkin continued to note Claimant's reports of frustration with his symptoms and treatment. On August 18, 2021 she referred Claimant to a physiatrist for evaluation of his low back pain and to Dr. Disorbio for a psychological evaluation. (*Cl. Ex. 4, PDF-1*).

28. On August 18, 2021 Claimant underwent a repeat lumbar MRI at UC Health. Mary Kristen Jesse, M.D. provided the following impression: (1) slight interval worsening L4-L5 degenerative disc disease with more prominent central annular fissure and broad-based disc bulge; moderate left neural foraminal narrowing at this level; and (2) L5-S1 degenerative disc disease with posterior annular fissure and disc bulge causing moderate narrowing of the bilateral neural foramen similar to previous. (*R. Ex. I, Bates 183-184*).

29. On August 20, 2021 Stephen Pehler, M.D. at Orthopedic Centers of Colorado evaluated Claimant. He reviewed Claimant's recent lumbar MRI, noting bilateral neuroforaminal stenosis at L5-S1. Dr. Pehler gave an assessment of lumbar spondylosis with radiculopathy and lumbar degenerative disc disease. He recommended Claimant proceed with bilateral L5-S1 transforaminal epidural steroid injections. (*Cl. Ex. 4, PDF-1 pp. 184-185 of 368*).

30. On September 15, 2021 Claimant underwent a comprehensive biopsychosocial psychomedical evaluation with John Mark Disorbio, Ed.D. Dr. Disorbio issued a report dated September 18, 2021. He noted he reviewed records from PA Bodkin and Dr. Burns at Concentra. No history of bipolar disorder is documented in Dr. Disorbio's

medical note. Dr. Disorbio diagnosed Claimant with generalized anxiety disorder, pain disorder with related factors of anxiety and depression, and major depressive disorder-single episode mild. Dr. Disorbio also evaluated Claimant on September, 22, 2021 and referred Claimant to Sababa Health Group for cognitive behavioral therapy. (*Cl. Ex. 4, PDF-1*).

31. On the referral of Dr. Pehler Claimant underwent bilateral L5-S1 transforaminal epidural steroid injections on September 21, 2021, performed by Lauren McLaughlin-Abrams, D.O. at Peak Anesthesia and Pain Management. (*Id. at PDF pp. 200-201 of 368*).

32. On September 24, 2021 Claimant reported to PA Bodkin that the recent injections provided lower back relief. He continued to complain of pain in his right lateral spine and SI joint. (*Id. at PDF-1 p. 203 of 368*).

33. Claimant returned to Dr. McLaughlin-Abrams on October 5, 2021. Dr. McLaughlin-Abrams opined that the injection provided more than 85% ongoing relief to Claimant and recommended Claimant follow-up with Dr. Pehler. (*Id. at PDF-1 p. 214 of 368*).

34. Claimant attended multiple sessions of cognitive behavioral therapy at Sababa Health Group beginning on October 14, 2021. Joel Misler, LPC noted Claimant was in the depressed/distressed category. The records from these visits records do not document a reported history or diagnosis of bipolar disorder. LPC Misler's notes indicate Claimant was making progress at each session. (*Cl. Ex. 4, PDF-1*).

35. At a follow-up evaluation on October 25, 2021 Claimant reported to PA Kaplan his pain decreased from 6-8/10 to 3-4/10 following his most recent injections. PA Kaplan noted minimal lower extremity radiculopathy or tingling with some continued back pain that was currently manageable. She opined that if Claimant's symptoms returned she would refer him for a right-sided joint injection or possible consideration of a L5-S1 microdiscectomy or possibly discogram. (*Id. at PDF-1 pp. 240-242 of 368*).

36. Claimant also saw PA Bodkin on October 25, 2021, reporting that the injections helped for 2-3 weeks but his pain subsequently returned at a level 2-4/10. Claimant reported he was not working but was able to tolerate more activity for longer periods. (*Id. at PDF-1 pp. 244-247 of 368*).

37. At a return evaluation with PA Kaplan on November 24, 2021 Claimant reported continued low back pain without significant lower extremity radiculopathy. He rated his pain 4-7/10. Claimant reported he was unable to do any physical activities due to his pain. PA Kaplan referred Claimant for a lumbar discogram. She noted that they would discuss a possible lumbar disc arthroplasty should the results indicate L5-S1 as his pain generator. (*Id. at PDF-1 pp. 290-293 of 368*).

38. LPC Misler discharged Claimant from his care on November 30, 2021, noting Claimant had successfully completed the functional acceleration program at Sababa Health Group. (*Id. at PDF-1 pp. 299-302 of 368*).

39. Dr. Pehler reviewed surveillance video of Claimant obtained by Respondents and issued a letter dated December 22, 2021. Dr. Pehler stated that the activity levels, range of motion, and lifting capacity demonstrated by Claimant on the surveillance video was inconsistent with Claimant's most recent complaints in his office. He remarked that Claimant's documented activity levels were inconsistent with continued low back pain and SI joint instability affecting his quality of life and ability to work. Dr. Pehler opined that, although it is possible Claimant continues to suffer from a lumbar radiculopathy with his documented activity levels, it would be reasonable to consider his lumbar radiculopathy mild. (*R. Ex. C*).

40. Claimant returned to PA Bodkin on December 27, 2021 reporting feeling a little better. PA Bodkin continued to note Claimant's frustrations and stated loss of trust in his providers. He reported continued L4 tender pain with some radiation into the bilateral hips and thighs. Claimant further reported no numbness and tingling but numbness in the ball of his left foot. (*Cl. Ex. 4, PDF-1 pp. 315-319 of 368*).

41. On January 4, 2022 Dr. McLaughlin-Abrams noted Claimant was experiencing some "increased left knee and upper back and neck pain that is becoming more pronounced over the past month without an inciting event, he has just started to notice it more consistently." (*Id. at PDF-1 p. 320 of 368*). Dr. McLaughlin further noted Claimant mentioned that after a previous epidural injection in February 2021 he experienced ongoing vision changes a week later and has needed reading glasses. Dr. McLaughlin ordered x-rays of the left knee and neck.

42. On January 6, 2022 PA Bodkin notified Claimant via telephone that, upon Dr. Pehler's review of the surveillance footage, it was determined no further treatment was indicated. She informed Claimant that he was scheduled for an impairment rating evaluation and if he did not agree he could speak with his attorney regarding his options such as pursuing a DIME or seeking further treatment on his own. (*Id. at PDF-1 pp. 323-325 of 368*).

43. Dr. Burns also reviewed surveillance video of Claimant. In e-mail correspondence dated January 6, 2022, Dr. Burns stated that in the surveillance video, Claimant was clearly able to walk, climb stairs, carry heavy objects up and down stairs, squat for a prolonged time and kneel for a prolonged time with completely normal biomechanics. Dr. Burns remarked that the surveillance video was inconsistent with Claimant's presenting complaints when at evaluations. She opined Claimant's overall response to the January 2021 and September 2021 injections were favorable, that Claimant's current exam was benign, and that his complaints surrounded discomfort, not functional deficits. Dr. Burns further noted she corresponded with Dr. Pehler who no longer believed a discogram or disc replacement was necessary. She opined Claimant was approaching MMI. (*Id. at PDF-1 pp. 326-328 of 368*).

44. Claimant subsequently sought treatment outside of the worker's compensation system at Stride Community Health Center. Claimant first presented to Elizabeth Sabella, NP on January 7, 2022 with depression, anxiety and a significant history of back injury, including chronic bilateral low back pain without sciatica. She noted Claimant was involved in a complicated worker's compensation case and would return for further evaluation in one week for further assessment. (*Cl. Ex. 4, PDF-2 p. 38 of 516*).

45. On January 9, 2022 Brian Mathwich, M.D. performed a Physician Advisor Review regarding the causal relatedness of Claimant's left knee and neck complaints. Dr. Mathwich opined that Claimant's left knee and neck pain were not causally related to his work injury. In support of his opinion he noted Claimant's left knee and neck complaints did not begin until 1/4/2022, that there was no mechanism of injury consistent with Claimant's current complaints, and no physiologic justification for pain in the left knee and cervical spine beginning one year after the original injury. (*R. Ex. G*).

46. At a follow-up evaluation with NP Sabella on January 11, 2022 Claimant complained of back symptoms and abdominal wall discomfort that he reported began after a physical therapy session in December 2020. NP Sabella ordered an abdominal ultrasound. (*Cl. Ex. 4, PDF-2 pp. 60-82 of 516*).

47. Claimant underwent an abdominal ultrasound at UC Health on January 11, 2022. Gerald D. Dodd III, M.D. interpreted the results of what he deemed to be a negative study. He stated there was no evidence of an abdominal wall hernia. He noted 1.3cm wide linea alba in the upper abdominal wall with no protrusion of abdominal contents or accentuation of the distance with Valsalva. No underlying intra-abdominal abnormality was identified. (*Id. at PDF-2 pp. 57-58 of 516).*

48. At a follow-up examination with NP Sabella on January 13, 2022 Claimant reported upper back pain. NP Sabella noted Claimant had sustained trauma to his upper back in the form of multiple vertebrae fractures 15 years prior. She referred Claimant for an x-ray and MRI of the thoracic spine. (*Id. at PDF-2 pp. 83-98 of 516*).

49. An MRI and x-rays of the thoracic spine were performed on January 21, 2022. Michael Kershen, M.D. provided the following impression of the thoracic MRI: multilevel disc dessication and height loss with a few associated small bulges and protrusions most notable protrusion is seen centrally at the T7-T8 level with mild spinal stenosis and mild flattening of the spinal cord; no significant neural foraminal stenosis; no acute or aggressive bone lesion. Chronic Schmori's nodes noted. Kevin Wooley, M.D. provided the following impression of the thoracic x-rays: chronic T5 vertebral compression deformity similar to previous thoracic spine MRI; scoliosis and mild degenerative change. (*Id. at PDF-2 pp. 99-104 of 516*).

50. On January 22, 2022 Dr. Woolley issued addendums to his x-ray report stating that the compression deformity identified on the current examination is at the T4

vertebral level as shown on the MRI study from the same date. He noted that upon comparison with the thoracic spine x-rays, there is a chronic compression deformity of the T4 vertebra with 20% loss of the vertebral body height. (*Id. at PDF-2 pp. 105-106 of 516*).

51. On January 25, 2022 Dr. McLaughlin-Abrams noted Insurer denied authorization of the requested left knee and neck x-rays. Claimant reported right lateral and anterior hip pain, left knee pain, mid back pain, low back pain and neck pain. Dr. McLaughlin-Abrams again noted Claimant was also experiencing some increased left knee and upper back and neck pain that was becoming more pronounced over the past few months without an inciting event. (*Id. at PDF-2 pp. 331-334 of 368*).

52. On January 26, 2022 NP Sabella reviewed Claimant's thoracic x-ray and MRI and remarked that the MRI showed possible reasons for Claimant's pain. She referred Claimant to a spine specialist, noting Claimant may benefit from injections if indicated by the specialist. (*Id. at PDF-2 pp. 117-128 of 516*).

53. Authorized treating physician ("ATP") Dr. Zimmerman performed an impairment rating evaluation on January 27, 2022. Claimant reported to Dr. Zimmerman nothing had changed over the course of his treatment and that he had experienced a year of chronic pain. Claimant further reported that his low back pain returned and that he had since underwent a new MRI which Claimant claimed discovered a herniated disc. Dr. Zimmerman noted that the lumbar injections in September 2021 only provided Claimant three weeks of relief before his symptoms returned. On examination, Dr. Zimmerman noted motion and sensation were grossly intact in both lower extremities, deep tendon reflexes were 2+/4 in the bilateral lower extremities, and straight leg raise and neural tension were negative bilaterally. He performed lumbar range of motion measurements with 2 standard inclinometers, detailing his three sets of measurements and determining the measurements were valid. (*R. Ex. B*).

54. Dr. Zimmerman's final assessment was: (1) lumbar strain with extension based pain, temporary therapeutic response to facet steroid injections; (2) MRI evidence of mild-to-moderate disk degeneration and bilateral neuroforaminal stenosis at L5-S1 based on MRI dated 12/30/2020; (3) history of situational anxiety, adjustment disorder, and previous history of mood disorders. Unreliable with regard to antidepressant medication use; (4) history of insomnia; and (5) no further medical treatment offered after Dr. Pehler reviewed surveillance video. (*Id.).*

55. Dr. Zimmerman placed Claimant at MMI. Using the AMA Guides, Dr. Zimmerman assigned a combined 16% whole person impairment rating. The rating consisted of 7% rating under Table 53(II)(C) for a lumbar strain with mild-to-moderate spondylitic changes and ongoing symptoms, along with 10% impairment for deficits in lumbar range of motion. He recommended permanent restrictions as outlined by PA Bodkin, and 6-12 months of maintenance medical treatment in the form of medication. (*Id.*).

56. On January 31, 2022, Claimant saw Barry Alan Ogin M.D. at Colorado Rehabilitation & Occupational Medicine on a previous referral from Dr. Pehler for Claimant's chronic axial low back pain. Dr. Ogin noted Claimant's current main complaint was axial lower lumbar pain with some occasional radiation down the left leg. Claimant had secondary complaints of mid back pain radiating up to the upper back and lower neck region, which Dr. Ogin noted became more prominent since about mid-October when Claimant had a flareup. Dr. Ogin further noted Claimant attributed those symptoms to physical therapy and Claimant was unsure if his mid and upper back pain was related to his initial occupational injury. On examination, Dr. Ogin noted lumbar tenderness and pain with flexion and extension, mild tenderness in lower thoracic region, full cervical range of motion without pain. While supine, straight leg raise increased pain in his back and buttocks bilaterally with no pain in the hip on internal or external rotation. When seated straight leg raise was negative bilaterally with no pain with hip internal or external rotation. (*Cl. Ex. 4, PDF-1 pp. 340-344 of 368*).

57. Dr. Ogin referenced Claimant's August 18, 2021 lumbar MRI and prior psychological testing. He assessed Claimant with a lumbar disc herniation, low back pain, lumbar degenerative disc disease and a lumbar sprain. He noted a lumbosacral discography had been scheduled for 1/31/2022 but was cancelled due to the request for the discography being withdrawn by the surgeon. Dr. Ogin noted there were obvious concerns as to whether would be a good surgical candidate, including psychosocial issues, and reviewed with Claimant that a discogram would only be appropriate if he is already been deemed a surgical candidate should he have a positive discogram. He opined that, in the event Claimant had a positive discogram and Dr. Pehler determined Claimant is a good surgical candidate, he would first need to be cleared by a psychologist prior to any interventional care. Claimant was to return on an as-needed basis. (*Id.).*

58. Claimant saw PA Bodkin for a final appointment on February 1, 2022. PA Bodkin noted Claimant was not happy and disagreed with the outcome of his case and had many remaining questions along with concerns that many of the medical reports needed amending. She further noted Claimant's report that he did not trust any of his providers despite her telling him she does not work for Employer or Insurer. On examination, PA Bodkin noted no tenderness and full range of motion of the thoracic spine, mild tenderness in the left and right paraspinals of the lumbosacral spine with bilateral muscle spasms and limited range of motion. The final assessment noted was: 1) Lumbar disc herniation; 2) Derangement of right SI joint; 3) Acute stress reaction; and 4) Lumbar sprain. Claimant was placed at MMI as of February 1, 2022 with 16% whole person impairment and permanent restrictions of no lifting greater than 50 lbs. PA Bodkin recommended 12 months of maintenance medications. Dr. Burns completed a Physician's Report of Worker's Compensation Injury on February 1, 2022 consistent with the reports of PA Bodkin and Dr. Zimmerman. (*Id. at PDF-1 pp. 345-349 of 368*).

59. On the referral of NP Sabella, Claimant saw NP Broesker at UC Health Spine Center on February 14, 2022. Claimant reported experiencing three weeks of relief from injections with subsequent return of low back pain and left leg numbness. Claimant also

endorsed thoracic spine muscle spasms and discomfort, as well as an abdominal hernia that worsened in physical therapy. NP Broesker assessed Claimant with lumbar degenerative disc disease and myofascial pain syndrome of the thoracic spine. She noted that options included repeat left L4-L5 and L5-S1 injections versus obtaining an updated lumbar MRI. NP Broesker further noted that the January 2022 thoracic showed multilevel disc degeneration with no concern for instability, central stenosis or foraminal stenosis. She discussed with Claimant that there is not a surgery that would make his upper back feel better and that he likely had a muscle strain and spasm. She further discussed stretching and exercises for his upper back. (*Cl. Ex. 4, PDF-2 pp. 128-150 of 516*).

60. Upon review of surveillance video of Claimant taken in the summer of 2021, Dr. Zimmerman issued a letter dated February 18, 2022. Dr. Zimmerman agreed with Dr. Pehler's opinion dated December 22, 2021 that the video surveillance activity is inconsistent with the complaints Claimant has in office. He further agreed with Dr. Burns' January 6, 2022 opinion that the surveillance video showed physical abilities that are inconsistent with Claimant's complaints in clinic and that Claimant was MMI at the time. Nonetheless, Dr. Zimmerman opined that the surveillance video did not provide any conclusive evidence that his impairment rating should be changed. He explained that the impairment rating he assigned under Table 53(II)(C) of the AMA Guides is for Claimant's underlying lumbar spondylosis confirmed by MRI and his ongoing symptoms. Dr. Zimmerman further explained that the video surveillance did not conclusively demonstrate Claimant's ability to extend beyond what was seen on his examination. Dr. Zimmerman remarked that Claimant has established himself as a very unreliable historian and repeatedly embellished his pain symptoms in the clinic. He continued to opine Claimant is at MMI with no further medical treatments indicated other than the maintenance medications for 6 to 12 months as documented in the impairment rating evaluation. (*R. Ex. B, Bates 23*).

61. On the referral of NP Sabella, Claimant presented to Angela Bohnen, M.D. at NeurosurgeryONE Clinic on February 28, 2022. Dr. Bohnen noted that a 2005 mountain biking accident revealed a T4 compression fracture resulting in mid back pain between Claimant's shoulder blades which improved over time. Dr. Bohnen documented Claimant's report of the 11/11/2020 work injury in which he felt a pop in his back and radiating pain into his lower extremity with pain ever since. Claimant reported that the February 2021 injections resulted in significant improvement in his right lower back and buttocks pain but no change in his other pain. Dr. Bohnen noted that the lumbar injection in September 2021 may have helped Claimant's left lower extremity pain but not his back. Claimant's primary complaint was low back pain radiating up to the base of his neck. Claimant reported subjective right lower extremity weakness and also neck pain radiating down into his arms. Dr. Bohnen noted Claimant did not feel like he had gotten a definitive answer for his pain. On examination Dr. Bohnen noted no tenderness to palpation to cervical and thoracic spine. Straight leg raise, FABER's and Spurling's tests were all negative bilaterally. (*Cl. Ex. 4, PDF-2 pp. 151-155 of 516*).

62. Dr. Bohnen reviewed the January 2022 thoracic MRI and x-rays as well as the August 2021 lumbar MRI. She diagnosed Claimant with thoracic compression fracture and back pain. Dr. Bohnen remarked,

> Overall, there is no structural cause for his pain. That being said, he does have symptoms. He is quite honed in on the symptoms and is frustrated with the process that he has gone through and does not understand how he can still be in pain if all of his imaging is negative. Overall, he does have an old impression fracture and some degenerative changes in his thoracic spine. I talked to him about doing CT spectroscopy to evaluate for any 1 potential inflammatory ictus, that could be then targeted. I think we should do this in the thoracic and lumbar. Somebody has brought up to him a potential lumbar disc replacement; however, the patient has not undergone a disco gram and ultimately schedule for the end of the month but then canceled for a reason I cannot understand. At this point the patient is not a surgical candidate.

(*Id. at PDF-2 pp. 154-155 of 516*).

Dr. Bohen noted she needed to look into potential pain generators and then determine next steps. She referred Claimant for a CT spectroscopy of the thoracic and lumbar spine and a L4-L5, L5-S1 discogram.

63. Respondents filed a Final Admission of Liability ("FAL") on March 2, 2022, admitting to 16% whole person impairment and reasonable, necessary and related medical treatment and/or medications after MMI. (*R. Ex. AA*).

64. Claimant objected to the FAL and filed an Amended Notice and Proposal and Application for a DIME on March 18, 2022, requesting evaluation of the following body parts/conditions: psychological, cervical spine, thoracic spine, lumbar spine, hernia, and vision.

65. On April 4, 2022, David Orgel, M.D. was selected and confirmed as the DIME physician. A DIME appointment was scheduled for June 9, 2022.

66. Claimant appeared for the DIME appointment with Dr. Orgel on June 9, 2022 after having provided additional records to Dr. Orgel that had not been exchanged in accordance with WCRP 11. Accordingly, Dr. Orgel was unable to proceed with the DIME as scheduled on June 9, 2022.

67. The parties attended multiple prehearing conferences regarding various issues, including, inter alia, requests to terminate the DIME process, payment of DIME cancellation and rescheduling fees, documents to be provided to the DIME physician, and body parts to be examined by the DIME physician. The orders from these conferences are incorporated herein by reference. Claimant was represented by

counsel at some of these prehearings, including the prehearing most recent to the rescheduled DIME appointment. (*Cl. Ex. 4, Ex. 6*).

68. The parties negotiated additional material to be considered by the DIME physician. Ultimately, the body parts and conditions to be considered by the DIME physician were the cervical, thoracic and lumbar spine, SI joint, hernia, psychological and visual. (*R. Ex. W*).

69. Claimant underwent a bone spectroscopy/CT on March 9, 2022 that was compared to his August 2021 lumbar MRI and January 2022 thoracic MRI. Olrin Hopper, M.D. interpreted the results and provided the following impression: No scintigraphic evidence of abnormal osteoblastic tibia involving the thoracic or lumbar spine on the planar or spectroscopy or CT images. (*Cl. Ex. 4, PDF-2 pp. 166 of 516*).

70. On March 15, 2022 Claimant saw Thomas Christopher Sanders, PA-C at the Colorado Comprehensive Spine Institute. Claimant presented with diffuse spinal pain, most severe at the lumbosacral junction and base of the cervical spine. PA Sanders noted Claimant's neck became a greater issue after he was involved in a mild motor vehicle Collison ("MVC"). PA Sanders reviewed Claimant's July 2021 lumbar x-rays, August 2021 lumbar MRI, and January 2021 thoracic x-rays and MRI. He noted that x-rays obtained the day of his examination revealed focal degeneration at C5-6 with advanced disc space collapse and associated facet arthrosis. There was osteophytic spurring present along both the dorsal and ventral vertebral body at the level of the disc space. Cervical lordosis was 30 degrees. PA Sanders diagnosed Claimant with spondylosis of cervical region without myelopathy or radiculopathy; cervicalgia; spondyloarthropathy of the lumbar spine; chronic bilateral low back pain; and cervical degenerative disc disease. He recommended Claimant undergo a medial branch block at L5-S1 bilaterally and referred Claimant for a cervical spine MRI. (*Id. PDF-2 at pp. 174-181 of 516*).

71. Claimant underwent a cervical spine MRI on March 23, 2022. Benjamin Aronovitz, M.D. interpreted the results and provided the following impression: moderate degenerative changes including multilevel severe neural foraminal narrowing. (*Id. at PDF-2 pp. 224-225 of 516*).

72. On March 29, 2022 PA Sanders noted that the clinical reviewer with Claimant's primary health insurance provider, Bright HealthCare, denied his request for a medial branch block/facet procedure because Claimant's pain was too diffuse. PA Sanders disagreed with the denial, noting Claimant had focal pain at the lumbosacral junction consistent with facet mediated pain. (*Id. at PDF-2 p. 252 of 516*).

73. On April 5, 2022 Claimant saw Audrey Beth Sindic, PA-C at the Colorado Comprehensive Spine Institute. Claimant's chief complaint was gradually worsening neck pain with bilateral upper extremity numbness. PA Sindic reviewed Claimant's cervical x-rays and MRI, which she noted demonstrated degenerative disc disease and bilateral facet arthropathy. Given Claimant's ongoing complaints of neck pain, she

concluded it was reasonable to begin with a potent anti-inflammatory and physical therapy. Surgical intervention for cervical spine was not recommended at that time. PA Sindic noted Claimant also vocalized concern for his lumbar spine pain. She encouraged him to gather his medical records for her review to determine next steps. (*Id. at PDF-2 pp. 257-262 of 516*).

74. On the referral of PA Sindic, Claimant began physical therapy for his cervical spine at Accelerate Physical Therapy on April 8, 2022. The record of this session documents that Claimant began to note the onset of neck pain in May 2021. Claimant reported he underwent injections for his low back in September 2021 and noted increased complaints of neck pain two weeks later. The physical therapist noted Claimant was involved in a MVC on 10/8/2021 in which he was the third car involved in a rear-end collision on the highway. Claimant underwent approximately 27 sessions of physical therapy at Accelerate Physical Therapy from April 8, 2022 through August 23, 2022. (*Cl. Ex. 4, PDF-2*).

75. On April 13, 2022 Claimant requested that NP Sabella provide a referral to the Colorado Comprehensive Spine Institute for evaluation of his lumbar spine. (*Id. at PDF-2, p. 282 of 516*).

76. On May 17, 2022 PA Sindic noted Claimant's continued neck and back complaints. She remarked that x-rays obtained on the day of this examination demonstrated mild evidence of osteoarthritis in the bilateral hips, well-maintained vertebral disc height spaces in the lumbar and thoracic spine, and evidence of degenerative disc disease mild at C3-C4 and moderate at C4-C5 and C5-C6. There was also mild degenerative disc disease at L5-S1. PA Sindic referred Claimant to Kevin Schmidt, M.D. for cervical facet injections at C4-C5 and C5-C6. (*Id. at PDF-2 pp. 322-337 of 516*).

77. On May 19, 2022 PA Sindic recommended proceeding with a right L5-S1 intra-articular facet steroid injection given Claimant's complaints of axial low back pain and his positive response to previous lumbar injections. She noted Claimant's lumbar MRI demonstrated evidence of facet arthropathy at L4-L5 and L5-S1 in addition to mild to moderate foraminal narrowing noted on the left at L5-S1. (*Id. at PDF-2 pp. 341-343 of 516*).

78. On May 22, 2022 Claimant wrote a note to PA Sindic in his online health record at Colorado Comprehensive Spine Institute. He wrote, "I verbally stated and from all past medical history that I have pain in my SI joint, numbness in my foot, sharp pains in my SI joint and L5-S1 since 11/20, pain in spine above L5-S1 feels catering to injury, upper back and neck bothersome since 3/21." (*Id. at PDF-2 p. 346 of 516*).

79. On May 23, 2022 PA Sindic issued an addendum to a May 17, 2022 lumbar x-ray noting retrolisthesis appreciated at L5-S1 with dynamic instability appreciated on flexion-extension views. There was subtle retrolisthesis at L4-L5 with no dynamic instability. (*Id. at PDF-2 p. 346 of 516*).

80. At a follow-up evaluation with PA Sindic on June 2, 2022 Claimant's chief complaint was a decreased ability to tolerate a standing position secondary to back pain. PA Sindic placed an order for injections. (*Id. at PDF-2 pp. 352-358 of 516*).

81. On June 14, 2022 Claimant underwent bilateral C4-C5 and C5-C6 facet injections performed by Dr. Schmidt. During a follow-up telephone call with Dr. Schmidt's office on June 15, 2022, Claimant reported improvement in his pain following the injections. He rated his pain at level 2-3/10. (*Id. at PDF-2 pp. 366 & 425 of 516*).

82. On June 17, 2022 [Redacted, hereinafter LG] at Colorado Comprehensive Spine Institute noted Claimant called the clinic asking why he was escorted off the hospital site the day prior. Claimant stated he wanted someone to be held accountable for the situation. (*Id. at PDF-2 p. 428 of 516*).

83. On June 20, 2022 NP Sabella referred Claimant to the pain clinic for evaluation of his back and to general surgery for evaluation of an abdominal wall bulge. (*Id. at PDF-2 pp. 433-436 of 516*).

84. On June 21, 2022 Farah L. Broomandi at the Colorado Comprehensive Spine Institute noted she spoke with Claimant and informed him that he would be allowed into Dr. Schmidt's clinic for care, but that he would need to sign a behavior plan with set expectations. (*Id. at PDF-2 p. 439 of 516*).

85. On June 28, 2022 Ms. Broomandi noted that a discharge letter would be sent to Claimant due to changes in the June 21, 2022 decision regarding allowing Claimant's care at Dr. Schmidt's clinic. (*Id*.).

86. Claimant returned to NP Broesker on July 11, 2022. He was scheduled to undergo L5-S1 right facet and right SI joint injections that day for diagnostic purposes. (*Id. at PDF-2 pp. 447-463 of 516*).

87. On the referral of NP Sabella, Claimant presented to Kevin Bradley Rothschild, M.D. at University of Colorado Medicine Surgery Department on August 8, 2022. Claimant complained of left upper quadrant abdominal pain. Claimant reported that approximately 1.5 years prior he was in the process of performing a core exercise in physical therapy and felt something pop. He further reported that he lived for a year and a half with something bulging and flopping out of his abdomen, and then over the last year or six months or so it improved. Dr. Rothschild noted a January 2022 abdominal ultrasound showed essentially a small rectus diastases with just a very modest separation of the rectus musculature without any hernia. On examination, Dr. Rothschild noted that with Valsalva he could appreciate a very small rectus diastases without any appreciable bulge. He did not feel a hernia. Dr. Rothschild further noted that Claimant pointed several times to the left costal margin just off the midline of his abdomen indicating there was a bulge, but after repeating the examination for a total of three

times, Dr. Rothschild did not appreciate a bulge and in fact felt normal rectus musculature with no sign at all of any hernia. (*Id. at PDF-2 pp. 485-492 of 516*).

88. Dr. Rothschild provided an assessment: of rectus diastases. He wrote,

> I spent about 10 minutes talking to the patient about the fact that I do not appreciate a hernia in that area that I have never really found any hernia in that area in my practice and that it's not an area that I am familiar with for someone to develop a defect. I talked to him about the nature of her (*sic*) rectus diastasis and that this is not a true hernia and in his case he has a very small one that is actually is (*sic*) not even bulging with Valsalva. After this he insisted that he had a defect and asked me on several occasions to repeat his exam and after several request I refused and told him that the visit was over as I did not see any surgical indication here. Patient absolutely refused to leave his clinic visit at this point insisting that both the MAs or anyone in the area repeat his exam for a quote 'second opinion'. I explained again my opinion and asked him to please leave and he refused. Sitting the (*sic)* exam room and demanding that he get a second opinion and another ultrasound. I eventually asked for security to escort the patient out (he asked the security guard to examine his abdomen).

(*Id. at PDF-2 p. 488 of 516*).

89. Claimant returned to NP Sabella on August 22, 2022. NP Sabella noted she deferred examination because Claimant was recording the appointment without her consent or prior notice. She noted a diagnosis of a strain of the rectus abdominis muscle. Claimant requested that NP Sabella order another abdominal ultrasound. (*Id. at PDF pp. 505-507 of 516*).

90. On August 31, 2022 Claimant underwent a x-rays of his cervical spine, ordered by Dr. Burger. MK Jesse, M.D. interpreted the results and gave the following impression: degenerative disc disease greatest at C5-C6 with no pathologic listhesis. (*Id. at PDF-2 pp. 513-514 of 516*).

91. On August 31, 2022 Claimant also saw Lisa Allison Malyak, M.D. at the Orthopaedic Spine Center. Claimant reported being frustrated with different opinions from different physicians. He further reported that he could not stand for more than 10 minutes without experiencing significant pain. Dr. Malyak noted she had extensive discussion with Claimant and Dr. Burger regarding Claimant's old prior thoracic disc herniation. She noted that the prior thoracic disc herniation had since healed but still appeared abnormal on imaging, which is to be expected. She further noted that Claimant does not have any pathology on his cervical or lumbar spine MRIs concerning for cord compression or abnormal signal changes. Dr. Malyak opined no surgical intervention was indicated at that time. Dr. Burger noted she saw and evaluated

Claimant and discussed the case with Dr. Malyak and agreed with the findings and plan as documented. (*Id. at PDF-2 pp. 498-501 of 516*).

92. On September 8, 2022 Claimant presented to Mile High Spine and Pain Center with complaints of low back pain radiating down his left side for the past two years. Claimant reported that the pain wrapped around the front of his groin on the left. Claimant also reported neck pain that began the same time two years ago with radiation down both sides of his neck and shoulders. Diagnoses included other low back pain, muscle spasm of the back, right and left side sciatica, lumbar radiculopathy, right and left leg pain, cervicalgia, cervical radiculopathy, other cervical disc degeneration, other lumbar disc degeneration, and thoracic spine pain. Courtney Williams, M.D. recommended Claimant undergo lumbar and SI trigger point injections, physical therapy, chiropractic treatment, platelet rich plasma injections, and a lumbar decompression. (*Cl. Ex. 7*).

93. Dr. Orgel conducted the DIME on October 20, 2022, noting the scope of his exam as the cervical, thoracic, and lumbar spine, sacroiliac joint, hernia, psychological and visual. Dr. Orgel spent two hours and six minutes with Claimant reviewing his history and performing a physical examination and impairment rating. Dr. Orgel reviewed over 360 pages of records in the initial DIME packet, along with 516 pages in the supplemental DIME packet. Dr. Orgel issued a report using Division form WC201 in which he detailed his records review, his physical examination, and Claimant's reported subjective history. He further identified and discussed several issues he deemed pertinent to his analysis, providing explanations for his conclusions. (*R. Ex. A*).

94. Dr. Orgel noted Claimant's reported dissatisfaction and frustration with his course of treatment. Claimant complained of chronic pain in his axial low back, left lateral hip and leg, and left upper quadrant. Claimant also complained of midthoracic back pain, which Dr. Orgel noted Claimant,

> [a]dmits to having pain in this area before this injury, but he states that this midthoracic pain and cervical pain began sometime in mid February or March, he's not sure why but there was no incident, he feels this may be related to his ongoing low back complaints and lack of treatment for the back pain or his posture."

(*Id. at Bates 9*).

Claimant further reported experiencing changes in his vision after receiving a back injection on February 3, 2021.

95. On examination, Dr. Orgel noted palpation of the abdominal wall did not reveal significant diastases recti or ventral hernias. Claimant pointed to his upper lateral rectus abdominis as the area of the original swelling and reported that it was not currently present and had improved. There was limited range of motion of the neck in all planes without axial cervical spine tenderness or significant trigger points or spasm.

Compression test was negative. Dr. Orgel noted scoliosis in the thoracic spine without tenderness, and full range of motion of the thoracic back without pain and trigger points. There was flattened lumbar lordosis with bilateral paraspinal muscle spasms, without sacroiliac discomfort or swelling, and no axial lumbar spine tenderness. Babinski, straight leg raising and Faber tests were negative. There was no weakness noted in either extremity. He documented three sets of lumbar range of motion measurements, which he noted were valid. (*R. Ex. A*).

96. Dr. Orgel detailed the findings of Claimant's multiple diagnostic tests in his records review. In a separate section of his report he specifically noted that the August 18, 2021 lumbar spine MRI "indicated some worsening of the degenerative disc disease at L4 5 with a more prominent central annular fissure and moderate left neuroforaminal narrowing. At L5 S1 there was a posterior annular fissure and disk bulging causing moderate bilateral neuroforaminal narrowing similar to the prior MRI." (*Id. at Bates 11*). He further noted that diagnostic testing revealed moderate bilateral cervical facet arthritis as well as bilateral foraminal narrowing throughout the cervical spine. Regarding the January 21, 2022 thoracic MRI, he remarked that it showed:

> [m]ultilevel disc desiccation and height loss with a few associated small bulges in protrusions most notable T7 T8 with mild spinal stenosis and mild flattening of the spinal cord. A compression deformity is noted at T4 with 20% loss of vertebral height characterizes a chronic depression deformity. There is no significant foraminal stenosis. There are chronic Scmorl's nodes noted. An x-ray of the thoracic spine suggest a mild compression deformity of the T5 vertebrae was 20% loss of height.

(*Id*.)

97. Dr. Orgel noted that a biopsychosocial psychomedical evaluation on September 18, 2021 did not document a history of bipolar disorder and deemed Claimant's condition work-related. He opined, however, that recurrent behavioral issues were noted in the record and appeared to be long-standing and stable, consistent with a personality disorder, as well as Claimant's diagnosed bipolar disease. Dr. Orgel therefore concluded that Claimant's psychological assessment was based on insufficient and incomplete information and was not correct. (R. Ex. A).

98. Dr. Orgel provided the following clinical diagnoses:

> Work-related lumbar strain
>
> Non-work-related cervical and thoracic pain, presbycusis and diastases recti
>
> Significant pre-existing psychological condition. He apparently was placed on an involuntary one week hold in the past. In addition, the behaviors as outlined in the record and in the office on my 1st meeting with him suggest

> some element of thought disorder, delusion, or more likely personality disorder. This is not work-related.

(*Id. at Bates 12*).

99. Dr. Orgel opined Claimant reached MMI on January 27, 2022. Using the AMA Guides, Dr. Orgel assigned Claimant a combined 20% whole person impairment, consisting of 7% impairment under Table 53(II)(C) and 14% impairment for lumbar range of motion deficits. Dr. Orgel explained that the record supported a work-related back injury, and despite his lack of improvement and expanding complaints, his exam of Claimant was consistent with ongoing back pain. He opined there was no separate impairment for the sacroiliac joint, as Claimant's primary complaint is related to the lumbar spine and the results of the Faber test on his examination was negative. Dr. Orgel explained there was no impairment for the cervical or thoracic spine for reasons discussed in his reports, noting Claimant had a prior thoracic injury, there was a lack of mechanism of injury, there no temporal relation, and there was an intervening cervical event in terms of the MVC. He noted he did not assign any abdominal or visual impairment as those conditions were not work-related. He further opined Claimant did not have any psychological impairment as his current psychological condition was preexisting and non-work related. (*R. Ex. A).*

100. As medical maintenance care Dr. Orgel recommended one year of follow-up with a physiatrist for medication management and as needed injections. He did not recommend any permanent restrictions. (*Id.*).

101. On October 26, 2022 Claimant presented as a new patient to Dallas Melvin Bogner, M.D. at Centura Health. Claimant reported that on November 11, 2020 he was smashing concrete with a sledgehammer and experienced back issues in which he felt a pop in his low back that radiated to his buttock and SI joint. Dr. Bogner noted Claimant underwent injection therapy to his low back in February 2021 and had an "odd complaint of vision issues, blurred." (*Cl. Ex. 7*). Claimant further reported cervical and thoracic pain and alleged an injury on the left rectus abdominal muscle from physical therapy. Dr. Bogner noted Claimant had been evaluated by the surgery department, who found mild rectus diastasis, but no hernia. He further noted an ultrasound did not reveal a hernia. Dr. Bogner provided an assessment of chronic midline low back pain without sciatica and referred Claimant for physical therapy and pain management.

102. On October 25, 2022 the DOWC issued a notice to the parties stating the DIME Unit was in receipt of Dr. Orgel's sufficient DIME report and the DIME process had thus concluded. (*R. Ex. Q*).

103. Respondents filed a FAL on October 26, 2022 consistent with Dr. Orgel's DIME report, admitting for 20% whole person impairment and reasonable, necessary and related medical treatment and/or medications after MMI. (*R. Ex. R*).

104. Claimant attended multiple physical therapy sessions at Select Physical Therapy between November 4, 2022 and February 13, 2023, reporting back and leg pain. (*Cl. Ex. 7*).

105. On November 8, 2022 Claimant filed an Objection to the FAL and an Application for Hearing challenging Dr. Orgel's DIME report and endorsing the issue of maintenance medical benefits. (*R. Ex. O, Ex. P*).

106. On November 22, 2022 Claimant saw Erin Colleen Zahradnik, M.D. at Centura Health on the referral of Dr. Bogner. Claimant reported mid and low back pain, as well as neck pain, left greater than right, with numbness in the left index finger and bilateral shoulders. Dr. Zahradnik requested to review of all of Claimant's records before determining if he would benefit from any further procedures, including additional cervical injections. (*Cl. Ex. 7*).

107. On December 29, 2022 Claimant presented to Todd F Vanderheiden, M.D. at Panorama Orthopedics & Spine Center for evaluation of his neck and back pain. Claimant reported that his symptoms began in November 2020 while slamming concrete with a sledge hammer at work, and that he then exacerbated his lower back symptoms three weeks later while working on a different project. Claimant complained of ongoing neck, mid back and low back pain and slight pain radiating down the legs mainly on the right. Dr. Vanderheiden noted that a March 23, 2022 cervical MRI demonstrated multilevel degenerative disc disease, a January 21, 2022 thoracic MRI demonstrated multilevel thoracic degenerative disc disease with evidence of Schmorl's nodes and Scheuermann's discs without kyphosis, and a December 30, 2020 lumbar spine MRI demonstrated degenerative changes from L4-S1. Dr. Vanderheiden's primary diagnoses were cervicalgia and cervical degenerative disc disease; his secondary diagnoses were thoracalgia, thoracic degenerative disc disease, multiple thoracic Schmorl's nodes, thoracic Scheuemann's discs without kyphosis; his tertiary diagnoses were L4-S1 degenerative disc disease and lumbago; and his quaternary diagnosis was work injury 11/2020. He opined there were no surgical indications, noting there was no malalignment, instability, or significant neurological compression. He recommended Claimant consult with a nonoperative spine specialist. (*Id.*).

108. Claimant returned to Dr. Zahradnik on January 4, 2023. Claimant reported experiencing relief from the right SI joint injection and right L5-S1 facet injections with Dr. Zimmerman in February 2021. He further reported experiencing 60% relief of his pain for three months after undergoing cervical injections in June 2022. Dr. Zahradnik noted Claimant's pain on her examination was consistent with both facet mediated pain and right SI joint mediated pain. She recommended starting with L4-5 and L5-S1 medical branch blocks for consideration of radiofrequency ablation, and then considering a right SI joint injection. (*Id.*).

109. On January 19, 2023 Claimant underwent bilateral L3, L4 and L5 medial branch blocks performed by Bryan Gary Wernick, M.D. at Centura Health. Claimant

reported significant alleviation of his pain for several hours after the medical branch blocks. (*Id.*).

110. Claimant's Exhibit 3 contains portions of audio recording of his evaluations with Dr. Zimmerman on January 27, 2022, PA Bodkin on February 1, 2022, NP Broesker on February 14, 2022 and Dr. Orgel on June 9, 2022. Claimant recorded and edited the recordings. Claimant is heard on the recordings vocalizing continued symptoms and concerns that his conditions were not fully addressed or resolved.

111. Claimant testified at hearing regarding his frustrations and dissatisfaction with his injury, course of treatment, providers, Employer, Insurer, counsel, the workers' compensation system and his personal physicians. Claimant testified that some of the medical records do not accurately reflect his reports to his providers or the true nature of his symptoms and condition. Claimant testified there are missing medical reports, which he identified as an x-ray from his December 4, 2020 evaluation, an incomplete MRI report from December 30, 2020, and two chiropractic reports from February 2021 in which the provider noted back and neck issues. Claimant alleges Respondents destroyed some other records, which he did not identify. He further testified that on March 31, 2021 he completed a written intake form indicating neck issues but that it was deleted by a third party and replaced with a digital copy that does not reflect his reported neck and other issues. Claimant testified Respondents delayed in, but ultimately provided, other records. Claimant stated he has been seeking real answers to, and resolutions for, his symptoms and he feels he has been written off.

112. Claimant further testified that, despite his prior thoracic spine injury in 2004 or 2005, he has worked ever since. He stated the symptoms he developed after the November 11, 2020 work injury were not present prior to the work injury. Claimant denies a history of bipolar disorder or psychological problems. He testified that Dr. Cotageorge, Dr. Disorbio, LPC Misler did not note any diagnosis of bipolar disorder in their notes. Claimant testified Dr. Orgel "distorted" everything and erred in his DIME opinion by placing him at MMI. He testified Dr. Orgel attributed everything to pre-existing conditions and failed to give an impairment rating for his cervical spine, thoracic spine, vision issues and abdomen. Claimant further testified Dr. Orgel referenced a December 2020 physical therapy record, but did not note the included findings and diagnoses regarding his cervical and thoracic spine. He testified that he is entitled to an impairment rating for his cervical spine based on having objective evidence of pathology on his imaging and over six months of treatment to his neck. Claimant testified that the October 2021 MVC in which he was involved was very minor and did not result in any neck issues. Claimant additionally testified that the medical records support a diagnosis of rectus diastases, which he believes is related to the work injury. He further stated that he suffered from vision issues which were not documented when he reported them to his providers, and that physicians subsequently incorrectly attributed the vision issues to old age. Claimant testified he is immobile and continues to experience symptoms and require treatment.

113. The ALJ finds the opinions of DIME physician Dr. Orgel and treating physicians Drs. Zimmerman, Burns, and Pehler, as supported by the medical records as well as the opinions of Claimant's multiple personal physicians, more credible and persuasive than Claimant's testimony and any other conflicting opinions.

114. Dr. Orgel properly applied the AMA Guides in his determination of MMI and permanent impairment.

115. Claimant failed to provide clear and convincing evidence demonstrating Dr. Orgel erred in his DIME opinions on MMI and permanent impairment.

116. Claimant failed to prove by a preponderance of the evidence treatment of the cervical spine, thoracic spine, SI joint, abdomen, vision or psychological condition is reasonable, necessary and causally related.

117. Claimant failed to establish by a preponderance of the evidence the post-MMI treatment Claimant sought with various providers outside of his ATPs and specific referrals from ATPs for maintenance care was authorized medical treatment.

118. Evidence and inferences contrary to these findings were not credible and persuasive.

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).

Overcoming the DIME

The party seeking to overcome the DIME physician's finding regarding MMI and permanent 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). "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 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S.

A determination of MMI and permanent medical impairment requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury and the losses resulting from that injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017); *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services*, W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016).

Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Offic*e, 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation, and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

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. Industrial Claim Appeals Office,* 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,* WC 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the AMA Guides in determining the weight to be accorded the DIME physician's findings. Deviations from the AMA Guides constitute evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *See Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Vuksic v. Lockheed Martin Corporation* WC 4-956-741-02 (ICAO, Aug. 4, 2016). 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,* WC 4-677-750 (ICAO, Apr. 16, 2008).

Claimant contends Dr. Orgel erred in determining Claimant reached MMI, finding that only his lumbar spine work-related, and failing to give permanent impairment ratings for his other conditions. As found, Claimant failed to prove it is highly probable Dr. Orgel's DIME opinions on MMI and permanent impairment are incorrect.

Dr. Orgel opined Claimant reached MMI on January 27, 2022 with a 20% whole person impairment rating. As part of his determination regarding MMI and impairment, Dr. Orgel specifically addressed each of the following body parts/conditions as agreed upon by the parties: cervical, thoracic and lumbar spine, SI joint, hernia, as well as psychological and visual conditions. He ultimately concluded that only Claimant's lumbar spine condition is related to the November 11, 2020 work injury.

Each body part/condition addressed by Dr. Orgel is discussed below.

<u>Cervical and Thoracic Spine</u>

Dr. Orgel found Claimant's cervical and thoracic pain unrelated to the work injury, noting a history of a prior thoracic injury, a lack of mechanism of injury and temporal relation to the thoracic spine, and an intervening cervical spine event. Dr. Orgel's conclusion is consistent with the medical records.

Dr. Orgel specifically noted that, per the history Claimant provided at his evaluation, as well as his review of the medical records, Claimant's thoracic and cervical spine complaints began occurring several months after the initial injury. Initial medical records do not document any mechanism of injury to the cervical or thoracic spine, nor any cervical or thoracic spine complaints or findings. Claimant argues that a December 7, 2020 physical therapy note documents limited range of motion with thoracolumbar side bending. This is not dispositive of a work-related cervical or thoracic injury. The first documentation in the medical records of reported upper back pain is in Dr. Cotageorge's January 28, 2021 note, in which Claimant reported chronic and ongoing upper back pain that was primarily due to an old injury. A February 17, 2021 chiropractic note does reference neck complaints as well as findings of segmental and somatic dysfunction of the cervical and thoracic regions. Even assuming, arguendo, that the two prior missing chiropractic notes referenced in the February 17, 2021 chiropractic note also document cervical/thoracic complaints and findings, such documentation would have occurred several weeks after the initial injury and is not dispositive, in light of the totality of the evidence, of any causal relationship to the work injury.

Evidence demonstrates Claimant's differing reports to providers regarding the onset of his neck and upper back pain. On January 4, 2022, Claimant reported to Dr. McLaughlin-Abrams increased upper back and neck pain that became more pronounced over the past month without an inciting event. On January 31, 2022, Dr. Ogin noted Claimant's secondary complaints of mid back pain radiating to Claimant's upper back and lower neck region which had become more prominent since about mid-October 2021. On March 15, 2022, PA Sanders noted that Claimant's neck became a greater issue after involvement in a MVC. An April 8, 2022 physical therapy record documents an onset of neck pain in May 2021. On May 22, 2022, Claimant himself wrote in his online records at the Colorado Comprehensive Spine Institute that his upper back and neck had been bothersome since March 2021. As noted by Dr. Orgel, Claimant reported to him that his cervical and thoracic pain began in mid-February or March 2021 without incident.

It is undisputed Claimant suffered a prior injury to his thoracic spine that resulted in compression fractures. Dr. Malyak credibly explained that Claimant's prior thoracic disc herniation had since healed but still appeared abnormal on imaging, which she stated is to be expected. Claimant underwent extensive workup of his cervical and thoracic spine, including thoracic x-rays and an MRI prior to MMI, as well as multiple cervical x-rays, MRIs, and a bone spectroscopy/CT post-MMI. Multiple providers in this matter, including the workers' compensation providers and Claimant's personal physicians, have opined that the imaging and testing demonstrated chronic and degenerative findings. While Claimant was able to perform his job as a carpenter prior to the November 11 2020 work injury despite his previous thoracic injury, there is insufficient objective evidence of any acute injury, aggravation, acceleration or exacerbation to Claimant's cervical or thoracic spine related to the work injury. There is no clear and convincing evidence establishing Dr. Orgel erred in finding Claimant's cervical spine and thoracic spine unrelated to the work injury, and thus concluding

Claimant does not require further work-related treatment or permanent impairment to such body parts.

Abdomen/Hernia

Claimant contends he sustained a work-related hernia during a physical therapy session for the work injury and that his providers ignored his complaints and failed to provide proper evaluation and treatment. Claimant's allegation he sustained a hernia during a December 28, 2020 physical therapy session is documented on December 30, 2020 and in various records thereafter. Dr. Orgel concluded Claimant suffered from non-work related diastases recti. Dr. Orgel's opinion is corroborated by the medical records and the opinions of other physicians. On January 20, 2021, an emergency room physician specifically noted Claimant's abdominal complaints, examined Claimant, and found no evidence of a hernia. This examination took place a few weeks after Claimant's reports of the onset of abdominal pain that he relates to the physical therapy session. Claimant also underwent an abdominal ultrasound on January 11, 2022, which was negative without evidence of an abdominal wall hernia.

Subsequently, Dr. Rothschild, a physician outside of the workers' compensation system, specifically evaluated Claimant for his abdominal condition. He reviewed the abdominal ultrasound, interviewed Claimant and performed a physical examination. Dr. Rothschild agreed there was no hernia and diagnosed Claimant with rectus diastases. Dr. Orgel's physical examination did not reveal significant diastases recti or ventral hernias. That Claimant felt abdominal pain during a physical therapy session and believes he sustained a hernia is insufficient, in light of the totality of the evidence, to establish that he sustained a work-related abdominal injury that caused disability or necessitated medical treatment. Accordingly, the evidence does not show that Dr. Orgel's opinion on the relatedness of Claimant's abdominal condition, MMI and impairment is highly probably incorrect.

Vision

Claimant argues he suffered vision problems as a result of the work injury. Dr. Orgel opined Claimant suffers from non-work related presbycusis. Dr. Orgel's opinion is consistent with the medical records. Vision complaints are not documented in the records until January 4, 2022, when Claimant reported to Dr. McLaughlin-Abrams that he experienced ongoing vision changes after undergoing an injection in February 2021. On October 26, 2022 Dr. Bogner referred to Claimant's complaints of vision issues after a February 2021 as "odd". No provider, whether an authorized provider or one of Claimant's personal physicians, has opined that Claimant's purported vision changes are the result of the work injury. No objective evidence was offered to even suggest a causal relationship between Claimant's purported vision issues and the work injury. That Claimant experienced changes to his vision during a period of time while he was also treating for a work injury is not dispositive of the fact the work injury caused his vision issues. The evidence, therefore, does not establish that Dr. Orgel's opinion on the

relatedness of Claimant's vision issues, MMI and impairment is highly probably incorrect.

Psychological

Claimant disagrees he had any prior history of bipolar disorder or psychological disorder and effectively argues that Dr. Orgel's references in his DIME report to psychological and behavioral problems represent bias against Claimant and are in error. There is not clear and convincing evidence Dr. Orgel's opinion regarding Claimant's psychological condition is highly probably incorrect.

A 2015 medical record documents Claimant was admitted to the hospital for psychosis and the record clearly notes a diagnosis of bipolar disorder. A January 20, 2021 medical record again documents a history of bipolar disorder. That Drs. Cotageorge and Disorbio and LPC Misler did not document a prior history or current diagnosis of bipolar disorder does not render Dr. Orgel's opinion highly probably incorrect. There is no indication those providers reviewed Claimant's prior medical records or were otherwise aware of his prior diagnosis. The ALJ is not persuaded Dr. Orgel's references to Claimant's recent behavioral episodes he either personally witnessed or reviewed in the medical records are biased or inappropriate, as Dr. Orgel was specifically asked to evaluate Claimant's psychological condition as part of his DIME. Additionally, per the AMA Guides, the DIME physician is to consider the current clinical status of the individual along with the findings of previous clinical evaluations in reaching their conclusions.

Prior to being placed at MMI, Claimant underwent authorized psychological evaluation and treatment. Drs. Cotageorge and Disorbio recommended Claimant undergo cognitive behavioral therapy for his work-related psychological conditions. Claimant participated in multiple CBT sessions with LPC Misler, who noted Claimant's progression at each session. LPC Misler ultimately discharged Claimant from his care, noting Claimant had successfully completed his program. Claimant's treating providers did not recommend additional work-related psychological treatment. Accordingly, the totality of the evidence does not establish that Dr. Orgel's opinion Claimant is at MMI with no psychological impairment or need for further work-related psychological treatment is highly probably incorrect.

Lumbar Spine and SI Joint

Dr. Orgel diagnosed Claimant with a work-related lumbar strain, for which Claimant reached MMI on January 27, 2022 with a 20% whole person impairment. Dr. Orgel's opinion is consistent with the medical records and the opinions of multiple treating physicians. On December 22, 2021 Dr. Pehler concluded that Claimant's documented activity levels were inconsistent with continued low back pain and SI joint instability affecting his quality of life and ability to work. He opined that, while it was possible Claimant had lumbar radiculopathy, it was mild, based on Claimant's demonstrated activity levels. Dr. Pehler no longer recommended that Claimant undergo

a discogram or disc replacement. On January 6, 2022, Dr. Burns opined that Claimant's current exam was benign, his complaints surrounded discomfort and not functional deficits, and that Claimant was approaching MMI. Dr. Zimmerman opined Claimant reached MMI at an evaluation on January 27, 2022. His final diagnoses included a lumbar strain, for which he gave Claimant 16% whole person impairment. Dr. Burns completed a Physician's Report of Worker's Compensation Injury on February 1, 2022 consistent with the reports of PA Bodkin and Dr. Zimmerman.

Prior to being placed at MMI, Claimant underwent a thorough workup of his lumbar spine, including multiple x-rays and MRIs, which revealed degenerative changes with minimal disc bulging and no neurologic compromise. Claimant also underwent treatment to his lumbar spine and SI joint, including physical therapy, chiropractic treatment and injections. That Claimant continued to experience lumbar complaints at the time he was placed at MMI does not negate the finding of MMI. A finding of MMI does not mean complete resolution of an individual's condition and symptoms, but that the physical or mental impairment as a result of injury has become stable and no further treatment is reasonably expected to improve the condition. See §8-40-201(11.5), C.R.S. An authorized treating physician shall make a determination as to when the injured employee reaches MMI. §8-42-107(8)(b)(I), C.R.S.

None of Claimant's authorized treating physicians recommended further diagnostic or curative treatment for Claimant's lumbar condition. Several of Claimant's personal physicians have opined that there are no surgical indications. Dr. Orgel's opinion that Claimant reached MMI for his work-related lumbar condition is consistent with the medical records and opinions of Claimant's authorized treating physicians that Claimant's condition was stable with no further treatment reasonably expected to improve his condition.

Moreover, as found, Dr. Orgel properly applied the AMA Guides when determining impairment. Using the AMA Guides, Dr. Orgel assigned Claimant a combined 20% whole person impairment, consisting of 7% impairment under Table 53(II)(C) and 14% impairment for lumbar range of motion deficits. Table 53(II)(C) of the AMA Guides provides for 7% permanent impairment of the lumbar spine for an "Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with moderate to severe degenerative changes on structural test; includes an operated herniated nucleus pulposus with or without radiculopathy." Here, Claimant had an unoperated, medically documented lumbar strain with a minimum of six months of medically documented pain, and moderate to severe degenerative changes on structural tests. Accordingly, Dr. Orgel's lumbar spine rating under Table 53(II)(C) was appropriate. Dr. Orgel's Table 53(II)(C) rating is also consistent with that of Dr. Zimmerman, who credibly explained that the impairment rating he assigned under Table 53(II)(C) of the AMA Guides is for Claimant's underlying lumbar spondylosis confirmed by MRI and ongoing symptoms.

There is no allegation of or evidence indicating Dr. Orgel did not properly perform or calculate his lumbar range of motion measurements. Dr. Orgel documented three sets of lumbar range of measurements, which he deemed valid. He properly calculated the corresponding impairment rating for Claimant's decreased lumbar range of motion under the AMA Guides. Dr. Orgel's range of motion measurements are consistent with findings documented in prior medical records and his impairment rating for lumbar range of motion deficits is even higher than that of Dr. Zimmerman. Dr. Orgel specifically explained he provided no separate impairment for the SI joint because Claimant's primary complaint is related to the lumbar spine and the results of the Faber test on his examination was negative. This is also largely consistent with prior examinations and the opinions of treating physicians. As such, there is not clear and convincing evidence Dr. Orgel's opinion on Claimant's lumbar spine impairment and MMI is incorrect.

Generally

In summation, Claimant has expressed substantial frustration with his course of treatment and various aspects of the workers' compensation system, including the DIME procedure. He continues to experience multiple symptoms and continues to seek medical treatment. The record reflects that Claimant's treating physicians, as well as Dr. Orgel, were aware of Claimant's continued reported complaints, that they assessed his conditions, and ultimately determined Claimant reached MMI for his work injury with impairment to his lumbar spine. Claimant essentially contends that any pathology documented in the medical records and any symptoms he experienced subsequent to the work injury are the direct result of the work injury. The existence of pathology and symptoms by itself is not dispositive of a causal relationship with the work injury. There must be a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). That Claimant has continued to seek and undergo treatment for his lumbar spine as well as other non-work related conditions subsequent to being placed at MMI does not disprove Dr. Orgel's opinion that Claimant has reached MMI for his work-related condition.

To the extent Claimant contends there are missing records, the ALJ is not persuaded, based on the totality of the evidence, including Claimant's own testimony, that the identified missing records, or other purported unidentified missing records, renders Dr. Orgel's opinion highly probably incorrect. Dr. Orgel performed a thorough review of the records he was provided, including not only the initial DIME packet of 316 pages, but an additional packet of 516 pages Claimant specifically requested be reviewed. Dr. Orgel took an extensive subjective history from Claimant, analyzed the history and course of Claimant's medical condition, assessed the clinical and diagnostic findings, and physically examined Claimant, addressing each body part identified by the parties to be within the scope of his evaluation. Dr. Orgel's findings and opinions were largely consistent with the findings of prior and subsequent evaluations as well as the opinions of multiple other treating physicians and Claimant's personal physicians. Dr. Orgel provided an accurate report including a thorough explanation of his review, impressions and ultimate opinions. The totality of the evidence demonstrates Dr. Orgel

followed proper DIME protocol and procedure pursuant to the Act, WCRP, AMA Guides and Impairment Rating Tips.

Based on the totality of the evidence, Claimant failed to prove it is highly probable Dr. Orgel's opinions on MMI and impairment are incorrect. Claimant's opinion and any medical opinions that could be deemed conflicting represent mere differences of opinion that do not rise to the level of clear and convincing evidence to overcome the DIME.

Maintenance Medical Treatment

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). 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 District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003).

Respondents filed a FAL admitting for reasonable, necessary and related medical treatment and/or medications after MMI. There are no recommendations from claimant's authorized treating physicians for specific maintenance medical treatment, other than 6-12 months of medication for the lumbar spine after January 27, 2022. Post-MMI, Claimant elected to continue to seek evaluation and treatment from UC Health and various other personal providers through his private insurance including multiple evaluations, injections, physical therapy, and diagnostic tests, for body parts and conditions other than the lumbar spine. As discussed above, Claimant's need for continued medical treatment to the cervical spine, thoracic spine, abdomen, vision and psychological conditions/body parts are not causally related to the work injury. Claimant failed to prove by a preponderance of the evidence that medical treatment for these conditions was reasonable, necessary and causally related treatment for the work injury.

Authorized Treatment

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the

claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (reasoning that the surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

Subsequent to being placed at MMI, Claimant continued to treat at UC Health on his own accord, as well as with various other personal providers. As found, the post-MMI treatment Claimant sought with various providers outside of his ATPs and referrals from ATPs for maintenance treatment was unauthorized treatment. As such, Respondents are not required to pay for such treatment.

ORDER

1. Claimant failed overcome Dr. Orgel's DIME opinion on MMI and permanent impairment by clear and convincing evidence. Claimant is at MMI as of January 27, 2022 with a 20% whole person impairment of the lumbar spine.

2. Claimant failed to prove by a preponderance of the evidence he is entitled to medical benefits for the cervical spine, thoracic spine, abdomen, vision, or psychological conditions. Claimant's claim for benefits associated with those body parts and conditions is denied and dismissed.

3. Claimant failed to prove by a preponderance of the evidence the post-MMI medical treatment he received by others than his ATPs or referrals of his ATPs for maintenance treatment was authorized. Respondents are not liable for the unauthorized medical treatment.

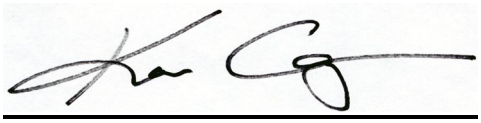
4. Claimant shall file an Application for Hearing on the issue of PTD benefits within 30 days of the final order in this matter, including any appeals.

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: May 26, 2023



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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to maintenance medical treatment to cure or alleviate the ongoing effects of his October 9, 2019 admitted industrial injury and/or prevent deterioration of his current condition.

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to a disfigurement award and if so, the amount of said disfigurement benefit.

FINDINGS OF FACT

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

1. Claimant injured his left shoulder on October 9, 2019, when his arm became tangled in a building truss moving down a conveyor belt. According to Claimant, his arm was bent awkwardly and caught between the truss and the rollers of the assembly line causing immediate pain.

2. Claimant initiated treatment at Concentra Medical Centers (Concentra) and was referred to physical therapy. (See generally, Ex. A). Therapy and modified work duties failed to resolve Claimant's persistent pain or improve his range of motion loss. Accordingly, Claimant was referred for an MRI.

3. An MRI of the left shoulder was obtained on December 27, 2019. This MRI demonstrated a rotator cuff tendinosis, high grade partial thickness tear of the anterior supraspinatus footplate and probable partial thickness tearing of the bands of the subscapularis tendon along with a suspected longitudinal split tear of the interarticular long head of the biceps and effusion and hypertrophic osteoarthritic changes of the left AC joint. (Ex. A, bates 10).

4. Claimant was referred to Dr. Michael Simpson for a surgical consultation. Dr. Simpson concluded that Claimant required surgical intervention. Thus, on February 6, 2020, Dr. Simpson performed an arthroscopic assisted left rotator cuff repair, a left biceps tenodesis and a subacromial decompression to address what was discovered to be a longitudinal tear of the mid subscapularis tendon, a full thickness and retracted tear of the supraspinatus tendon, a longitudinal split tear of the biceps tendon and subacromial impingement. (Ex. A, bates 23).

5. Claimant experienced significant post-surgical shoulder pain and dysfunction. Consequently, he underwent additional injection therapy to include an interarticular subacromial steroid injection and two platelet rich plasma (PRP) injections.[1] (Ex. A, bates, 76, 102, 112). Unfortunately, this supplementary injection therapy seemingly worsened Claimant's symptoms prompting a referral for a repeat MRI. *Id.* at bates 116.

6. A repeat MRI of the left shoulder completed September 30, 2020, demonstrated "probable high-grade bursal and articular surface fibrillation [and] fraying of the proximal supraspinatus tendon". While no recurrent tearing was visualized distally in the area of the preoperative abnormality, there was a "[s]mall volume of fluid within the subacromial bursa" along with "moderate hypertrophic osteoarthritic change in the AC joint". (Ex. A, bates 129).

7. Dr. Simpson recommended a second operative procedure. He took Claimant to the operating room on November 10, 2020 for completion of a left shoulder "[a]rthroscopic-assisted revision rotator cuff repair with Regeneten augmentation", an [a]rthroscopic distal clavicle excision", and an arthroscopy with "extensive" debridement of the "anterior rotator interval, anterior subscapularis tendon, and bursal-sided adhesions" followed by a "manipulation under anesthesia". (Ex. A, bates 145).

8. Claimant experienced slow post-surgical progress following this procedure. After some initial confusion regarding his participation in physical therapy (PT), Claimant started PT on February 25, 2021. (EX. A, bates 248). By March 23, 2021, Claimant was noted to be "doing well". *Id*. at bates 270. While he had made significant improvement with respect to his left shoulder strength and was "increasing his job duties", Claimant reported persistent 7/10 left shoulder pain. *Id*.

9. Claimant continued to make progress over the next several weeks. Nonetheless, he had persistent pain and impaired range of motion. Ultimately, Claimant was released from care by Dr. Simpson's practice on April 21, 2021.

10. Claimant returned to Concentra for a follow up appointment with his authorized treating physician (ATP), Dr. Daniel Peterson on April 30, 2021. (EX. A, bates 306). Claimant was evaluated by Physician Assistant (PA) Wendi Kleppinger in lieu of Dr. Peterson at this appointment. PA Kleppinger noted that Claimant had made substantial improvement and had been released from "ortho" on April 21, 2021 and from PT "after meeting [his] goals". (Ex. A, bates 318). Claimant was returned to modified duty work with restrictions of no lifting over 50 pounds, carrying 30 pounds, pushing/pulling 100 pounds and a repetitive lifting restriction of 30 pounds. PA Kleppinger anticipated that maximum medical improvement (MMI) would be reached on May 10, 2021, with maintenance treatment needs. *Id*. at bates 322.

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[1] Although a medical record signed by Physician Assistant Kimberly Shenuk reflects that Claimant "tired" three PRP injections, the record evidence supports a finding that only two PRP injections were administered. (See, Ex. A, bates 116, 102, 112).

11. Claimant returned to Concentra on May 10, 2021, where he was evaluated by PA Michael Gottus. PA Gottus noted that Claimant reported feeling as though he was performing regular duty work but that he was still having "residual weakness with abduction". (Ex. A, bates 325). A return appointment was set for Claimant to be evaluated by Dr. Peterson. Dr. Peterson would not evaluate Claimant until May 25, 2021.

12. During the May 25, 2021, follow-up appointment, Dr. Peterson noted that Claimant was "as good as he is going to get". (Ex. A, bates 334). Examination of the left shoulder revealed "[t]enderness in the bicipital groove" and the anterior portion of the shoulder, but not in the AC joint. *Id*. at bates 338. Claimant also demonstrated reduced range of motion in the left shoulder but provocative testing maneuvers were reportedly negative. *Id*. at bates 338-339. Dr. Peterson opined that Claimant had reached "functional goal" and was ready for discharge. *Id*. at bates 339. He placed Claimant at MMI with 19% upper extremity impairment. *Id*. at bates 333, 339. According to Dr. Peterson, Claimant had "no need [for] medical maintenance care". *Id.*

13. Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Peterson's opinions regarding impairment and maintenance care on June 10, 2021. (Ex. 1, bates 1-8).

14. Claimant objected to Respondents FAL and requested a Division Independent Medical Examination (DIME). Dr. William Watson was designated as the DIME doctor and he completed his independent medical examination on January 25, 2022. (Ex. A; Ex 4).

15. Dr. Watson agreed with Dr. Peterson that Claimant reached MMI on May 25, 2021. After obtaining range of motion measurements, Dr. Watson also agreed that, as a consequence of his October 9, 2019, work-injury, Claimant had sustained 19% scheduled impairment of the left upper extremity, which, converts to 11% whole person impairment. (Ex. A, bates 15).

16. Although he opined that Claimant reached MMI on May 25, 2021, Dr. Watson raised concern that Claimant continued to present with signs of adhesive capsulitis. (Ex. A, bates 15, ¶ L). Accordingly, Dr. Watson documented the following with regard to maintenance care:

> As noted above, [Claimant] has had decreased range of motion since his final date of MMI as outlined by Dr. Peterson. I feel as part of maintenance care he should return to see his surgeon Dr. Michael Simpson and be reevaluated. Dr. Simpson can make a decision of whether he feels another MRI is indicated. I believe Dr. Simpson's recommendation should be followed. If he feels no more care is indicated he would continue to be at maximum medical improvement.

(Ex. A, bates 16, ¶ N).

17. Insurer filed an Amended Final Admission of Liability admitting to Dr. Watson's opinions concerning MMI and impairment on February 23, 2022. (Ex. 2). Although in agreement with Dr. Watson's opinions regarding MMI and impairment, Insurer elected to deny maintenance care after MMI "per the treating physician's original MMI report". *Id*. at bates 9 (emphasis added). Despite indicating in the remarks section of the February 23, 2022 FAL that the denial of maintenance care was based on Dr. Peterson's May 25, 2021 report of MMI/impairment, the claims representative, Lori Watson noted that maintenance treatment was being denied "pursuant to Dr. Watson's medical report dated 1/25/2022. *Id*. (emphasis added). As noted at ¶ 16 above, Dr. Watson recommended maintenance care in the form of a return appointment to Dr. Simpson for a follow-up evaluation in light of the evidence of persistent adhesive capsulitis. Based upon the evidence presented, the ALJ finds the denial of maintenance treatment predicated on Dr. Watson's January 25, 2022 DIME report inconsistent with the statement contained at ¶ N of the DIME report itself.

18. Claimant underwent a third MRI of the shoulder on January 17, 2023 for what is documented as "[w]orsening left shoulder pain with limited ability to lift and carry heavy objects". (Ex. 5). This MRI revealed the possibility of a "tiny interstitial tear" of the supraspinatus tendon along with subacromial and subdeltoid bursitis. *Id*. at bates 39. On January 18, 2023 Dr. Simpson commented on the MRI as follows:

> The MRI shows the rotator cuff repair is intact. There may be a very small interstitial tear but nothing that would require surgery. There is a little subacromial bursitis but in all the repair looks very good. When we see him back I think [it] would be reasonable to do a corticosteroid injection.

(Ex. 5, bates 38).

19. Claimant testified that he had undergone an injection with Dr. Simpson one day before his hearing. According to Claimant, the injection provided some pain relief, most importantly it was enough for him to finally get a good night's sleep. *Id*. at p. 17, ll. 12-14. Claimant also indicated he was scheduled for a follow-up visit with Dr. Simpson on March 15, 2023. Id. at ll. 15-23.

20. Claimant also testified that once he had completed his post-surgical care following his second surgery he returned to work for Employer. According to Claimant, he was placed at the "heaviest" work station and had to carry materials weighing 100 pounds. ([Redacted, hereinafter AP] Hrg. Trans. p. 15, ll. 14-16). Claimant testified that within a week and a half of returning to work his shoulder "popped". *Id.* at ll. 17-21. Claimant experienced swelling and was dropping things so he reported this to the "office". *Id.* at ll. 21-23. Per Claimant, he was told there was nothing more they could do for his shoulder. *Id*. at l. 24.

21. During cross-examination, Claimant clarified that shortly after he had returned to work following his second surgery, he went to Employer's office and reported his swelling and increased pain at which time he was told by the "manager" that he had been released from care and that Employer could not send him to a doctor "any more to get checked for your shoulder". (AP[Redacted] Hrg. Trans. p. 19, ll. 4-9. Claimant conceded that he abruptly left his employment but could not recall when this occurred. *Id*. at ll. 1-9. Rather, he testified that his niece encouraged him to apply for a different position with a temporary agency. *Id*. at ll. 10-18.

22. Claimant secured a position through the temporary agency running a machine that spray coats vitamins with color and/or wax. (AP[Redacted] Hrg. Trans. p. 20, l. 1). He commenced this work around August 2021 and testified at hearing that he continues to work in this capacity eight hours per day.[2] *Id*. at p. 19, ll. 21-24. According to Claimant, his job involves having to move barrels that weigh 55-70 kilograms. He moves the barrels by using a floor jack and rolling them into position using his right arm only. *Id*. at pp. 20-21, ll. 1-7. Additional duties associated with Claimant's current work as a pill coater include cleaning the spray guns, scooping pills into the machine, monitoring the machine and temperatures and documenting outcomes. *Id*.

23. Claimant testified that he continues to experience pain similar to that he had when he was placed at maximum medical improvement, both in intensity and location. He has popping and locking in the left shoulder. (AP[Redacted]Aapex Legal Services, LLC Hrg. Trans. p. 23, ll. 1-12).

24. As noted, Dr. Simpson testified by deposition on April 25, 2023. Dr. Simpson testified as a board certified orthopedic surgeon. (Depo. Dr. Simpson, p. 5, ll. 14-25). Dr. Simpson testified that Claimant did well after his second surgery with improved range of motion, despite the delay in getting him in for post-operative therapy. *Id*. at p. 8, ll. 20-23. Dr. Simpson saw Claimant on December 15, 2022, more than 1.5 years after being placed at MMI, and more than a year after Dr. Watson made the recommendation for Claimant to return to Dr. Simpson. *Id.* at p. 9, ll. 6-11. Dr. Simpson's note from the visit reflected Claimant reported his shoulder started bothering him shortly after returning to work moving trusses for the Employer. *Id*. Dr. Simpson had no record or knowledge of the work Claimant performed after he left his employment with the Employer. *Id*. at p. 10, ll. 9-14. He did recall that Claimant returned for follow-up appointments partly because he was in pain and partly because it was standard clinical procedure for his medical practice. *Id*. at p. 14, ll. 8-13.

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[2] Although Respondents indicate that Claimant's testimony regarding his permanent hire date by [Redacted, hereinafter NN] and other information about his job duties was lost due to a "break" in the audio recording, the ALJ has listened to the entire audio recording of the January 26, 2023 hearing and finds no break in the soundtrack. Details surrounding the asserted break in the audio as asserted by [Redacted, hereinafter LR], the Court Reporter hired by Respondents, are unknown. Perhaps she received a defective copy of the audio recording or she experienced a glitch in the recording while transcribing the record. Nonetheless, the Courts audio recording and the transcript of that recording as prepared by [Redacted, hereinafter CS] of AP[Redacted] appear complete and consistent with each other. Accordingly, the ALJ finds and concludes that the transcript prepared by LR[Redacted] is not an accurate record of the proceedings recorded on January 26, 2023.

25. Dr. Simpson testified that as of May 25, 2021, Claimant would have had osteoarthritis of his left acromioclavicular (AC) joint. (Depo. Dr. Simpson, p. 13, ll. 6-16). However, he added that the distal clavicle resection performed as part of Claimant's revision (second) surgery, would have mitigated that arthritis and it "no longer existed after the excision of the distal clavicle. *Id.* at ll. 17-25, p. 14, ll. 1-4.

26. Dr. Simpson testified that he recommended that Claimant undergo an MRI as part of the December 15, 2022 appointment. (Depo. Dr. Simpson, p. 14, ll. 14-17). Dr. Simpson testified that the results of that MRI demonstrated, some "subacromial subdeltoid bursitis, that the rotator cuff repairs were essentially intact, and that his biceps tenodesis was intact". *Id*. at ll. 20-22. He added that Claimant had a "small" interstitial tear, which could cause pain but was not significant enough to warrant additional surgery. *Id.* at p. 15, ll. 4-8. Given the MRI findings, Dr. Simpson recommended a subacromial injection. *Id*. at ll. 9-12.

27. Dr. Simpson testified that a cause of bursitis is overuse and he "assumed" that the cause of Claimant's bursitis was overuse and "probably somewhat related to his underlying rotator cuff kind of tendonitis, tendinopathy . . ." (Depo. Dr. Simpson, p. 15, ll. 15-25).

28. Dr. Simpson generally agreed that the job duties Claimant was performing after June 2021, could affect whether Claimant's condition, and need for treatment, is related to the original injury or an aggravation from his new employment. (Depo. Dr. Simpson, p. 16, ll. 6-14). Nonetheless, it is clear from the content of Dr. Simpson's deposition testimony that he did not take a work history from the Claimant at the appointment on December 15, 2022. Rather, it was his assumption the Claimant had gone back to full duty for Employer and was involved in heavy lifting of trusses and that was giving him issues. *Id*. at p. 9, ll. 12-23. Accordingly, the ALJ finds it unlikely that Dr. Simpsons is fully aware of the exact nature of Claimant's job duties with NN[Redacted] or how he performs those duties. Indeed, in response to the question of whether the condition he was treating was still related to Claimant's underlying work injury or an aggravation of that condition by subsequent employment, Dr. Simpson testified: "Probably without seeing Dr. Peterson's report, and . . . without having that complete work history, and the timeline of [the] job change, and development of symptoms, and whether symptoms persisted up to that point [it] is hard to say. So it is kind of indeterminate at this point". *Id.* at p. 18, ll. 14-25; p. 19, l. 1. Nonetheless, Dr. Simpson testified that there is "treatment we have to offer him, whether that is compensable under the original injury or whether that might be compensable as an overuse injury", adding "I guess that - - perhaps that's why we're here." *Id.* at p. 17, ll. 9-12. Dr. Simpson then discussed potentially performing additional corticosteroid injections or attempting PRP injections for Claimant's condition. *Id*. at ll. 16-25.

29. Based upon the content of Dr. Simpson's deposition testimony, the ALJ is not convinced he definitively answered the question of whether Claimant current need for treatment is related to Claimant's October 9, 2019 industrial injury. Nonetheless, the

totality of the evidence presented, persuades the ALJ that, more probably than not, Claimant's October 9, 2019 industrial injury is the proximate cause of his persistent symptoms and need for probable maintenance care, including additional corticosteroid or PRP injections, rather than a subsequent intervening cause.

30. Visual inspection of Claimant's left shoulder reveals the following disfigurement: Four (4) arthroscopic surgical scars located about the left shoulder, i.e. the front, side, top and back aspect of the shoulder. These scars are all semi-circular in shape and approximately ⅜ of an inch in diameter. The scar located on the posterior aspect of the shoulder is light pink in color while the remaining three scars located on the front, side and top of the shoulder all appear lighter than the surrounding skin. The scars on the front, side and top of the shoulder also appear to be the same contour as the surrounding skin, while the scar located on the upper back aspect of the left shoulder is slightly depressed resulting in a pock like appearance when compared to the contour of the adjacent skin.

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).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or

unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo.App. 1990). 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); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Claimant's Entitlement to Maintenance Medical Treatment

D. A claimant's need for medical treatment may extend beyond the point of maximum medical improvement (MMI) where he/she requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*."

E. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra.* Indeed, a claimant is only entitled to such future benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); C.R.S. § 8-41-301(1)(c). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those, which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

F. The question of whether Claimant's symptoms and need for treatment are the natural and proximate result of his prior industrial injury, or the result of an efficient

intervening cause is one of fact for determination by the ALJ. See *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). In this case, there is scant evidence to support Respondents' suggestion that Claimant's current need for treatment may related to possible repetitive activities associated with his current employment. Although Dr. Simpson opined that the cause of Claimant's current need for treatment is "kind of indeterminate", he did indicate that Claimant's bursitis was "probably somewhat related to his underlying rotator cuff kind of tendonitis, tendinopathy." This, combined with the stated cause for the January 17, 2023, i.e. "[w]orsening left shoulder pain with limited ability to lift and carry heavy objects", persuades the ALJ that the condition of Claimant's left shoulder has deteriorated with the passage of time and that his current pain/symptoms are probably related to the original October 9, 2019 industrial injury and subsequent surgery.

G. The ALJ credits Claimant's testimony to find that his present condition will likely deteriorate further and he will experience greater functional decline without maintenance care, including additional injection therapies. Accordingly, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that he is entitled to a general award of maintenance medical care. Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for future medical treatment is reasonable, necessary and related to Claimant's industrial injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

Claimant's Entitlement to Disfigurement Benefits

H. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement", as used in the statute, contemplates that there be an "observable impairment of the natural appearance of [the] person." In this case, the ALJ finds and concludes that as a result of his August 26, 2020 work injury, Claimant has visible disfigurement to the body consisting of surgical scarring as described in Finding of Fact, paragraph 30 above.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for reasonably necessary post-MMI medical treatment, including additional corticosteroid or PRP injections from authorized providers to relieve Claimant from the ongoing effects of his industrial injuries and/or prevent deterioration of his condition.

2. Respondents retain the right to challenge future requests for maintenance treatment on the grounds that such care is not reasonable, necessary or related to Claimant's October 9, 2019 industrial injury. *See generally*, *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,*

916 P.2d 609 (Colo.App. 1995); Section 8-42-101 (1) (a), C.R.S.; *Hanna v. Print Expediters Inc., supra.*

3. Respondents shall pay Claimant $1,200.00 in disfigurement benefits.

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

DATED: May 26, 2023

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-130-124-001

ISSUES

- Whether Claimant has overcome the findings of the Division-sponsored Independent Medical Examination ("DIME") physician that Claimant is at maximum medical improvement ("MMI") for his November 26, 2019 work injury?

- Whether Claimant is entitled to an award for disfigurement related to his compensable work injury pursuant to Section 8-42-108, C.R.S.?

FINDINGS OF FACT

1. Claimant was employed by Employer as an acting supervisor building townhomes for Employer. Claimant testified that on November 26, 2019 he was headed up a ladder while working on a roof of a townhome when the ladder slipped and Claimant began to fall. Claimant testified he put his left arm on another ladder that was set up to the roof of the townhome in an attempt to catch himself, but still fell to the ground landing on his wrist and hip. On the employee accident report dated November 27, 2019, Claimant reported landing on his stomach on the ground.

2. Claimant testified he stayed at work to meet with a building inspector who was scheduled to arrive that day and after meeting with the building inspector, went to Mercy Medical Center Emergency Room ("ER"). At the ER, Claimant reported falling from a ladder just prior to arrival. X-rays taken at the ER showed a minimally displaced distal radius fracture. Claimant reported pain in the left shoulder and right forearm. Claimant reported a little bleeding from his nose that had since resolved. Claimant was provided with a sling and instructed to follow up with orthopedics.

3. Claimant was examined by Dr. Furry on December 2, 2019 with regard to his fractured distal radius. Dr. Furry recommended surgery which could include a bridging plate. Dr. Furry also noted Claimant had impingement syndrome of his left shoulder.

4. Claimant was evaluated at Animas Surgical Hospital on December 4, 2019 for follow up of his right wrist fracture. Claimant reported that he had minimal pain to his right forearm and only slight pain to his left shoulder with movement that he believed was improving. Claimant also reported some left hip pain which was not present until the past few days which Claimant attributed to increased sitting. The medical report was later corrected to note that Claimant was complaining of right hip pain.

5. Surgery consisting of open reduction and internal fixation ("ORIF") of Claimant's right distal radius fracture eventually took place on December 16, 2019 under the auspices of Dr. Furry.

6. Following surgery on his right arm, focus of Claimant's treatment switched to his left shoulder. Claimant was examined by Dr. Furry on December 27, 2019 and Claimant was diagnosed with traumatic incomplete tear of the left rotator cuff. Dr. Furry recommended a magnetic resonance image ("MRI") of his left shoulder.

7. Claimant was examined by Dr. Furry on January 24, 2020. Dr. Furry was performing a follow up examination from Claimant's surgery. Dr. Furry noted Claimant also complained of right hip pain in the area proximal to his greater trochanter in the region of his gluteus medius as the area of his greatest pain.

8. The MRI of Claimant's left shoulder was eventually performed on February 3, 2020. The MRI showed predominantly full-thickness irregular degenerative tearing of the supraspinatus and interior infraspinatus; full-thickness tear of the subscapularis with associated medial subluxation of the long head of the biceps; tendinosis with interstitial tearing involving the infraspinatus; intermediate grade tearing of the intra-articular long head of the biceps; anterior inferior labral tear involving the inferior labrum with more complex degenerative tearing seen at the posterior superior labrum; moderate glenohumeral joint osteoarthritis and moderate acromioclavicular ("AC") joint degeneration.

9. Claimant underwent surgery of the left shoulder on March 12, 2020. The left shoulder surgery included an arthroscopy with arthroscopic biceps tenodesis and repair of the subscapularis; arthroscopic repair of the supraspinatus and infraspinatus; subacromial decompression and extensive glenohumeral debridement.

10. Claimant was eventually referred to Dr. Smith for treatment of the hip. Claimant underwent an MRI of the hip on May 7, 2020 which showed a complex tear of the right anterior superior labrum. Based on the MRI results, Claimant underwent a right hip injection on May 27, 2020. Claimant testified that after injections and physical therapy did not provide him with relief of his hip pain, he was referred to Spine of Colorado for further evaluation.

11. Claimant underwent an x-ray of the lumbar spine on July 16, 2020 which showed L4-5 and L5-S1 moderated degenerative disc disease, L3-4, 3 mm listehesis, and mild retrolistheses at the L4-5 level. No instability was noted.

12. Claimant underwent an MRI of the lumbar spine on July 29, 2020 which showed moderate to large right paracentral dis extrusion at L4-5, moderate multilevel facet arthropathy, and foraminal stenosis at L3-4, L4-5 and L5-S1.

13. Claimant was examined at Spine of Colorado by Dr. Orndorff and was diagnosed with lumbar radiculopathy. Dr. Orndorff noted Claimant had significant L4-5 and L5-S1 lumbar spondylosis with retrolisthesis of L4-5 and L5-S1. Dr. Bohachevsky

provided Claimant with a series of transforaminal steroid injections ("TFSI"). Dr. Orndorff noted that Claimant reported good transient relief from the injection.

14. Respondents obtained an independent medical examination ("IME") with Dr. Rauzzino on October 14, 2021. Dr. Rauzzino reviewed Claimant's medical records, obtained a medical history and pertormed a physical examination in connection with his IME. Dr. Rauzzino opined that Claimant's July 28, 2020 MRI showed a clear acute disc herniation at L4-L5 with marked impingement of the exiting nerve root. Dr. Rauzzino opined based on his review of the medical records that the Claimant did not develop right lower extremity pain and radiculopathy until at least seven months after the injury.

15. From a causation analysis, Dr. Rauzzino opined that the disc herniation at L4-L5 and the radiculopathy and back pain that came later would not be occupationally related. Dr. Rauzzino noted that Dr. Orndorff had recommended a two-level fusion surgery and opined that absent a clearly defined pain generator or severe radiculopathy, the surgery would not be an ideal situation. Dr. Rauzzino also opined that based on Claimant's failure to respond to the injections, and the lack of overt instability along with the fact that Claimant's symptoms were getting better, the surgery would not be consistent with the Medical Treatment Guidelines.

16. Dr. Rauzzino opined that Claimant was at MMI for the shoulder and wrist injuries and based on his opinion that the lumbar spine was not related to the work injury, Claimant was at maximum medical improvement for his claim.

17. Dr. Rauzzino testified by deposition in this matter consistent with his IME report.

18. Respondents sought a 24 month Division-sponsored Independent Medical Examination ("DIME") of Claimant which was pertormed by Dr. Green on September 28, 2022. Dr. Green reviewed Claimant's medical records, obtained a medical history and pertormed a physical examination in connection with his DIME. Dr. Green noted that Claimant was scheduled for spine surgery this upcoming December that was to be covered by his personal insurance. Dr. Green noted that Claimant's "Hip surgeon concerned that his spine/surgery/back pain may be causing his hip pain (radicular pain)". Dr. Green noted Claimant reported it was difficult to bend over, secondary to right buttock and lower back discomfort.

19. Dr. Green diagnosed Claimant with (1) status post ORIF right wrist for right wrist fracture, work related; (2) status post left rotator cuff tear and operative repair, work related; (3) right hip labral tear, more likely than not, work related; (4) multiple-level lumbosacral degenerative changes, with resolving right L4-5 disc herniation, not clearly work-related; and (5) right L5 radiculitis, not clearly work-related. Dr. Green agreed in his opinion with Dr. Rauzzino's October 1, 2020 date of MMI and provided Claimant with an impairment rating of 6% of the upper extremity for the right wrist (converted to a 4% whole person impairment), 16% of the upper extremity for the left shoulder (converted to a 10% whole person impairment) and 10% range of motion impairment of the right hip

(which converts to a 4% whole person impairment). Dr. Green combined the impairments to equal a 16% whole person impairment.

20. Dr. Green further noted that based on his review of the medical records, it was not definitively clear that the clinical presentation, including review of pertinent records, location or distribution of hip pain complaints immediately following the reported work-related fall can more likely than not be attributed to the subsequently diagnosed L4-5 disc herniation seen on MRI, or reported right L5 radiculitis noted approximately 8 months following the date of injury. Dr. Green opined that there did not appear to be a clear documentation of ongoing radicular symptoms within the first one to two months following the reported fall, or clear documentation to support an isolated lumbar disc herniation clinical presentation. Dr. Green further noted that Claimant did not report the onset of radiating leg pain immediately following the fall and on examination, there appeared to be inconsistencies with provocation of pain that are not typical of Claimant's pain that Dr. Green would usually associate with lumbar discogenic pain. Dr. Green noted that based on his review of the records, he believed the onset of radiating right leg pain appeared to be in July 2020. Dr. Green provided Claimant with a 20 pound lift/carry restriction.

21. Respondents filed a final admission of liability ("FAL") based on the 24 month DIME report from Dr. Green admitting for the scheduled impairment benefits.

22. Claimant subsequently filed an application for hearing contesting the finding of MMI along with disfigurement.

23. At hearing, Claimant testified that immediately after the accident, he knew he had injured his wrist and shoulder and sought treatment for this from the ER on the date of the injury. Claimant testified that he then developed pain in his right hip and reported this to his treating physicians in early December 2019. Claimant noted that the medical provider initially recorded the wrong side of his complaints of pain, mentioning the left hip instead of the right hip which was subsequently corrected.

24. Claimant testified that his right hip pain was minor at that time and the focus of his medical providers was initially on the wrist and shoulder injuries. Claimant testified he underwent an MRI of the hip which showed the torn labrum which was treated with injections and physical therapy.

25. Claimant testified that he was eventually referred to Dr. Orndorff who recommended an MRI of his back. Claimant testified that after treating with Dr. Orndorff, Claimant believed that the hip pain was coming from his lumbar spine issues. Claimant testified that he continued to treat with Dr. Orndorff and eventually underwent lumbar fusion surgery on December 6, 2022. Claimant testified that after surgery, his hip pain that developed after his work injury resolved. Claimant's testimony regarding the onset of his pain complaints and the resolution of his hip issues following the lumbar fusion surgery is found to be credible and persuasive by the ALJ.

26. Claimant testified that he sought the medical treatment with Dr. Orndorff under his personal health insurance due to the fact that the surgery was not covered by his workers' compensation claim.

27. The ALJ credits Claimant's testimony at hearing and finds that Claimant has overcome the opinion of Dr. Green that his lumbar spine injury is not related to the work injury by clear and convincing evidence. The ALJ notes that the medical documentation shows that Claimant first complained of hip pain to a medical provider 8 days after his November 26, 2019 injury (December 4, 2019). The ALJ further finds Claimant's testimony that his hip pain that developed in connection with his November 26, 2019 fall was resolved by the lumbar surgery performed by Dr. Orndorff on December 6, 2022 to be credible and persuasive.

28. The ALJ finds that Claimant has demonstrated that it is highly probable and free from substantial doubt that the fall on November 26, 2019 resulted in an injury to his lumbar spine that necessitated the need for treatment including the surgery performed by Dr. Orndorff on December 6, 2022.

29. The ALJ credits Claimant's testimony at hearing and finds that the opinion of Dr. Green that the lumbar spine injury was not related to Claimant's fall on November 26, 2019 to have been overcome by clear and convincing evidence. Because the ALJ finds that the lumbar spine injury is a compensable component to the November 26, 2019 injury, Claimant has established that it is highly probable and free from substantial doubt that he was not at MMI as of October 1, 2020, as Claimant was still under active treatment for the lumbar spine component of his injury.

30. Because Claimant is not at MMI for the November 19, 2019 injury and due to the fact that Claimant had a lumbar surgery that is related to the November 19, 2019 injury, the issue of disfigurement is not yet ripe for adjudication and will be reserved for later determination. Claimant's eventual disfigurement in this case will need to take in any potential disfigurement resulting from Claimant's lumbar surgery.

31. Because the ALJ finds that Claimant's lumbar spine condition was causally related to the November 26, 2019 work injury, Respondents are liable for reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury related to the lumbar spine.

CONCLUSIONS OF LAW

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

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-

43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving* & *Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado,* W.C. No. 4-350-356 (March 22, 2000).

5. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

6. As found, the ALJ credits the testimony of Claimant at hearing along with the records from Dr. Orndorff and finds that Claimant has overcome the finding that he was at MMI as of October 1, 2020 by clear and convincing evidence. Specifically, the ALJ credits the testimony of Claimant regarding the onset of his symptoms in his hip and back as being related to the November 26, 2019 fall. The ALJ further credits Claimant's testimony that his symptoms that developed shortly after his November 26, 2019 fall resolved after the lumbar spine fusion performed by Dr. Orndorff on December 6, 2022. The ALJ determines that Claimant's testimony was supported by the medical records entered into evidence at hearing, including the records of Dr. Furry, Dr. Smith and Dr. Orndorff.

ORDER

It is therefore ordered that:

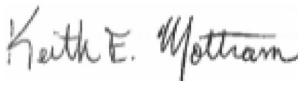
1. Claimant has overcome the finding that he was at MMI for the November 26, 2019 work injury as of October 1, 2020 by clear and convincing evidence.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury, including the medical treatment for Claimant's lumbar spine provided by physicians that are authorized to treat Claimant for his work injury, including, but not limited to, the medical treatment provided by Dr. Orndorff, pursuant to the Colorado Medical Fee Schedule.

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

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

DATED: May 20, 2023



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6^{1h} Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-110-083-003

ISSUES

I. Whether Claimant overcame the opinion of Division Independent Medical Examination ("DIME") physician Douglas Scott M.D. on permanent impairment.

II. Whether Claimant is entitled to an award of disfigurement benefits.

III. Medical maintenance benefits.

FINDINGS OF FACT

1. Claimant is a 41-year-old who works for Employer as a teacher's assistant.

2. Claimant sustained an admitted industrial injury while working for Employer on February 21, 2019. Claimant's right knee landed on a small wooden toy on the floor while she was crawling to attend to a child. When Claimant stood she felt a pop in her right knee, her knee gave way and she twisted her right ankle.

3. On February 25, 2019 Claimant sought treatment at the emergency department of Denver Health with complaints of swelling, bruising, and pain in the right knee. Candace Daughtery, PA noted Claimant also had "mild pain in the right lateral ankle but is far less concerned about this" (Cl. Ex. 4, p. 31). On examination PA Daughtery noted mild ecchymosis over the anteromedial right knee. Regarding the right ankle, there was tenderness to palpation over and immediately anterior to the lateral malleolus, no joint effusion, and near full active range of motion. X-rays of the right knee and right ankle revealed no definite acute fractures. Claimant was diagnosed with a right knee injury and right ankle sprain. PA Daughtery noted there was no evidence of fracture, traumatic malalignment or neurovascular compromise of the ankle. She recommended Claimant wear a knee sleeve and ankle splint, rest, ice and elevate her right extremity, and treat with NSAIDs.

4. On March 6, 2019 Claimant established care with authorized provider Concentra. Claimant initially presented to Janelle Tittalfitz, PA-C and Jerald Solot, D.O. Examination of the right knee revealed tenderness and limited range of motion. Appearance of the right ankle was normal. There was tenderness in the ATFL and CFL and deltoid ligament along with limited range of motion. Claimant was assessed with a right knee strain and right ankle sprain and referred for physical therapy for the right knee.

5. Claimant attended approximately 33 physical therapy sessions at Concentra from March 6, 2019 to October 1, 2019. All but three physical therapy records from these appointments reference right ankle findings or complaints. On March 6, 2019, Claimant

reported right knee pain and numbness down to her ankle. On March 8, 2019, full right ankle range of motion is noted. A May 2, 2019 note documents Claimant's reports of a little pain on the outside of the right ankle. No ankle findings are documented at this appointment.

6. On March 8, 2019 Claimant reported right knee and ankle pain. On examination of the right ankle, Dr. Solot noted mild pain with range of motion and no swelling or ecchymosis. He prescribed Claimant an ankle double strap.

7. On March 21, 2019 Claimant saw authorized treating physician ("ATP") Amanda Cava, M.D. at Concentra with complaints of pain in the right knee, right ankle and back. On examination of the right ankle, Dr. Cava noted mild tenderness to palpation over the anterior ankle/dorsal mid foot and mildly limited painful range of motion. There was no ecchymosis, swelling, or crepitus Dr. Cava's assessment was right ankle sprain, right knee strain and muscle spasm. She prescribed Claimant Medral for the ankle and knee, and other medications for muscle spasms.

8. On April 1, 2019 Dr. Cava noted mild tenderness over the anterior tibialis tendon on examination of the right ankle.

9. On April 12, 2019 Claimant reported to Dr. Cava that her ankle pain was improving and now occurred just with certain movements. On examination of the right ankle Dr. Cava noted no tenderness with full range of motion and normal strength. She remarked that Claimant's right ankle symptoms were resolving. Dr. Cava ordered an MRI of the right knee and referred Claimant to a chiropractor.

10. Claimant underwent six chiropractic sessions at Concentra with Richard Mobus, D.C. from April 15, 2019 through May 13, 2019. Dr. Mobus' treatment focused on reported symptoms in the low back, sacroiliac joint, hip, gluteal and hamstring. No ankle symptoms, findings or treatment are documented in his notes.

11. On April 26 and May 10, 2019, Dr. Cava noted Claimant's reports of continued back and right knee pain but improving ankle pain. No ankle exam is documented. Dr. Cava referred Claimant to an orthopedic specialist for evaluation of her right knee.

12. Claimant underwent an orthopedic evaluation of the right knee by Cary Motz, M.D. on May 21, 2019. Dr. Motz noted that a right knee MRI demonstrated grade 4 chondral defect in the lateral femoral condyle posteriorly as well as some grade 3 changes of the lateral patellar cartilage. There was no evidence of a loose body and no meniscal tear. The impression was right knee posterior lateral femoral condyle grade 4 defect and patellofemoral chondromalacia. Dr. Motz noted that Claimant had some degenerative changes per the MRI report and that she suspected Claimant aggravated this with the twisting injury at work. Dr. Motz administered a steroid injection to Claimant's right knee and recommended Claimant continue physical therapy. Dr. Motz did not address the right ankle.

13. At a follow-up evaluation on May 28, 2019 Claimant reported to Dr. Cava that her right knee pain was unchanged since undergoing the injection. She complained of hip and low back pain as well as issues with her left knee. Ankle complaints and exam are not documented. Dr. Cava's assessment was chondromalacia, right knee strain and low back strain.

14. On June 11, 2019 Dr. Motz noted Claimant had persistent symptoms despite chiropractic treatment, physical therapy and injections. She discussed proceeding with surgery of the right knee.

15. On June 14, 2019 Claimant complained of back pain radiating to her right buttock, right thigh, right calf and right lateral foot. No ankle complaints or exam are documented. Dr. Cava assessed Claimant with back pain of the lumbosacral region with sciatica and a right knee strain. She referred Claimant for a lumbar MRI.

16. On July 1, 2019 Claimant underwent a right knee arthroscopy with osteochondral plug placement and chondroplasty of medial femoral condyle and patella, performed by Dr. Motz. Dr. Motz' preoperative diagnosis was right knee chondral defect, lateral femoral condyle. Her postoperative diagnoses were right knee chondral defect, lateral femoral condyle and grade III chondromalacia of the patella and medial femoral condyle.

17. Claimant continued to see Dr. Cava and Dr. Motz postoperatively. On August 13, 2019 Claimant reported 7/10 right knee pain and no pain of the right ankle. Dr. Motz subsequently ordered a repeat right knee MRI and referred Claimant to John D. Papilion, M.D. for concern that the osteochondral plug failed.

18. Claimant presented to Dr. Papilion on November 5, 2019. Dr. Papilion assessed Claimant with right knee pain and chondromalacia and recommended proceeding with a mini open fresh osteochondral allograft. Dr. Papilion performed a right knee scope with osteochondral graft to lateral femoral condyle on December 16, 2019.

19. Claimant attended approximately 32 sessions of physical therapy at Lowry Now from January 16, 2020 through June 9, 2020. The notes from these appointments contain no right ankle complaints or findings with the exception of a February 6, 2020 note documenting tenderness across the midfoot and distal to the lateral malleolus with no pain with passive range of motion and a May 12, 2020 note documenting Claimant's report that she also twisted her ankle on the day of injury. nothing else documented re: ankle.

20. On January 28, 2020 Claimant reported to Dr. Cava experiencing pain in the right anterior-lateral ankle with weight bearing, as well as continued knee pain and swelling. No ankle exam is documented. Dr. Cava's assessment was chondromalacia and s/p right knee surgery.

21. On April 28, 2020 Dr. Papilion noted that a repeat right knee MRI revealed intact osteochondral graft with incorporation, normal cartilage surface and joint space with some patellar chondromalacia.

22. Claimant continued to complain of right knee pain. On May 22, 2020 Claimant reported 7/10 right knee pain with pain radiating to the right lower leg and occasional pain shooting down her right lateral lower leg to the ankle and dorsal foot. No ankle exam is documented.

23. On June 9, 2020 Claimant reported to Dr. Papilion experiencing no relief from a steroid injection. She complained of sciatic-type pain radiating from her right buttock down to her lateral foot and ankle.

24. On June 15, 2020 Claimant saw Dr. Cava with complaints of back pain radiating to her right lower leg and foot since undergoing an injection. No ankle complaints or findings are noted. Dr. Cava referred Claimant for massage therapy for her back and to an orthopedic specialist for her back and right knee.

25. On July 6, 2020 Dr. Cava noted Claimant's complaints of worsening back pain and increased pain and swelling in the right knee radiating to the lateral right lower leg and foot. No ankle examination is documented.

26. On July 16, 2020 Claimant presented to orthopedic surgeon Rachel Frank, M.D. at UC Health for a third opinion on her right knee pain. Claimant reported 7-8/10 knee pain and swelling and lower back and sciatic nerve discomfort radiating from her buttock down the posterior aspect of her leg with paresethesias in the middle toe. Examination of the right knee revealed tenderness and range of motion 0 to 130 symmetric to the left knee. She noted the appearance of femoral external rotation and ankle mortis varus changes compared to the left side. Dr. Frank reviewed a May 2020 MRI and opined that much of Claimant's pain may be coming from her lateral and patellofemoral cartilage wear and prior cartilage graft, which had significant edema on MRI suggestive of having not appropriately incorporated. She considered a CT of the hip and knee to assess for femoral rotation and recommend a series of hyaluronic acid injections. No ankle exam or complaints are documented.

27. On August 13, 2020 Kevin Shinsako, PA-C at UC Health noted Claimant's reports of significant anterior lateral and lateral-sided knee pain walking with a significant antalgic gait. Claimant underwent third hyaluronic injection of the right knee.

28. As of September 1, 2020 Dr. Cava's assessment was chondromalacia, S/P right knee surgery, and back pain of lumbosacral region with sciatica. No ankle findings or complaints were noted.

29. At a follow-up evaluation with Dr. Frank on September 10, 2020, Claimant reported experiencing no significant change after undergoing the knee injections. Claimant complained of knee pain radiating down to the foot. Dr. Frank noted that

Claimant also reported ankle complaints relating back to the original injury. No ankle exam is documented. Dr. Frank recommended that Claimant undergo a CT scanogram to assess for bilateral hip anatomy and knee anatomy. She referred Claimant to foot and ankle specialist Dr. Moon for evaluation of her ankle complaints and also referred Claimant for pain management.

30. On September 28, 2020 Claimant complained to Dr. Cava that she never had any evaluation or treatment of her right ankle complaints. Dr. Cava noted that the record from Claimant's initial emergency room visit documented a normal ankle x-ray and mild findings on ankle exam. She wrote,

> Per my early notes, her ankle strain was continually improving in the first few months, she had a normal ankle exam on 4/12/19, and her symptom complaints were nearly resolved by May 2019. Symptoms are unchanged. Symptoms are located in the right lateral ankle. Associated symptoms include tingling lateral ankle to lat and dorsal foot, but no instability.

(Cl. Ex. 5, p. 43).

31. On examination, Dr. Cava noted antalgia on the right and limping on the right. She did not document any examination of the ankles. Her assessment now included right ankle sprain. Dr. Cava referred Claimant for an MRI of the right ankle.

32. Claimant presented to Daniel Kyeongtaek Moon, M.D. on September 30, 2020. Clamant reported that she twisted her ankle at work and had some continued right ankle pain with activities. She reported that her pain increased after undergoing a knee injection in Spring 2020. Claimant complained of pain radiating down the side of her leg to her foot as well as pain when lying down. Her pain was perifibular in the dorsal lateral foot. On examination, Dr. Moon noted that Claimant had an altered gait where her right knee and foot seemed somewhat externally rotated. There was decreased sensation and positive Tinel's. Dr. Moon did not document ankle range of motion. X-rays of the right ankle obtained that day demonstrated posterior enthesophyte in the calcansus and small rounded ossific body at the medial malleolus tip. There were some minimal degenerative changes and OS peroneum. Dr. Moon's impression was peroneal nerve sensitivity and swelling. He recommended that Claimant wear a compression stocking and undergo physical therapy focusing on the ankle.

33. Dr. Frank reevaluated Claimant on October 8, 2020. Dr. Frank opined, "At this point I do not think her knee is the primary source of her pain. She is having more radiating lower leg pain down into the ankle. Pain also appears to be more nervelike in nature. No additional knee surgery are injections warranted at this time. May continue to use knee brace." (Cl. Ex. 9, p. 732). On examination, Dr. Frank noted "gross genu valgum appearance of right compared to left with external rotation of the entire right lower extremity that seems to be coming from the hip." (Id). She did not document specific measurements of the degree of gross genu valgum appearance.

34. On October 26, 2020 Dr. Cava noted Claimant had a normal ankle MRI and saw Dr. Moon, who ordered physical therapy. Claimant reported pain and swelling in the right foot with difficulty wearing shoes other than sandals. She reported no change in her ankle and foot symptoms. Claimant complained of right knee pain, swelling, clicking and instability. On examination, Dr. Cava noted diffuse tenderness of the right knee with limited range of motion. Claimant's foot/ankle was not tender. Dr. Cava did not document ankle range of motion.

35. Claimant attended approximately nine physical therapy sessions at CACC Physical Therapy from November 2, 2020 through July 13, 2021. On November 2, 2020, Claimant presented with pain in the right lateral ankle with limitations in range of motion, flexibility and endurance. On December 4, 2020 and February 19, 2021 the physical therapist noted slight improvement in ankle range of motion, pain and strength measurements. On May 26, 2021 Claimant reported a burning pain in her right ankle. The physical therapist noted decreased ankle and knee range of motion and an antalgic gait pattern on the right. Claimant continued to report right ankle pain at each subsequent session through July 13, 2021. The physical therapist recommended Claimant return to her physician before continuing with physical therapy as Claimant's gains had been very slow.

36. On December 29, 2020 Claimant reported to Dr. Cava pain up and down her leg with no improvement. Dr. Cava assessed Claimant with numbness of the right lower extremity. No knee or ankle exam is documented. Dr. Cava referred Claimant for an EMG of the right lower extremity and physical therapy for her chondromalacia, right ankle sprain and right knee.

37. Claimant underwent an EMG of the right lower extremity on January 18, 2021, performed by Kathy McCranie, M.D. The EMG was mildly abnormal with findings of a mild right sural neuropathy. Dr. McCranie opined that the mild right sural neuropathy did not explain the more diffuse nature of Claimant's complaints.

38. On January 26, 2021 Dr. Cava referred Claimant for continued physical therapy as well as massage therapy for her lumbar spine. On examination Dr. Cava noted swelling, diffuse tenderness and limited range of motion of the right knee. She further noted no tenderness or crepitus on palpation of the right ankle, with limited range of motion in all planes. Specific range of motion measurements were not specified.

39. On February 10, 2021 Kathleen D'Angelo, M.D. performed an Independent Medical Examination ("IME") at the request of Respondent. Claimant reported low back, right knee, sciatica and foot complaints. On examination of the right knee Dr. D'Angelo noted no tenderness over the knee anteriorly or to the quadriceps tendons distally and that range of motion was "actually very good." There was some atrophy of the VMO. On examination of the right ankle she noted range of motion was almost full in inversion, eversion and plantar flexion, but limited in dorsiflexion. There was no tenderness over the Achilles Tendon or the medial and lateral malleolus. Dr. D'Angelo remarked that Claimant's post-injury course was one of metastasizing and expanding complaints and

that Claimant's claims were inconsistent with her presentation in Dr. D'Angelo's office where she was observed sitting comfortably without display of pain behaviors. Dr. D'Angelo opined that all diagnostic and therapeutic interventions should be stopped until Claimant completes a forensic psychological evaluation. She concluded that Claimant would require an impairment rating only for her right knee, as there was no other objective evidence of work-related abnormalities to her lumbar spine, right ankle, hips, contralateral knee or ankle, and her head. She explained that the only reason to provide an impairment rating for the right knee was for the surgical interventions performed as Claimant's findings of chondromalacia were not causally related to the work injury.

40. On February 26, 2021 Claimant reported continued pain in her back, right knee and right ankle. Dr. Cava noted antalgia on the right and limping on the right, with no specific knee or ankle findings documented. She referred Claimant to an orthopedic specialist for the numbness of the right lower extremity and right ankle sprain and to a physiatrist for back pain. She also referred Claimant for additional physical therapy for her back and knee as well as a psychological evaluation.

41. Claimant underwent a neuropsychological evaluation with Kevin J. Reilly, Psy.D. on March 17, 2021. Dr. Reilly opined that Claimant's clinical presentation was consistent with a chronic pain syndrome, noting that her clinical history was one of increasing pain complaints and decreasing functional abilities. Dr. Reilly noted that Claimant's psychological testing was invalid due to minimization and inconsistencies in responding. He diagnosed Claimant with pain disorder with related psychological factors and adjustment disorder with depressed mood. He recommended Claimant undergo eight sessions of psychological and biofeedback therapies which were to be discontinued if Claimant did not report benefit after four sessions.

42. Walter J. Torres, Ph.D. performed a psychological evaluation of Claimant on March 18, March 23 and April 1, 2021. He issued a report dated April 6, 2021. Dr. Torres noted Claimant's testing was largely invalid due to a mixture of underreporting and insufficient completion of items; however, there were no indications of overreporting of symptomatology. Claimant attended teletherapy sessions with Dr. Torres on April 15, May 13, June 3, and July 21, 2021. As of last session, Dr. Torres noted that Claimant presented with no significant psychological impairment stemming from her situation.

43. Dr. D'Angelo reviewed Dr. Reilly's report and issued an addendum to her IME report on April 19, 2021. She opined Claimant was at maximum medical improvement ("MMI") if she did not show any subjective improvement in pain complaints from her psychological sessions.

44. Claimant returned to Dr. Moon on April 21, 2021. On examination he noted Claimant's right foot and right knee were externally rotated. There was tenderness to palpation of the peroneal tendons. He did not document ankle range of motion. Dr. Moon's impression was right peroneal tendinitis and superficial peroneal nerve sensitivity. He recommended Claimant restart physical therapy to work on her peroneal

tendon strength and gait and gave Claimant an ankle brace. Dr. Moon advised Claimant to focus on walking with the knee and foot in a straight position instead of externally rotated.

45. On April 22, 2021 Claimant complained to Dr. Cava of constant knee pain. Dr. Cava noted Claimant had seen Dr. Moon for her right foot/ankle. No examination of the ankle was noted. Dr. Cava remarked that Claimant's symptoms continued to worsen and migrate throughout her course of treatment and that Claimant did not seem to have a realistic understanding or expectation of Dr. Moon's recommendation for her treatment for her ankle/knee.

46. On May 18, 2021 Claimant continued to complain of pain in the right knee, back, hips and right ankle, along with pain in her left knee. On exam of the right knee Dr. Cava noted no apparent swelling of the right knee compared to the left, diffuse tenderness over the anterior knee, and limited range of motion with pain. Exam of the right lower leg was normal with the exception of increased sensitivity to light touch over the lateral lower leg to anterior-lateral ankle. The right ankle appeared normal. There was tenderness in the peroneal tendons and anterior ankle but full range of motion. Dr. Cava noted antalgia on the right with limping. Her assessment was chondromalacia, numbness of right lower extremity, emotional stress reaction and right ankle sprain. She referred Claimant for a repeat right knee MRI. Under the Discussion/Summary section of her medical note she remarked,

> [r]ight knee injury (and initially right ankle sprain that resolved) with persistently worsening/migrating symptoms and subjective complaints more than objective findings…Gait training/practice is important for her, as she has been frequently positioning her right lower extremity (and sometimes left) in external rotation and abduction for more than a year now.

(Cl. Ex. 5, p. 90).

47. On June 17, 2021 Dr. Cava noted on examination diffuse tenderness, weakness and limited range of motion of the right knee. There was increased/abnormal sensitivity to light touch over the lateral lower leg to anterior-lateral ankle. No ankle exam findings are documented. Claimant demonstrated antalgia on the right. Dr. Cava noted that a recent right knee MRI of right demonstrated a well-incorporated osteochondral graft and unchanged arthritis changes in the knee compared to a prior exam. She remarked that, despite Claimant completing an extensive course of physical therapy, as well as six chiropractic sessions and massage therapy, her symptoms and function had not improved but instead migrated and worsened. She referred Claimant to Dr. Frank for a maintenance visit for the right knee.

48. On July 16, 2021 Dr. Cava placed Claimant at MMI. On examination of the right knee, Dr. Cava noted no swelling, diffuse medial tenderness and tenderness to palpation inferior to the patella with no tenderness over the patella, mild lateral

tenderness, and no crepitus with passive knee motion but a small click/catch with the patella moved distally. Active right knee range of motion was 130 degrees flexion and 0 degrees extension. Left knee active range of motion was 135 degrees flexion and 0 degrees extension. Dr. Cava made no findings of any valgus deformity at the time of her examination. No examination of the right ankle is documented.

49. Dr. Cava's final assessment was right knee strain and s/p right knee surgery. Using the AMA Guides, she assigned Claimant 13% combined lower extremity impairment. The total combined impairment rating consisted of 2% lower extremity impairment for range of motion deficits in the right knee (using the left knee as a baseline), 10% lower extremity impairment for chondromalacia under Table 40 of the AMA Guides, and 1% lower impairment for mild right sural neuropathy that developed postoperatively. Dr. Cava referred Claimant for a functional capacity evaluation ("FCE") for the right knee and released Claimant to modified duty with permanent restrictions as determined by a valid FCE. Regarding maintenance treatment, Dr. Cava recommended Claimant complete her eight total visits with Dr. Torres, and one maintenance visit with Dr. Frank for the right knee in the next eight weeks.

50. Dr. Scott performed a DIME on November 30, 2021, taking Claimant's subjective history, reviewing medical records and performing a physical examination. The parties requested Dr. Scott evaluate Claimant's right ankle, right knee, right hip, lumbar spine and digestive issues. On examination of the right knee, Dr. Scott noted no swelling, popping or crepitus. Ligaments of the knee were stressed and stable with good patellar tracking. There was no MCL or LCL gapping with varus and valgus stress at 0 and 30 degrees. McMurray's testing was negative. Active range of motion of the right knee was measured by goniometer to 119 degrees of flexion and limited to -30 degrees in extension while sitting. Claimant was able to place her right knee in 0 degrees of extension or neutral position. There was no right calf tenderness. Claimant reported decreased sensation to light touch over the right lateral leg. Examination of the right ankle showed no swelling and no tenderness over the lateral or medial malleolus. Regarding right ankle range of motion Dr. Scott noted Claimant had "good passive range of motion without resistance she noted some Achilles tendon tightness with dorsiflexion of the foot." (R. Ex. E, p. 109). There was no pain with inversion or eversion stress and no ligamentous instability with inversion or eversion stress. There was negative anterior posterior drawer sign of the right ankle. Dr. Scott did not note any valgus deformity of the right knee.

51. Dr. Scott provided the following clinical diagnoses: (1) Contusions of the right knee resolved; (2) Twist of the right ankle with mild strain/sprain, resolved; (3) Aggravation of pre-existing chondromalacia of the patella and femoral condyle, with two arthroscopic surgeries and cartilage allograft placement; (4) Claimed low back pain due to altered gait from pain in the right knee; and (5) Possible mild sural nerve neuropathy due to regional block at time of second knee surgery on 12/16/2019. He agreed with Dr. Cava that Claimant reached MMI as of July 16, 2021.

52. Dr. Scott opined that the medical record and structural testing clearly demonstrated Claimant probably had pre-existing right knee chondromalacia that was aggravated by the February 21, 2019 work injury. Using the AMA Guides and the Impairment Rating Tips, Dr. Scott assigned Claimant combined 16% lower extremity impairment for the right knee. The rating consisted of 11% lower extremity impairment for range of motion deficits in the right knee under Section 3.2c and Table 39 of the AMA Guides, 5% lower extremity impairment under Section 5 of Table 40 of the AMA Guides for chondromalacia, and 1% lower extremity impairment for mild sural nerve impairment. Dr. Scott did not assign any impairment of the right ankle or right hip, stating the following: "By my examination [Claimant] has no permanent dysfunction of her right ankle for her presumed mild sprain of the right ankle on 2/21/2019. [Claimant] did not report an injury to her right hip nor did she report to me problems with her right hip." (R. Ex. E, p. 111). Dr. Scott explained that his impairment rating differed from Dr. Cava's as Claimant's right knee active range of motion was less on his examination. He further explained that he chose a 5% rating for chondromalacia versus 10% because of his belief that the work injury aggravated Claimant's chondromalacia.

53. Dr. Scott did not assign any permanent impairment for the lumbar spine, opining that there was no evidence Claimant suffered any work-related structural injury to her lumbar spine. He also did not assign any permanent impairment for any digestive issues, concluding that Claimant presented no evidence she suffered a permanent structural or physiologic impairment of the digestive system as a result of the work injury. Regarding maintenance care, Dr. Scott recommended Claimant continue wearing the unloader knee brace, take Tylenol for and ice/heat the knee as needed, and continue a strengthening program for the muscles surrounding the knee.

54. It is undisputed Respondent filed a Final Admission of Liability consistent with Dr. Scott's DIME report. Respondent admitted for reasonable, necessary and related medical maintenance treatment. Claimant did not offer evidence as to any specific maintenance medical treatment Claimant has requested and Respondent has failed to authorize or denied.

55. On October 20, 2022 Caroline Gellrick, M.D. performed an IME at the request of Claimant. Dr. Gellrick's record review did not include Dr. Scott's DIME report. On examination Dr. Gellrick noted Claimant walked with her right foot outward. There was mild positive McMurray's testing medially and laterally on the right and tenderness medially and laterally on the right knee. Right knee active range of motion using goniometer was 131 degrees flexion and -5 degrees extension. Claimant was intolerant of range of motion measurements of the left knee due to cramping in her left leg. Dr. Gellrick noted the following right ankle range of motion measurements: 10 degrees dorsiflexion, 40 degrees plantar, 30 degrees inversion and 20 degrees eversion. No measurements of the valgus deformity are documented.

56. Dr. Gellrick agreed with the MMI date assigned by Dr. Cava of July 16, 2021. She noted she agreed in part with Dr. D'Angelo's notation that Claimant symptoms of pain in the number of body parts kept spreading from the initial encounter of a right

knee sprain and ankle sprain. Dr. Gellrick opined that there was no surgical indication for further surgery of the right knee or surgery of the right ankle.

57. Using the AMA Guides Dr. Gellrick assigned a combined lower extremity impairment of 29%. Her rating consisted of:

a. 21% impairment for the right knee, comprised of: (1) 2% lower extremity impairment for range of motion deficits of the right knee, using Dr. Cava's left knee measurements for normalization, as Claimant was intolerant of left knee measurements during her exam; (2) 10% impairment for chondromalacia under Table 40 of the AMA Guides; and (3) 10% impairment for posttraumatic valgus deformity;

b. 9% impairment of the right ankle for range of motion deficits; and

c. 1% impairment for damage to the sural nerve under Table 51 of the AMA Guides.

58. Regarding maintenance care, Dr. Gellrick recommended further neuropsychological testing with a bilingual neuropsychologist, orthotics to correct Claimant's leg length discrepancy, aquatic and land physical therapy, and knee brace replacements.

59. Dr. Gellrick testified at a deposition as Level II accredited expert in family medicine and addiction medicine. Dr. Gellrick testified consistent with her IME report. She confirmed that, at the time of issuing her IME report she had not reviewed Dr. Scott's DIME report. Dr. Gellrick explained that she provided 10% impairment for chondromalacia because the two surgeries resulting from Claimant's work injury aggravated the condition. She testified that she assigned 10% impairment for posttraumatic valgus deformity, which she explained is a deformity of the leg in which Claimant's right knee bent inward. Dr. Gellrick opined that the valgus deformity most likely developed after Claimant's work-related surgeries, noting that the initial medical records did not document any valgus deformity. She did not address measurements of the degree of valgus deformity. Dr. Gellrick testified she assigned 2% impairment for range of motion deficits of the right knee after normalization, as well as 1% impairment for mild right sural neuropathy that was likely caused by Claimant's knee surgeries. Dr. Gellrick testified that Claimant's ankle was part of her original work injury and that she assigned 9% impairment of the right ankle after normalization compared to the left ankle.

60. Dr. Gellrick continued to recommend the maintenance care detailed in her IME report, including a follow-up with Dr. Torres, an evaluation with a neuropsychologist like Dr. Rieffel who speaks Spanish, orthotics, a knee brace as well as possibly a brace for her right ankle. On cross-examination Dr. Gellrick acknowledged that, by the time she examined Claimant approximately 13 months post-MMI, Claimant's range of motion could have worsened with the passage of time, body habitus and inactivity.

61. Claimant testified at hearing that she did not have any prior right knee or right ankle injuries. She testified that after undergoing the right knee surgeries her right foot began to turn outward and she experienced numbness from her hip down to her foot. Claimant testified she developed a limp after sustaining the injury in March 2019 and has had the limp since such time. She testified her right knee currently feels like it will give out 2-3 times per day, and has 9/10 pain. She wears a knee brace prescribed by Dr. Frank and an ankle brace that was prescribed by Dr. Moon. She testified that since being placed at MMI by Dr. Cava almost two years ago her condition has worsened, with more pain and stiffness.

62. The ALJ finds the opinions of Drs. Scott and Cava, as supported by the medical records, more credible and persuasive than the opinion of Dr. Gellrick and Claimant's testimony.

63. The ALJ finds Dr. Scott properly applied the AMA Guides. Claimant failed to prove by a preponderance of the evidence Dr. Scott's DIME opinion on permanent impairment is incorrect.

64. As a result of Claimant's February 24, 2019 work injury and related surgeries, Claimant has a visible disfigurement to the body and is entitled to award for disfigurement. The disfigurement consists of the following:

a. A noticeable limp on the right side.

b. A scar on the front of Claimant's right knee measuring approximately 2 inches in length and ½ inch in width. The scar is discolored and textured.

c. A knee brace Claimant testified she wears almost daily but not in the house.

d. An ankle brace Claimant testified she wears when driving and standing for a long period of time.

e. Two arthroscopic scars on Claimant's inner right knee which are slightly discolored.

f. An arthroscopic scar on Claimant's out right knee that is slightly discolored.

65. Claimant's disfigurement does not entail extensive facial scars or facial burn scars, extensive body scars or burn scars; or stumps due to loss or partial loss of limbs.

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).

Overcoming the 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). "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 (ICAP,

Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. 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).

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The Court of Appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of §8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* WC 4-971-646-03 (ICAO, Feb. 6, 2018). Claimant has the burden of showing the extent of his scheduled impairment by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc. and Indeminity Care ESIS Inc*., WC 4-777-882 (ICAO, Nov. 5, 2010); *see Morris v. Olson Heating & Plumbing Co.,* WC 4-980-171 (ICAO, May 20, 2019) (whether the claimant sustained a whole person or extremity impairment is one of fact for the ALJ and the DIME opinion on the issue is not entitled to any enhanced weight).

If a party has carried the initial burden of overcoming the DIME physician's impairment rating, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence." *Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, WC 4-561-848 (ICAO, Mar. 19, 2004). An ALJ's statutory power to render evidentiary decisions does not disappear merely because the ATP and the DIME doctor agree that a claimant has not reached MMI. An ALJ may thus determine whether a claimant has reached MMI and assign an impairment rating as a question of fact. *Destination Maternity and Liberty Mutual Insurance Company v. Burren*, 19SC298 (Colo. May 18, 2020); *see Niedzielski v.*

Target Corporation, WC 5-036-773-001 (ICAO, Mar. 9, 2020) (when an ALJ determines that a DIME opinion has been overcome, the issue of the claimant's correct impairment rating becomes a question of fact and the ALJ may calculate the impairment based upon a preponderance of the evidence).

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. Industrial Claim Appeals Office,* 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,* WC 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. Deviations from the *AMA Guides* constitute evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *See Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Vuksic v. Lockheed Martin Corporation* WC 4-956-741-02 (ICAO, Aug. 4, 2016). 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,* WC 4-677-750 (ICAO, Apr. 16, 2008).

Claimant argues Dr. Scott erred in his DIME opinion by failing to assign impairment of the right ankle and failing to assign a higher lower extremity impairment rating for the right knee. As part of his work-related diagnoses, Dr. Scott opined that Claimant sustained resolved contusions of the right knee, a resolved mild right ankle strain/sprain, and aggravation of pre-existing chondromalacia of the patella and femoral condyle. Dr. Scott included the right ankle as part of his work-related diagnoses and specifically determined Claimant did not sustain any permanent impairment of the right ankle. As Claimant is attempting to challenge the DIME physician's opinion on scheduled impairment of body parts Dr. Scott deemed related to the work injury (the right knee and right ankle), the correct burden of proof to overcome the DIME is a preponderance of the evidence.

As found, Claimant failed to prove it is more probably true than not Dr. Scott's DIME opinion was incorrect. Dr. Scott determined Claimant sustained a combined 16% lower extremity impairment, consisting of 11% impairment for right knee range of motion deficits, 5% for right knee chondromalacia under Table 40 of the AMA Guides, and 1% for mild sural nerve impairment. Claimant does not argue that Dr. Scott's 1% rating for sural nerve impairment is incorrect. Dr. Scott's 1% impairment for sural nerve impairment is consistent with the impairment assigned by Drs. Cava and Gellrick and is supported by the medical records. The crux of Claimant's challenge to the DIME - the impairment ratings of the right knee and right ankle - is discussed below.

<u>Right Knee</u>

Claimant does not allege Dr. Scott erred in his right knee range of motion measurements or calculations. Claimant argues Dr. Scott erred by assigning 5% impairment instead of 10% impairment for Claimant's chondromalacia and that he

provided no basis for doing so. Claimant further argues Dr. Scott erred by failing to rate Claimant's valgus deformity. Claimant contends she is entitled to 21% lower extremity impairment for her right knee, as determined by Dr. Gellrick.

Claimant's argument that Dr. Scott did not explain the basis for his rating for chondromalacia is inaccurate. Dr. Scott specifically stated in his DIME report that he assigned 5% impairment instead of 10% impairment because he believed Claimant aggravated a condition of chondromalacia. That Dr. Scott did not provide a more extensive explanation of his reasoning does not render his opinion probably incorrect in light of the totality of the circumstances. The preponderant evidence demonstrates Dr. Scott's impairment rating for chondromalacia was discretionary and within the parameters established by the AMA Guides. Section 5 of Table 40 of the AMA Guides provides for 0-20% impairment of the lower extremity for arthritis due to any cause including trauma. Neither the AMA Guides nor the Impairment Rating Tips specify that a physician is required to give a particular rating between 0-20%. The AMA Guides only note that the impairment of 0-20% under Section 5 of Table 40 is "according to deformity." (AMA Guides, p. 68).

Claimant relies on the fact that Dr. Gellrick's 10% impairment for chondromalacia is the same as Dr. Cava's. While Dr. Gellrick's 10% impairment for chondromalacia is consistent with that of Dr. Cava, the preponderant evidence does not demonstrate Dr. Scott's opinion was probably in error. Drs. Scott, Cava and Gellrick all opine Claimant had pre-existing chondromalacia that was aggravated by the work injury. Claimant's imaging confirms what was likely pre-existing chondromalacia. A right knee MRI obtained prior to Claimant's first right knee surgery noted grade III chondromalacia, while those obtained after her two surgeries demonstrated grade III and grade IV chondromalacia. Dr. Scott determined that the extent of work-related aggravation and deformity qualified for a 5% rating instead of 10%, which was within his discretion and within the parameters of the AMA Guides.

Similarly, the preponderant evidence does not establish Dr. Scott erred in failing to assign impairment for valgus deformity. On October 8, 2020, Dr. Frank did note the appearance of right gross genu valgum as compared to the left. Nonetheless, neither Dr. Cava, who treated Claimant for more than two years, Dr. D'Angelo, or Dr. Scott noted any valgus deformity related to the work injury or gave any impairment for such condition. Section 10 of Table 40 of the AMA Guides provides for 10% lower extremity impairment for posttraumatic valgus deformity *if over 20 degrees*. (Emphasis added). The medical records, including Dr. Gellrick's IME report, do not document measurements with respect to the degree of valgus deformity. Dr. Gellrick testified that she attributes the valgus deformity to the work injury, but did not address any degree of deformity. The existence of a valgus deformity is not dispositive that Dr. Scott likely erred in not assigning permanent impairment for such condition under the totality of the circumstances.

<u>Right Ankle</u>

Claimant further contends Dr. Scott erred in failing to assign permanent impairment for the right ankle, based on documentation in the records of limited ankle range of motion and right ankle pain, as well as failure by Drs. Cava and Scott to take specific range of motion measurements of the right ankle. Claimant argues she is entitled to 9% impairment of the right ankle due to range of motion deficits as determined by Dr. Gellrick.

The preponderant evidence does not demonstrate Dr. Scott erred in failing to assign permanent impairment for the right ankle. Documentation of ankle range of motion and complaints are present in the record, although somewhat inconsistently. While there are references to limited or decreased ankle range of motion at certain points throughout Claimant's evaluation and treatment, specific ankle range of motion measurements are not documented. Dr. Scott performed an examination of the right ankle noting "good" passive range of motion. He specifically explained that his exam revealed no permanent dysfunction of the right ankle. Dr. Scott's clinical diagnoses included a mild right ankle strain/sprain that had resolved.

His opinion that Claimant did not sustain any impairment to her ankle is consistent with that of Dr. D'Angelo, as well as ATP Dr. Cava. On September 28, 2020, Dr. Cava specifically addressed Claimant's complaint that her right ankle had gone untreated, noting that initial emergency room records documented mild ankle findings and a normal x-ray. Dr. Cava further noted that Claimant's ankle strain was continually improving in the first few months, she had a normal ankle exam on April 12, 2019, and that the strain nearly resolved by May 2019. On May 18, 2021, two months prior to being placed at MMI, Dr. Cava noted full right ankle range of motion on examination. Her final assessment was right knee strain and s/p right knee surgery.

Dr. Gellrick assigned an impairment for the right ankle based on deficits in range of motion obtained 13 months subsequent to Claimant being placed at MMI. Claimant testified that, since MMI she has experienced more pain and stiffness. Dr. Gellrick acknowledged during her testimony that, by the time she examined Claimant, Claimant's range of motion could have worsened with the passage of time, body habitus and inactivity. With respect to impairment of the right ankle, Dr. Scott's opinion, as corroborated by Drs. Cava and D'Angelo and the medical records, is more credible and persuasive than that of Dr. Gellrick. To the extent Dr. Scott was required under the AMA Guides to document specific ankle range of motion measurements and did not do so, such deviation did not materially impact his rating, in light of his ultimate conclusions that Claimant's right ankle sprain/strain resolved without permanent dysfunction.

Based on the totality of the evidence, the preponderant evidence does not demonstrate Dr. Scott erred in his DIME opinion on permanent impairment.

Maintenance Medical Treatment

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further

deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). 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 District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003).

As found, Respondent admitted liability for reasonable, necessary and related medical benefits. Claimant does not contend, nor was any evidence offered, that Respondent denied or otherwise failed to authorize a specific medical maintenance benefit requested by Claimant. Accordingly, any determination of whether specific medical treatment is reasonable, necessary and related maintenance treatment is premature. The issue shall be reserved for future determination as applicable.

Disfigurement

Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

As found, as a result of the work injury and related surgeries, Claimant sustained a serious permanent disfigurement in an area of the body normally exposed to public view. Based on Claimant's disfigurement, that ALJ concludes she is entitled to the disfigurement maximum for her date of injury, $5,229.68.

ORDER

1. Claimant failed overcome Dr. Scott's DIME opinion permanent impairment by a preponderance of the evidence.

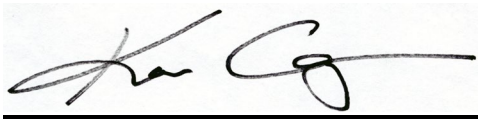
2. Respondent shall pay Claimant $5,229.68 for her disfigurement. Respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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: May 30, 2023



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. 5-183-740-003

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive an accounting demonstrating proof of reimbursement of medical expenses.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is permitted to receive interest on her Workers' Compensation indemnity benefits.

3. Whether Claimant has established by a preponderance of the evidence that she is eligible for reimbursement of mileage and other expenses.

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to recover penalties.

FINDINGS OF FACT

1. On August 19, 2021 Claimant sustained a work-related injury to her right shoulder during the course and scope of her employment with Employer.

2. A First Report of Injury was filed on September 29, 2021. Respondents filed a Notice of Contest on October 4, 2021.

3. On October 25, 2021 Claimant filed an Application for Hearing regarding compensability, medical benefits and Temporary Total Disability (TTD) benefits.

4. On December 16, 2021 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged Claimant was entitled to receive medical benefits and TTD benefits.

5. On April 21, 2022 John J. Raschbacher, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI). Respondents filed a Final Admission of Liability (FAL) on May 24, 2022.

6. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME). On June 6, 2022 Claimant filed an Application for Indigent Determination with the Office of Administrative Courts. On June 29, 2022 ALJ Nemechek determined Claimant's liquid assets totaled $22,100.00 and thus exceeded the $1,500.00 limit. He concluded Claimant was not indigent pursuant to WCRP 18-10(A)(1). Claimant thus paid the $1000 DIME fee.

7. On October 10, 2022 DIME physician John D. Douthit, M.D. determined Claimant had reached Maximum Medical Improvement (MMI) on April 21, 2022 and assigned a 13% right upper extremity impairment rating. On October 27, 2022 Respondents filed a FAL consistent with Dr. Douthit's MMI and impairment determinations. The FAL also acknowledged that Claimant was permitted to receive medical maintenance benefits in the form of pain management including a second opinion on her right shoulder with an orthopedic surgeon.

8. On November 3, 2022 Respondents filed an Amended FAL. The Amended FAL reiterated that Claimant was authorized to receive medical maintenance benefits in the form of pain management including a second opinion on her right shoulder with an orthopedic surgeon. The document specified that Respondents had paid $4349.40 in medical benefits The FAL noted that it had been amended to include the payment of TTD benefits for the period April 21, 2022 through October 9, 2022 based on Dr. Douthit's DIME opinion. The FAL stated that Claimant had received TTD benefits totaling $18,799.04 for the period August 20, 2021 through October 9, 2022. Claimant also received Temporary Partial Disability (TPD) benefits for the period October 10, 2022 through April 16, 2023 totaling $9,834.45. The FAL reveals that Respondents did not make any interest payments to Claimant.

9. Claimant objected to the FAL and filed an Application for Hearing regarding multiple issues, including the following:

> [a]ccurate accounting showing proof of reimbursement of all medical expenses, maintenance care and treatment as recommended by DIME physician, penalties for requiring me, as well as, all Colorado instructors, to perform tasks "off the clock" without pay and then using the argument that I wasn't on the clock to justify denial of a Workers' Comp claim, penalties for handling my claim incorrectly and violating workers' compensation rules/deadlines, interest on TTD for four months of non-payment while waiting for court date, interest on PPD for six months of non-payment while waiting for DIME, reimbursement for $1000 DIME since their first doctor was wrong, reimbursement for mileage, reimbursement for paper, ink, postage, etc. required to fight the denial, PTO and holiday pay that I used up when wasn't receiving TTD but should have been, unpaid wages for 100s of times loading and unloading equipment from my vehicle. They have admitted this was done 'off the clock.' If submitted this time on my timesheets it brought down my "efficiency rating" which prompted discipline at performance reviews.

10. Claimant testified at the hearing in this matter. She recounted that she reported her August 19, 2021 injury to Employer but was not apprised that the claim might involve Workers' Compensation. She thus went to an emergency room and later underwent physical therapy under private insurance. Claimant noted Employer did not

timely file a First Report of Injury or supply a designated provider list. Respondents initially denied liability, but eventually accepted the claim and filed a GAL.

11. Claimant explained that, after Respondents accepted liability, she was required to attend additional medical appointments through Workers' Compensation providers but never received mileage reimbursement. Because she initially reached MMI with a 0% impairment rating, she was required to pay for a DIME and received a 13% upper extremity rating. Claimant remarked that she still suffers right arm limitations as a result of her August 19, 2021 work injury.

12. Claimant seeks an "accounting showing proof of reimbursement of all medical expenses, maintenance care and treatment" as recommended by DIME Dr. Douthit. However, Respondents' counsel has stated that a copy of the medical payment log has been provided to Claimant. Moreover, on November 3, 2022 Respondents filed an Amended FAL reiterating that Claimant was entitled to receive medical maintenance benefits in the form of pain management including a second opinion on her right shoulder with an orthopedic surgeon. The document specified that Respondents had paid $4349.40 in medical benefits for Claimant's injury.

13. Importantly, the record reflects that Respondents have requested medical provider SCL Health to cease billing Claimant and submit their bills to Insurer for payment. Specifically, on January 27, 2022 Respondents' counsel authored a letter advising medical providers SCL Health Saint Joseph Hospital and Western Orthopaedics and Sports Medicine that a FAL had been filed "which indicates that all medical costs incurred for treatment of the claimant's work-related injuries are the sole responsibility of the employer. As such, any attempt to collect against the claimant will be in direct violation of Colorado law." The letter also specified that an injured worker is never required "to directly pay for admitted or ordered medical benefits covered under the Workers' Compensation Act." Notably, if the injured worker has directly paid for medical treatment that is later admitted, "the payer shall reimburse the injured worker for the amounts actually paid for authorized treatment within 30 days of receipt of the bill." On June 27, 2022 Respondents authored an identical letter to SCL Health Saint Joseph Hospital.

14. The preceding documentation reflects that Respondents have admitted liability for and paid Claimant's reasonable, necessary and related medical benefits. To the extent that medical providers seek payment directly from Claimant, Respondents have advised the providers that their requests violate Colorado law. Instead, Respondents have acknowledged that they are required to reimburse Claimant for the amounts actually paid for authorized treatment within 30 days of receipt of the bill. Finally, there is no evidence in the record that Respondents have denied any requested maintenance medical treatment. Because Respondents have acknowledged liability for medical benefits and advised providers they are responsible for payment, Claimant's request for an accounting and reimbursement of medical expenses is denied and dismissed.

15. Claimant seeks four months of interest payments on TTD benefits while awaiting a court date. Claimant also requests six months of PPD benefits while waiting for a DIME. The FAL reveals that Respondents did not make any interest payments to Claimant. However, the indemnity benefits for which Claimant seeks interest were not due and owing until after Dr. Douthit's DIME opinion was issued on October 10, 2022. Respondents then timely issued an Amended FAL on November 3, 2022 based on Dr. Douthit's determination. The Amended FAL noted that it had been revised to include the payment of TTD benefits for the period April 21, 2022 through October 9, 2022. The Amended FAL detailed that Claimant had received TTD benefits totaling $18,799.04 for the period August 20, 2021 through October 9, 2022. Claimant also received TPD benefits for the period October 10, 2022 through April 16, 2023 totaling $9,834.45. Because the record reveals that Respondents timely filed an Amended FAL and did not delay indemnity benefit payments to Claimant, no interest is due. Claimant's request for interest payments is thus denied and dismissed.

16. In Claimant's Application for Hearing she sought reimbursement for mileage expenses. DOWC Rule of Procedure 18-7(E) specifies that "the injured worker shall submit a request to the Payer showing the date(s) of travel and mileage, and explain any other reasonable and necessary travel expenses incurred or anticipated." However, the record is devoid of evidence that Claimant requested mileage reimbursement for medical expenses from Respondents. Accordingly, Claimant's request for mileage reimbursement is denied as unripe.

17. Claimant also seeks reimbursement for expenses in the form of paper, ink, and postage to challenge the denial of her claim for benefits. However, there is no evidence in the record regarding the amount Claimant seeks. Furthermore, there is no provision in the Workers' Compensation Act for reimbursement of expenses for paper, ink and postage incurred in challenging a denied claim. Accordingly, Claimant's request for reimbursement of costs for paper, ink and postage is denied and dismissed.

18. Claimant requests "reimbursement for $1000 DIME since their first doctor was wrong." However, the record reflects that Claimant was responsible for the DIME fees. Initially, Claimant objected to the FAL and sought a DIME. On June 6, 2022 Claimant filed an Application for Indigent Determination with the Office of Administrative Courts. On June 29, 2022 ALJ Nemechek determined that Claimant's liquid assets totaled $22,100.00 and exceeded the $1,500.00 limit. He thus concluded that Claimant was not indigent pursuant to WCRP 18-10(A)(1). Claimant then paid the $1000 DIME fee. Pursuant to WCRP 11-5(B) the requesting party is liable for payment of DIME fees absent a finding of indigence. Accordingly, Claimant's request for reimbursement of the DIME fee is denied and dismissed.

19. In her Application for Hearing, Claimant sought penalties for "handling my claim incorrectly and violating workers' compensation rules/deadlines." The Application did not state with specificity the grounds on which Claimant was seeking penalties. Although Claimant testified that Employer did not timely file a First Report of Injury or

supply a designated provider list, Respondents did not receive adequate notice of the factual or legal bases for her penalty claims.

20. Regardless of Claimant's testimony at hearing, the Application for Hearing simply identified that Respondents had failed to correctly handle her claim and violated deadlines. However, Respondents were entitled to reasonable notice of the specific legal and factual bases of the penalty claims so they had a fair opportunity to prepare appropriate defenses. Based on a review of the record, Respondents did not receive a fair opportunity to present contrary evidence at the time of the hearing or receive sufficient notice of the bases of the claims for penalties to satisfy standards of due process. Accordingly, Claimant's request for penalties is denied and dismissed.

21. Claimant also seeks penalties for work performed "off the clock" and unpaid wages for loading equipment. The preceding issues seek compensation for employment duties and do not involve work injuries. Because requests exceed the jurisdiction of the Office of Administrative Courts they will not be addressed.

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).

Reimbursement for Medical Expenses

4. Section 8-43-203(2)(b)(II), C.R.S. provides that a claim will automatically close after the date of the FAL unless the claimant contests the FAL in writing and requests a hearing on any disputed issues that are ripe for hearing. *See Stefanski v. Indus. Claim Appeals Off.,* 128 P.3d 282 (Colo. App. 2006). One purpose of the procedures enumerated in §8-43-203(2)(b)(II) is to provide the claimant with formal notice of the issues admitted and denied by the respondents as well as the bases for those actions. The claimant may then make an informed decision regarding whether to contest the FAL. The purpose of procedures surrounding the filing of FAL is for the respondents to notify the claimant regarding admitted and denied issues and for the claimant to determine whether the claim should close or be contested. *Olguin v. Rent a Center*, W.C. No. 4-714-364 (ICAO, Apr. 13, 2010). The statutory automatic closure provisions are designed to "promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy." *Dyrkopp v. Indus. Claim Appeals Off.,* 30 P.3d 821, 822 (Colo. App. 2001).

5. As found, Claimant seeks an "accounting showing proof of reimbursement of all medical expenses, maintenance care and treatment" as recommended by DIME Dr. Douthit. However, Respondents' counsel has stated that a copy of the medical payment log has been provided to Claimant. Moreover, on November 3, 2022 Respondents filed an Amended FAL reiterating that Claimant was entitled to receive medical maintenance benefits in the form of pain management including a second opinion on her right shoulder with an orthopedic surgeon. The document specified that Respondents had paid $4349.40 in medical benefits for Claimant's injury.

6. As found, importantly, the record reflects that Respondents have requested medical provider SCL Health to cease billing Claimant and submit their bills to Insurer for payment. Specifically, on January 27, 2022 Respondents' counsel authored a letter advising medical providers SCL Health Saint Joseph Hospital and Western Orthopaedics and Sports Medicine that a FAL had been filed "which indicates that all medical costs incurred for treatment of the claimant's work-related injuries are the sole responsibility of the employer. As such, any attempt to collect against the claimant will be in direct violation of Colorado law." The letter also specified that an injured worker is never required "to directly pay for admitted or ordered medical benefits covered under the Workers' Compensation Act." Notably, if the injured worker has directly paid for medical treatment that is later admitted, "the payer shall reimburse the injured worker for the amounts actually paid for authorized treatment within 30 days of receipt of the bill." On June 27, 2022 Respondents authored an identical letter to SCL Health Saint Joseph Hospital.

7. As found the preceding documentation reflects that Respondents have admitted liability for and paid Claimant's reasonable, necessary and related medical benefits. To the extent that medical providers seek payment directly from Claimant, Respondents have advised the providers that their requests violate Colorado law. Instead, Respondents have acknowledged that they are required to reimburse Claimant for the amounts actually paid for authorized treatment within 30 days of receipt of the bill.

Finally, there is no evidence in the record that Respondents have denied any requested maintenance medical treatment. Because Respondents have acknowledged liability for medical benefits and advised providers they are responsible for payment, Claimant's request for an accounting and reimbursement of medical expenses is denied and dismissed.

8. As found, Claimant seeks four months of interest payments on TTD benefits while awaiting a court date. Claimant also requests six months of PPD benefits while waiting for a DIME. The FAL reveals that Respondents did not make any interest payments to Claimant. However, the indemnity benefits for which Claimant seeks interest were not due and owing until after Dr. Douthit's DIME opinion was issued on October 10, 2022. Respondents then timely issued an Amended FAL on November 3, 2022 based on Dr. Douthit's determination. The Amended FAL noted that it had been revised to include the payment of TTD benefits for the period April 21, 2022 through October 9, 2022. The Amended FAL detailed that Claimant had received TTD benefits totaling $18,799.04 for the period August 20, 2021 through October 9, 2022. Claimant also received TPD benefits for the period October 10, 2022 through April 16, 2023 totaling $9,834.45. Because the record reveals that Respondents timely filed an Amended FAL and did not delay indemnity benefit payments to Claimant, no interest is due. Claimant's request for interest payments is thus denied and dismissed.

Reimbursement for Mileage and other Expenses

9. Section 8-42-101(1)(a), C.R.S. requires the respondents to pay for expenses that are incidental to obtaining reasonable and necessary medical treatment. Specifically, mileage expenses are compensable if "incidental" to obtaining medical treatment. *Country Squire Kennels v. Tarshsis*, 899 P.2d 362 (Colo. App. 1995); *Sigman Meat Co. v. Indus. Claim Appeals Off.*, 761 P.2d 265 (Colo. App. 1988). Similarly, Colorado Division of Workers' Compensation (DOWC) Rule of Procedure 16-10(G) specifies that "payers shall reimburse injured workers for mileage expenses as required by statute or provide written notice of the reason(s) for denying reimbursement within 30 days of receipt." Finally, DOWC Rule of Procedure 18-7(E) provides that "[t]he Payer shall reimburse the injured worker for reasonable and necessary mileage expenses for travel to and from medical appointments.

10. As found, in Claimant's Application for Hearing she sought reimbursement for mileage expenses. DOWC Rule of Procedure 18-7(E) specifies that "the injured worker shall submit a request to the Payer showing the date(s) of travel and mileage, and explain any other reasonable and necessary travel expenses incurred or anticipated." However, the record is devoid of evidence that Claimant requested mileage reimbursement for medical expenses from Respondents. Accordingly, Claimant's request for mileage reimbursement is denied as unripe.

11. As found, Claimant also seeks reimbursement for expenses in the form of paper, ink, and postage to challenge the denial of her claim for benefits. However, there is no evidence in the record regarding the amount Claimant seeks. Furthermore, there is no provision in the Workers' Compensation Act for reimbursement of expenses for paper,

ink and postage incurred in challenging a denied claim. Accordingly, Claimant's request for reimbursement of costs for paper, ink and postage is denied and dismissed.

12. As found, Claimant requests "reimbursement for $1000 DIME since their first doctor was wrong." However, the record reflects that Claimant was responsible for the DIME fees. Initially, Claimant objected to the FAL and sought a DIME. On June 6, 2022 Claimant filed an Application for Indigent Determination with the Office of Administrative Courts. On June 29, 2022 ALJ Nemechek determined that Claimant's liquid assets totaled $22,100.00 and exceeded the $1,500.00 limit. He thus concluded that Claimant was not indigent pursuant to WCRP 18-10(A)(1). Claimant then paid the $1000 DIME fee. Pursuant to WCRP 11-5(B) the requesting party is liable for payment of DIME fees absent a finding of indigence. Accordingly, Claimant's request for reimbursement of the DIME fee is denied and dismissed.

Penalties

13. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015). The purposes of the specificity requirement are to both: (1) provide notice of the basis of the alleged violation so the putative violator can have an opportunity to cure the violation and (2) provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *See Major Medical Insurance Fund v. Indus. Claim Appeals Off.*, 77 P.3d 867 (Colo. App. 2003). The notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015). Nevertheless, the statute does not prescribe a precise form for pleading penalties and an ALJ may consider the circumstances of the individual case to ascertain whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, WC 4-493-641 (ICAO Apr. 28, 2004).

14. The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in these requirements is the rule that parties will receive adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. *See Hendricks v. Indus Claim Appeals Off,* 809 P.2d 1076, 1077 (Colo. App. 1990); *In Re Claim of Campbell*, W.C. No. 5-050-078-02 (ICAO, Dec. 18, 2018).

15. As found, in her Application for Hearing, Claimant sought penalties for "handling my claim incorrectly and violating workers' compensation rules/deadlines." The Application did not state with specificity the grounds on which Claimant was seeking penalties. Although Claimant testified that Employer did not timely file a First Report of

Injury or supply a designated provider list, Respondents did not receive adequate notice of the factual or legal bases for her penalty claims.

16. As found, regardless of Claimant's testimony at hearing, the Application for Hearing simply identified that Respondents had failed to correctly handle her claim and violated deadlines. However, Respondents were entitled to reasonable notice of the specific legal and factual bases of the penalty claims so they had a fair opportunity to prepare appropriate defenses. Based on a review of the record, Respondents did not receive a fair opportunity to present contrary evidence at the time of the hearing or receive sufficient notice of the bases of the claims for penalties to satisfy standards of due process. Accordingly, Claimant's request for penalties is denied and dismissed. *See In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015) (setting aside ALJ's order assessing penalties because claimant's application for hearing did not sufficiently notify the respondents of the legal or factual bases of the claims for penalties ultimately imposed).

17. As found, Claimant also seeks penalties for work performed "off the clock" and unpaid wages for loading equipment. The preceding issues seek compensation for employment duties and do not involve work injuries. Because requests exceed the jurisdiction of the Office of Administrative Courts they will not be addressed.

ORDER

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

1. Claimant's request for an accounting and reimbursement of medical expenses is denied and dismissed.

2. Claimant's request for interest payments is denied and dismissed.

3. Claimant request for reimbursement of mileage is denied as unripe and her request for other expenses is denied and dismissed.

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

5. Claimant's other issues will not be addressed because they exceed the jurisdiction of the Office of Administrative Courts.

6. 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: May 30, 2023.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-997-495-004

ISSUES

1. Whether Claimant established by a preponderance of the evidence that [Redacted, hereinafter KO] is authorized to provide Claimant massage therapy and homecare services.

2. Whether Respondents established by a preponderance of the evidence that the care ordered by ALJ Martinez Tenreiro is no longer reasonable, necessary, and related to Claimant's work injury.

FINDINGS OF FACT

1. Claimant sustained injuries arising out of the course of his employment with Employer on October 23, 2015. Claimant's injuries were previously found compensable by ALJ Margot Jones on September 21, 2016. On February 21, 2018, ALJ Edwin Felter issued a Final Order granting Claimant permanent total disability benefits. On June 9, 2022, ALJ Elsa Martinez Tenreiro issued a Final Order ("June 2022 Order") requiring Respondents to pay for home health services to assist Claimant with activities of daily living up to 8 hours a day that are reasonable, necessary, and related to his work injury, including "both therapy and attendant care services to relieve him from the effects of the October 23, 2015 work related injury." (Ex. 7). In the June 2022 Order, ALJ Martinez Tenreiro found that "Claimant's partner or an outside provider should be providing for at least 5 hours a day seven days a week of attendant care service, which is found to be reasonably necessary and related to the injury. In addition, Claimant should be attended by a professional massage therapist up to twice a day for up to one and one-half hours per session, which is also found to be reasonably necessary and related to the injury. This would provide for approximately eight total hours of care per day." The June 2022 Order further provides that "continuing home health care should include attendant care services, and deep tissue massage services, if available. If they are not available, Respondents shall pay Claimant's life partner [*i.e.*, KO[Redacted]] for the services she is currently providing." (Ex. 7).

2. Although the June 2022 Order does not specifically define the term "attendant care service," the Order indicates that Claimant requires assistance getting "to into the tub, bathing his lower extremities, dressing his lower body, travel to his medical appointments, and performing most activities of daily living, including shopping, making meals other than simple fare, washing his clothes and bedding." The ALJ infers that "attendant care services" is intended to encompass these tasks.

3. Claimant's domestic partner, KO[Redacted], assists Claimant by massaging areas of his body in their home and as he requests. Claimant testified that KO[Redacted]

massages various parts of his body between 8 to 12 times per day, and that her assistance provides him relief. He further testified that no one other than KO[Redacted] has performed massages since he previously received massage from physical therapist Rachel Moore, P.T. Claimant testified that Ms. Moore instructed KO[Redacted] on how to perform massage on Claimant. Claimant further testified that because he experiences spasms in his groin area, he prefers that KO[Redacted] attend to these areas to avoid embarrassment. He also testified that he believes KO[Redacted] knows the locations on his body to the massages, and that she is caring and compassionate.

4. In February 2019, Claimant's physician, Bennett Machanic, M.D., recommended that Claimant receive a massage table for his home for relief. (Ex. 4). Insurer authorized the purchase of the massage table, which Claimant testified KO[Redacted] uses to perform massages in their home.

5. Claimant testified that KO[Redacted] has assisted him with activities around his house, such as assistance using the bathroom, assisting in getting into the bathtub or shower, and bathing him. He further testified that no other person has assisted him in this fashion. KO[Redacted] also assists Claimant with dressing, preparing his meals, washing his clothes, cleaning, child care "and basically all the chores he used to do around the house." (Ex. 7).

6. Claimant requests that KO[Redacted] be deemed an "authorized treating provider" and that Respondents' compensate KO[Redacted] for performing massages and "attendant care" services, such as assisting Claimant with bathing, using the restroom, and performing other activities of daily living and household chores.

7. Allison Fall, M.D. testified at hearing and was admitted as an expert in her specialty -- physical medicine and rehabilitation. On February 3, 2022, Dr. Fall performed an independent medical examination (IME) and medical record review at Respondents' request, and issued a written report. (Ex. H). Dr. Fall testified at Claimant's March 31, 2022 hearing before ALJ Martinez Tenreiro. In that hearing, Dr. Fall opined that Claimant did not require massage therapy or home health attended care services, because Claimant needed to learn and use self- management techniques. She further opined that she saw no evidence that massage therapy relieved or alleviated Claimant's spasms from his injury. ALJ Martinez Tenreiro found Dr. Fall's opinion's unpersuasive and issued her order as described above. (Ex. 7).

8. On February 25, 2022, Dr. Fall reviewed additional records regarding Claimant and issued a report. (Ex. I). Dr. Fall's report indicates she reviewed a report from Craig Hospital dated January 27, 2023. Dr. Fall opined that the findings from Craig Hospital supported her previous opinion that Claimant did not require maintenance care, and that no ongoing medical care was needed. She also indicated that the updated record did not change her previously-expressed opinions.

9. At hearing, Dr. Fall testified consistent with the opinions expressed in her reports. Dr. Fall testified that no medical reason exists for Claimant to receive assistance with activities of daily living, and that he does not require attendant care. She described

"attendant care" as including both assistance with activities of daily living and assistance with medical-related services, such as monitoring medical conditions, wound management, safety issues, bathing, grooming, dressing, feeding and household chores. She opined that there is no medical reason for Claimant to receive these types of services. This is because Claimant does not need assistance with medication management, blood pressure or wound care, and he is able to bathe himself, ambulate throughout his home, drive a vehicle, and has no cognitive impairment. Dr. Fall's opinions were not persuasive.

10. [Redacted, hereinafter AA] was a "resolution manager" for [Redacted, hereinafter GB], until March 28, 2023. In this role, AA[Redacted] handled workers' compensation claims, including Claimant's claim for a period of time. AA[Redacted] testified that after the June 2022 Order was issued, Insurer identified a provider to provide attendant home services for Claimant five hours daily. AA[Redacted] testified that Claimant was offered this care on November 30, 2022. This offer was conveyed to Claimant's counsel by a letter dated November 30, 2022. (Ex. L). Claimant has not accepted that offer.

11. AA[Redacted] also testified that Insurer identified multiple providers who could provide Claimant professional massage therapy, and that this service was offered to Claimant on January 17, 2023. This offer was conveyed to Claimant's counsel by a letter dated January 17, 2023, indicating that Respondents had found five professional massage therapy services who could massage therapy at Claimant's home consistent with the June 2022 Order. (Ex. N). No evidence was admitted indicating Claimant has accepted this offer. Claimant testified that he was not aware the services had been offered.

12. No credible evidence was admitted indicating KO[Redacted] is a licensed massage therapist, or has received any formal training in massage therapy.

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. 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 Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

KO[Redacted] as an "Authorized Provider"

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer (*i.e.*, the authorized treating physician or ATP), as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Providers within this chain of referrals from the ATP are not limited to physicians, and may include other non-physician medical providers. *See e.g.*, *In re Claim of Petrich*, W.C. No. 4-766-673-02 (ICAO May 3, 2013). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO Oct. 16, 2018).

Massage Therapy

Claimant requests that KO[Redacted] be "authorized" to provide to Claimant the massage therapy ordered in the June 2022 Order. Claimant has failed to establish that KO[Redacted] should be authorized to perform massage therapy. No credible evidence was admitted that any of Claimant's physicians referred Claimant specifically to KO[Redacted] for massage therapy. Thus, she is not within the chain of referrals. Notwithstanding, even if an ATP had referred Claimant to KO[Redacted], such a referral would not be permissible.

First, the June 2022 Order directs that Claimant receive massage therapy from a "professional massage therapist." No evidence was admitted indicating KO[Redacted] is a professional massage therapist. Thus, she does not meet the criteria required by the June 2022 Order.

Second, although KO[Redacted] has provided Claimant with "massages,"[1] she is statutorily prohibited from performing massage therapy without a license. The Massage Therapy Practice Act, § 12-235-101, *et seq.*, ("MTPA") and regulations enacted by the Office of Massage Therapy Licensure govern the practice of massage therapy in Colorado. § 12-235-107, C.R.S. The MTPA and associated regulations require that any person who practices massage therapy in Colorado possess a valid license, which may be granted if one meets the education and training requirements set forth in 3 CCR 722-1. The MTPA also provides that "a person who practices or offers or attempt to practice massage therapy without an active license" is subject to penalties under section 12-20-407 (1)(b), which makes the unlicensed practice of massage therapy a class 2 misdemeanor. § 12-235-115, C.R.S. Because no credible evidence was admitted establishing that KO[Redacted] is a licensed massage therapist, or that any exception to the statutory requirements exist, KO[Redacted] cannot legally provide massage therapy, and therefore cannot be an "authorized provider" for the treatment Claimant requires.

Claimant's contention that Respondents have waived of any objection to KO[Redacted] providing massage therapy services is not persuasive. The present case is not analogous to *Wielgosz v. Denver Post Corp., W.C. No. 4-285-153 Dec. 3, 1998)* as Claimant contends. In *Wielgosz*, the insurer paid for initial treatment an injured worker obtained from a provider who was not authorized at the time. Based on Insurer's payment, the injured worker continued to see the provider. Later, the insurer denied payment for additional treatment. The ALJ found the insurer's payment for the unauthorized physician's initial services induced the injured worker to rely on the insurer's conduct and obtain further treatment from the physician. Thus, the ALJ concluded, the insurer had waived any objection to payment of the provider's bills.

The circumstances here are different. Claimant contends that by authorizing and paying for a massage table, with knowledge that KO[Redacted] was providing massages, Insurer is now obligated to pay KO[Redacted] for providing massages. Although Insurer authorized and paid for a massage table, no credible evidence was admitted indicating that the authorization induced Claimant to utilize KO[Redacted] for massages with the expectation that she would be compensated. No credible evidence was presented that KO[Redacted] has previously sought compensation for massaging Claimant, that Insurer has ever paid or agreed to pay KO[Redacted]. Claimant has failed to establish that Insurer implicitly consented to paying KO[Redacted] for massage therapy services. Regardless, even if Insurer's conduct could be deemed as a waiver of the right to object to KO[Redacted] as a provider, the ALJ cannot order such relief as KO[Redacted] is

[1] The ALJ's use of the term "massage" colloquially to describe the actions Claimant has described KO[Redacted] performing. The ALJ makes no findings as to whether the "massages" KO[Redacted] has performed to date constitute the practice of "massage therapy" as defined under Colorado law.

statutorily prohibited from providing massage therapy without a license, which she does not possess.

For these reasons, Claimant's request to have KO[Redacted] deemed an authorized provider to perform massage therapy for Claimant is denied.

Attendant Care

The June 2022 Order found Claimant was entitled to "attendant care services" for five hours per day, which consist primarily of assistance with activities of daily living. "Attendant care" services "may encompass assisting the claimant with activities of daily living, including matters of personal hygiene." *Cross v. Microglide, Inc.*, WC No. 4-355-764 (ICAO Sep. 9, 2003), *citing Suetrack v. Indus. Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). The June 2022 Order demonstrates that ALJ Martinez Tenreiro considered the many household tasks and other assistance KO[Redacted] provides for Claimant when issuing the order. The June 2022 Order provides that these services should be provided by either Claimant's partner (KO[Redacted]) or an outside provider, and that Respondents' should pay KO[Redacted] for the services if not available from an outside provider. Specifically, the June 2022 Order states: "continuing home health care should include attendant care services, and deep tissue massage services, if available. If they are not available, Respondents shall pay Claimant's life partner [*i.e.*, KO[Redacted]] for the services she is currently providing." (Ex. 7, p. 12). By its terms, the June 2022 Order requires Respondents to pay KO[Redacted] for attendant care services only if they are not otherwise available from an outside service.

The evidence establishes that, in November 2022, Insurer identified an "attendant care services" provider who is able to perform the services Claimant requires. Respondents offered this service to Claimant, through counsel in November 2022. Thus, the services are "available" to Claimant at Insurer's expense. Claimant has not presented any credible evidence that attendant care services cannot be provided by an outside service or that KO[Redacted] is the only person capable of performing the ordered attendant care services. Accordingly, the ALJ finds and concludes Respondents are not obligated to pay KO[Redacted] for "attendant care services" and that she is not an "authorized provider" for such services.

CLAIMANT'S CONTINUED CARE

Respondents have failed to establish by a preponderance of the evidence that the care awarded Claimant in the June 2022 Order is no longer reasonable, necessary, or related to his industrial injury. Claimant credibly testified that he continues to require massage to function properly and assistance with "attendant care services." No credible evidence was admitted indicating Claimant's physical condition has improved since the June 2022 Order, or that the services are no longer reasonable, necessary, or related to his industrial injury. Respondents rely on Dr. Fall's opinion that Claimant does not require these services. However, Dr. Fall merely restated the opinions she previously offered, and which were rejected by ALJ Martinez Tenreiro. Dr. Fall has not personally examined Claimant since her initial IME in February 2022, and the only new information she has

reviewed was a single treatment visit from January 2023. She offered no credible testimony or opinions establishing that the treatment and care Ordered by ALJ Tenreiro is no longer reasonable, necessary, or related to his industrial injury. Respondents' request to terminate the care authorized by ALJ Martinez Tenreiro's June 2022 Order is denied.

ORDER

It is therefore ordered that:

1. Claimant's request to deem KO[Redacted] an "authorized" provider for massage therapy and attendant care services is denied.

2. Respondents request to terminate the care ordered in the June 2022 Order is denied.

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: May 30, 2023

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

ISSUES

I. Whether Respondent has proven by a preponderance of the evidence that they are entitled to penalties against Claimant of up to $1,000 per day pursuant to Sec. 8-43-304(1), C.R.S. from December 9, 2022 to May 11, 2023 for Claimant's violation of WCRP 5-4(C) for failing to provide requested signed releases, medical provider list, and employer list within 15 days of Respondent's November 23, 2022 request, with each day to be considered a separate offense pursuant to Sec. 8-43-305, C.R.S.

II. Whether Respondent has proven by a preponderance of the evidence that they are entitled to penalties against Claimant of up to $1,000 per day pursuant to Sec.8-43-304(1), C.R.S. from January 10, 2023 to May 11, 2023 for Claimant's failure to obey the December 30, 2022 Order of PALJ Zarlengo which ordered Claimant to provide Respondent with the requested signed releases and lists of medical providers and employers within 5 business days or by January 9, 2023 with each day to be considered a separate offense pursuant to Sec. 8-43-305, C.R.S.

III. Whether Respondent has proven by a preponderance of the evidence that they are entitled to penalties against Claimant of up to $1,000 per day pursuant to Sec. 8-43-304(1), C.R.S. from January 6, 2023 and ongoing for Claimant's failure to comply with the Workers' Compensation Rule of Procedure (W.C.R.P.) Rule 9-1(B)(2) for failing to provide responses to interrogatories within 20 days of the December 16, 2022 date of service, with each day to be considered a separate offense pursuant to Sec. 8-43-305, C.R.S.

IV. Whether Respondent has proven by a preponderance of the evidence that they are entitled to penalties against Claimant of up to $1,000 per day pursuant to Sec. 8-43-304(1), C.R.S. from February 24, 2023 and ongoing for Claimant's failure to obey the February 16, 2023 order of PALJ Zarlengo which ordered Claimant to provide Respondent with verified responses to its discovery request within seven days of the February 16, 2023 order, with each day to be considered a separate offense pursuant to Sec. 8-43-305, C.R.S.

FINDINGS OF FACT

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

1. This is an admitted claim for date of injury of October 13, 2020. Claimant lived in Gran Lake, CO and was 61 years old at the time of the hearing.

2. Claimant was initially evaluated for an impairment rating by Dr. John Sacha on July 13, 2022. Dr. Sacha concluded that Claimant had an impairment of the cervical spine, with 11% for specific disorder of the spine per Table 53IIB and 8% for loss of range

of motion of the cervical spine for a combined rating of 18% whole person. He also assessed a 28% upper extremity rating for the left shoulder which converted to a 17% whole person rating. Both ratings combined to a 32% whole person impairment rating.

3. Claimant was placed at maximum medical improvement on August 3, 2022 by Hanna Bodkin PA-C of Concentra. At that time she made multiple referrals to massage therapy to continue in Kremmling, Colorado, which is close to Claimant's home, a follow up with Dr. John Sacha for an EMG, and stated that they were awaiting authorization for a follow up MRI of the cervical spine as well as a follow up with Ortho Steamboat. Claimant was provided with work restrictions of lifting 15 lbs. maximum, no climbing, no overhead activity with the left arm, and maintenance medical benefits to continue with Dr. Sacha. She adopted Dr. Sacha's rating.

4. Multiple Final Admissions of Liability were filed by Respondent, including on October 20, 2022 for an 18% whole person impairment related to the cervical spine and 32% upper extremity impairment related to the left shoulder injury, which was later amended on November 9, 2022 pursuant to Dr. Sacha's rating from July 13, 2022 for 28% upper extremity rating, and 18% whole person impairment related to the cervical spine.

5. Claimant filed an Objection to the FAL and a Notice and Proposal and Application for a Division Independent Medical Examination (DIME).

6. On November 23, 2022 Respondent sent Claimant's counsel a letter pursuant to Rule 5-4(C) & (D), enclosing several releases for Claimant to execute and requested that Claimant provide a list of all medical providers and employers. This request was sent by email to Claimant's counsel directly attaching the authorizations, including a two page release for medical information, an employment information release, an insurance authorization, a release to Standard Insurance, an unemployment authorization, a Unum authorization, a social security authorization, a PERA authorization, and lastly, a form to obtain the list of providers and employers. The releases and lists of providers and employers were due on or before December 8, 2022.

7. On November 30, 2022 Claimant was seen by Dr. Sacha for a bilateral C7 transforaminal epidural injection.

8. On December 9, 2022, Respondent's counsel contacted Claimant's counsel requesting Claimant provide the signed releases and the lists of medical providers and employers by December 14, 2022 or Respondent would move forward with the filing of a motion to compel the production. (See Exhibit B).

9. On December 9, 2022 Respondent followed up by email requesting the status of the releases and list of medical providers

10. On December 16, 2022, Respondent sent Claimant, through counsel, Interrogatories and Requests for Production of Documents.

11. On December 16, 2022 Respondent filed a Motion to Compel Executed Releases and list of Medical Providers and employers.

12. Claimant followed up with Dr. Sacha on December 19, 2022. Dr. Sacha noted that Claimant had a diagnostic response and quite good lasting relief. He discussed

doing trigger point injections for the continuing headaches and neck symptoms. He continued prescribing medications including narcotic and was under a narcotic agreement. Dr. Sacha prescribed eight sessions of massage therapy at Spine Fix.

13. Claimant returned to see Dr. Sacha for trigger point injections on December 30, 2022. He noted that Claimant's massage therapy had still not been authorized.

14. On December 30, 2022 Prehearing Administrative Law Judge (PALJ) Marcus Zarlengo issued an order stating that Claimant had five business days to comply and provide the executed medical and employer releases as well as the list of medical providers.

15. On January 6, 2023, Respondent's counsel sent an email to Claimant's counsel inquiring as to the status of Claimant's Interrogatory responses and to confer regarding the filing of a motion to compel, if responses were not received within five days.

16. On January 11, 2023 Respondent's counsel reached out to Claimant's counsel that the order signed by PALJ Zarlengo had been issues and that Respondent still did not have the releases or the provider list. Respondent explained that Claimant's failure prevented Respondent from obtaining the necessary medical records to send to the DIME physician. Respondent specifically stated:

> Please provide the requested information as soon as possible, and no later than 1/18/23. If not received by 1/18/23, Respondent will have no choice but to seek an order holding the DIME process in abeyance until medical records can be obtained.

17. Claimant sent Respondent an email on January 18, 2023 purportedly attaching some medical releases and requesting that any records received should be sent to Claimant. Claimant mentioned a prehearing conference scheduled on the issue of holding the DIME in abeyance, to which Claimant did not object. It further made demands for authorization of medical care recommended by authorized treating providers including a CT of the spine as well as physical therapy and massage therapy.

18. On January 18, 2023 Respondent advised that they could not open the attached authorizations, requesting that they be sent as PDF documents.

19. Again on January 18, 2023 Claimant sent Respondent another attachment but did not specify what it was.

20. Respondent's counsel again advised Claimant on January 23, 2023 that they could not open the attached releases and to resend them as PDF documents.

21. Claimant's counsel immediately responded stating that he was attaching the releases in pdf format. He confirmed that he was aware that Claimant had not provided the list of providers but that his client was outside the state attending a funeral. The authorizations provided were a release for employment information, a release for standard insurance, an unemployment insurance release, an illegible PERA benefits authorization, an illegible medical release, what seems to be the signature page of the social security authorization, which was also illegible.

22. On January 24, 2023 Respondent informed Claimant that the releases were not legible and requested they be resubmitted.

23. On January 25, 2023 Claimant acknowledged that the authorizations were not usable by stating that counsel would have Claimant come into his office and resign them.

24. On February 2, 2023 Respondent sent Claimant a Motion to Compel Claimant's Responses to Interrogatories and Request for Production of Documents. The motion indicated that a Final Admission of Liability was most recently filed on December 14, 2022, Claimant timely filed an objection, and the claim was currently in the DIME process. Respondent reminded Claimant that per WCRP Rule 9-1(B)(2), discovery responses were due within 20 days of mailing, on or before January 5, 2023.

25. Respondent, again, followed up on February 3, 2023 to inquire regarding the status of claimant's releases, provider list (5 yrs. prior to DOI to present), and employer list.

26. Claimant was seen by Dr. Sacha on February 3, 2023. He remarked that Claimant's surgeon had recommended a CT to be assured that the hardware had not failed, which had not been authorized. Dr. Sacha noted that the massage therapy had not yet been authorized either as the parties were still awaiting a DIME evaluation. Dr. Sacha refilled Claimant's medications, performed trigger point injections and noted Claimant was to follow up in a month.

27. Again, on February 8, 2023 Respondent followed up. This time Respondent provided the next step, stating as follows:

> What is the status of providing signed releases, provider list, and employer list? Per order, this information was supposed to have been provided by 1/9/23. As Respondent has not received this information, it would appear that claimant is in violation of the court order.
>
> Please provide this information as soon as possible, and no later than Monday, February 13, 2023. If the information is not provided by close of business on Monday, February 13th, Respondent will have no choice but to seek penalties against claimant for failure to comply with the order. Please consider this Respondent's attempt to confer should that become necessary.

28. Respondent filed the Application for Hearing on the issue of multiple penalties on February 15, 2023 listing as issue penalties as follows:

> 1) Respondent seeks penalties against Claimant of up to $1,000 per day pursuant to §8-43-304(1), C.R.S. from 12/9/22 and ongoing for Claimant's violation of WCRP 5-4(C) for failing to provide requested signed releases, medical provider list, and employer list within 15 days of Respondent's 11/23/22 request for same. Each day to be considered a separate offense pursuant to §8-43-305, C.R.S.
>
> 2) Respondent seeks penalties of up to $1,000 per day pursuant to §8-43-304(1), C.R.S. from 1/10/23 to ongoing for Claimant's failure to obey the 12/30/22 lawful Order of PALJ Zarlengo which ordered Claimant to provide Respondent with the requested signed releases and lists of medical providers and employers within 5 business days or by 1/9/23. Each day to be considered a separate offense pursuant to §8-43-305, C.R.S.

29. On February 16, 2023 PALJ Zarlengo issued an Order Granting Respondent's Presumed Opposed Motion to Compel Claimant's Responses to Interrogatories and Request for Production of Documents. The order specifically stated that "Claimant shall provide Respondent with *verified responses* to its Interrogatories and Requests for Production of Documents within seven (7) days of the date this Order is served on Claimant." (*Emphasis added*.)

30. On March 3, 2023 Claimant was attended by Dr. Sacha in Greenwood Village, CO. He noted that Claimant had two or more conditions that were chronic. He proceeded with trigger point injections into the neck and shoulder that had given at least four weeks of relief previously.

31. Respondent's counsel reached out to Claimant on March 6, 2023 advising that the responses to discovery were due on February 23, 2023 pursuant to the order, had not been received and that it was Respondent's intention to add the issue of penalties for violation of the rule as well as violation of the order.

32. On March 7, 2023 Respondent filed a formal notice with regard to the addition of the penalty issues stating as follows:

> Pursuant to Office of Administrative Courts Rule of Procedure (O.A.C.R.P.) 12, "issues for hearing shall be listed on the Application for Hearing, the Response to Application for Hearing, or may be added before the hearing date is confirmed by written notice to the OAC and the opposing party."
>
> …
>
> 3. The hearing date in this matter has not yet been confirmed.
>
> 4. Respondent hereby provides Notice of endorsement of additional issues to be addressed at the upcoming hearing in the interest of judicial economy.
>
> 5. Respondent hereby also seeks penalties against Claimant of up to $1,000 per day pursuant to §8-43-304(1), C.R.S. from January 6, 2023 and ongoing for Claimant's failure to comply with the Workers' Compensation Rule of Procedure (W.C.R.P.) 9-1(B)(2) for failing to provide responses to interrogatories within 20 days of the December 16, 2022 date of service.
>
> 6. Additionally, Respondent seeks penalties against Claimant of up to $1,000 per day pursuant to §8-43-304(1), C.R.S. from February 24, 2023 and ongoing for Claimant's failure to obey the February 16, 2023 lawful order of PALJ Zarlengo which ordered Claimant to provide Respondent with responses to its discovery request within seven days of the February 16, 2023 order.

33. Claimant was seen by Dr. Sacha on March 31, 2023 for a maintenance visit in Greenwood Village, CO. He proceeded to provide trigger point injections and continued to diagnose cervical facet syndrome, cervical discectomy, radiculopathy, post-laminectomy syndrome, and total shoulder replacement.

34. Finally, on April 1, 2023, Claimant emailed Respondent stating that the authorizations and interrogatory responses were attached but that the interrogatory responses were unsigned. The medical release was signed on March 30, 2023, as well as the employment release, the insurance releases, the UI release, the Unum release, the social security release, and the PERA release. The form requesting medical providers

was completed by stating that Claimant had not seen any providers regarding Claimant's injured body parts in the claim.

35. On April 11, 2023 Respondent followed up, again requesting the corrected list of providers.

36. Respondent sent a follow up on April 18, 2023 stating as follows:

> In reviewing the information you provided, it appears claimant did not provide a list of all medical providers he has seen in 5 years prior to the date of injury to the present. The list says "N/A" and he gave us blank releases which does not help us determine from whom medical records are needed.
>
> Claimant would appear to still be in violation of the court order which required him to provide signed releases and a medical provider list.
>
> Please provide the provider list ASAP.

37. Claimant's counsel responded on April 21, 2023 noting that Claimant had seen Dr. Kenneth Allen at Injury Solutions.

38. On May 5, 2023 PALJ Zarlengo issued a third prehearing order. He specifically found as follows:

> Claimant sustained compensable work injuries on 10/13/20. Respondents filed an Amended Final Admission of Liability (FAL) most recently on 12/14/22. Claimant timely objected and applied for a DIME. Dr. Matthew Brodie was selected as the DIME physician. On 1/20/23, Respondents asked to hold the DIME process in abeyance to allow additional time to gather medical records. Judge Sandberg granted the motion and held the DIME in abeyance for 60 days.
>
> Additionally, Respondents applied for a hearing with the OAC on 2/15/23 endorsing the issue of statutory penalties against Claimant for discovery and other violations. That hearing is set to commence on 5/17/23.
>
> Respondents now request that Claimant schedule the DIME with Dr. Brodie. The parties agree the necessary records or releases have now been received and the DIME is ready to proceed.

39. PALJ Zarlengo ordered Claimant to schedule the DIME with Dr. Brodie to take place 45-75 days of the date of the order.

40. Respondent stated at the time of the hearing that the medical records were not received until May 11, 2023 and that should be the end date of penalties.

41. The parties disclosed that the DIME was currently set to proceed on June 21, 2023.

42. Respondents asserted that Claimant had still not provided the verified response to discovery as of the date of the hearing. Claimant's counsel disclosed that would be provided within the week.

43. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v.*

Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Penalties generally

Whether statutory penalties may be imposed under Sec. 8-43-304(1) C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1,000.00 per day where the employee "does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel." Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo. App. 1995).

Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of a parties' 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). Whether the violator's actions were objectively unreasonable, is a question of fact based on rational argument. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995); *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312 (Colo. App. 1997*); Dean v. NGL Energy Partners*, WC 5-095-928, ICAO (September, 8, 2022); *Housley v. Circle K Stores Inc.*, WC, 5-143-923, ICAO (February 27, 2023). There is no requirement that the violating party 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 Claimant's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that Claimant violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If Respondent makes a prima facie showing the burden of persuasion shifts to Claimant to prove their conduct was reasonable under the circumstances. *Pioneers Hosp. v. Indus. Claim Appeals Office, (supra); Human Res. Co. v. Indus. Claim Appeals Office, 984 P.2d 1194 (Colo. App. 1999).*

Once a violation of a statute or rule is established, penalties are mandatory, whether or not actual damages are established. See *Martinez v. Flying J., Inc.,* W.C. No. 4-374-856 (June 22, 2000)(insurer may be penalized for failing to comply with a Rule when it unilaterally terminated benefits even if it is ultimately determined that no benefits were due; the unreasonableness of insurer's actions is not dependent on relative harm to claimant).

Damage to the non-violating party is not an element of penalties under Sec. 8-43-304(1). The reasonableness of the violator's actions depends on whether the actions were predicated on rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). In *Associated Business Products v.*

Indus. Claim Appeals Office, 126 P.3d 323, 326 (Colo. 2005), the Supreme Court held that imposition of penalties did not violate the excessive fines clause even though "the financial harm suffered by this one claimant may have been relatively small."

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). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Industrial Claim Appeals* Office, 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020). When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to 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 this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc*., WC 4-981-806 (ICAO, July 1, 2019).

The gross disproportionality test was clarified by the Colorado Supreme Court in *Colorado Dep't of Labor & Empl. v. Dami Hospitality, LLC,* 442 P.3d 94 (Colo. 2019) when determining whether the penalty imposed under Sec. 8-43-304(1), C.R.S. violated the Excessive Fines Clause. See *Gallego v. Wizbang Solutions*, WC 5-026-699-003, ICAO (April 13, 2022). The burden of proof in applying the gross disproportionality test is properly placed on the party being assessed the fine. *Associated Bus. Prods. v. Indus. Claim Appeals Office, (supra.)* ("Once the right to impose a fine has been proved, the party upon whom the fine is levied has the burden of proving the fine is 'grossly disproportionate'"). See also *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (overruled by statute on other grounds); *Gallego v. Wizbang Solutions, (supra).*

C. Curing a Violation

Section 8-43-304(4), C.R.S. permits an alleged violator 20 days from the date of mailing of an Application for Hearing that asserts penalties to cure the violation. If the violator cures the violation within the 20 day period "and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App. 2003). Section 8-43-304(4), C.R.S. modifies the rule and adds an extra element of proof when a cure has been effected. Specifically, the party seeking penalties

must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *see In re Tadlock*, WC 4-200-716, ICAO (May 16, 2007).

D. Penalty for failure to comply with WCRP Rule 5-4(C).

W.C.R.P. Rule 5-4(C) specifically states as follows:

> 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. Any request for information in excess of the presumption contained in this rule shall include a notice that the insurer is requesting information in excess of what is presumed reasonable and that providing the information is not required. If a party disputes that a request within the presumption is reasonable or that information sought is reasonably necessary, that party may file a motion with the Office of Administrative Courts or schedule a prehearing conference. Requests for release of medical information as well as informal disclosures necessary to evaluate/adjust the claim are not considered discovery.

Respondent seeks penalties from December 9, 2022 through May 11, 2023 for Claimant's failure to comply with W.C.R.P. Rule 5-4(C) to provide the releases and list of medical providers. It is undisputed that Respondent sent the releases and request for providers to Claimant on November 23, 2022. Respondent's followed up on December 9, 2023. Since they did not receive a response, they filed a motion to compel on December 16, 2022, which was granted on December 30, 2022 by PALJ Zarlengo. On January 11, 2023 Respondent again contacted Claimant stating that Claimant's failure to provide the releases and information was hampering their ability to obtain records needed for the DIME packet. On January 18, 2023 Claimant sent Respondent a document with releases but no medical provider list. Respondents advised that they were insufficient as they were unable to open the document. On the same day Claimant sent the document again. On January 24, 2023 Respondents informed Claimant that the releases were unusable, requesting that they be resubmitted. On February 3, 2023 Respondents followed up again. Respondents filed the AFH on February 15, 2023. This provided Claimant a 20 day window to cure. Claimant failed to cure. Finally, Claimant complied with providing the list of providers and releases on April 1, 2023, which was supplemented on April 21, 2023. Respondent argues that the delay, caused the DIME process delay, holding the DIME process in abeyance until Claimant complied.

Claimant argued that Claimant was unable to travel from Grand Lake, Colorado to Denver, in order to sign the releases considering his multiple physical problems related to the claim and the cost of travel. Claimant also argued that they provided the releases by January 18, 2023. Further, Claimant argued that there was no harm to Respondent as they were not paying temporary total disability benefits only permanent partial disability

and had received a favorable order from PALJ Sandberg in response to their January 20, 2023 Motion to Hold the DIME Process in Abeyance.

As found, holding the DIME process in abeyance was a contemplated non-monetary and appropriate penalty for Claimant's failure to comply with the rule requiring the provision of the releases and the list of providers and employers.

E. Penalty for failure to comply with December 30, 2022 Order

Respondent next argued that Claimant's failure to comply with PALJ Zarlengo's December 30, 2022 order requiring Claimant to provide, within five business days of the order, the executed medical and employer releases as well as the list of medical providers should be the subject of another penalty. It has already been established that there was a violation of the order as laid out above. The issue is not whether the claimant had a reasonable explanation for his actions. Instead, the issue is whether the claimant's failure to comply with the PALJ order was predicated on a rational argument in law or fact that he was not required to comply with the PALJ order. See *Porras v. World Service Co., Inc*., W.C. No. 155-161 (October 12, 1995); *Dean v. NGL Energy Partners*, (*supra*).

The legislative intent of the Workers' Compensation Act is "to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation." This goes both ways. Claimant's actions as listed above, in not responding to Respondents inquiries until it forces them to resort to an ALJ and then disregarding the order itself is not promoting the quick and efficient delivery of disability benefits to Claimant. In this case, Claimant's benefits were being delayed by Claimant's failure to act so that Respondent could obtain records that might have been pertinent to the claim. In fact, Respondent argued that they were relevant medical records as they had to do with prior injuries to his neck/cervical spine, which is the same body part injured in this claim. Claimant did not object to this argument or state that it was incorrect. Claimant's statements that counsel was trying to have claimant avoid driving to the Denver area to sign the releases is also not a persuasive argument as Claimant had attended multiple medical appointments after November 23, 2022 through the January 18, 2023 date when Claimant attempted to provide releases to Respondent, specifically was in the Denver area to see Dr. Sacha on November 30, December 19, and December 30, 2022. And after realizing on January 25, 2023 that the releases were not usable, Claimant was seen in the Denver area by Dr. Sacha on February 3, March 3, and March 31, 2023.

Because this is a violation of a specific judicial order, the gravity of the offense is enlarged exponentially. A reasonable Claimant would have obtained Respondent's agreement to enlarge the time to respond or scheduled a prehearing conference before a PALJ on the issue of obtaining more time to comply. Claimant did not provide evidence that would persuade this ALJ to not penalize Claimant for the failure to comply with the order. Further, Claimant did not provide any information that would lead this ALJ to conclude that Claimant would not have the ability to pay the penalty fine. Therefore, this ALJ determines that Claimant failed to comply with PALJ Zarlengo's order of December 30, 2022. The order provided for five business days to comply. As January 2, 2023 was the observed state holiday, Claimant had until January 9, 2023 to comply. Claimant

attempted to comply with the order on January 18, 2023, a period of 9 days. Then Claimant realized that the information was not legible as of January 25, 2023. Therefore, Claimant was in clear violation of the order from January 25, 2023 through April 1, 2023, when the list and releases were produced. That is another 66 days of non-compliance for a total of 75 days.

While Respondent's argued that penalties for failure to comply was due and owing through May 11, 2023, this ALJ reviewed little evidence to support that position. There were arguments of Respondent regarding whether the records from Injury Solutions were or not relevant, but none of the records were submitted in evidence for this ALJ's consideration to determine the relevance in this case, and this ALJ offered to allow the record to remain open for further submissions. In fact, the record was left open and Claimant submitted Exhibits 1 and 2 and Respondents submitted Exhibits G and H, which this ALJ considered. Neither did Respondent's specifically request to make an offer of proof.

In comparing this matter to others of similarly situated parties, a penalty of $10.00 per day is found reasonable. Claimant provided little information regarding his ability to pay other than counsel's arguments that Claimant was having financial difficulties. Claimant did not indicate that he would have a difficult time paying a penalty award other than general allegations. As found, Respondent showed that they are entitled to a penalty for failure to comply with ALJ Zarlengo's December 16, 2022 order from January 9, 2023 through January 18, 2023 and January 25, 2023 through April 1, 2023 a period of 75 days.

F. Penalty for failure to comply with WCRP Rule 9-1

Respondent next argued that Claimant violated W.C.R.P. Rule 9-1(B)(2), which states as follows:

> (B) Interrogatories and requests for production
>
> (2) The responses to the interrogatories and production of documents shall be provided to all opposing parties within 20 days of mailing of the interrogatories and requests.

Respondents propounded three interrogatories to Claimant on December 16, 2022. Discovery responses were due on January 5, 2023. Respondent requested a status of the discovery on January 6, 2023, stating that they would seek an order compelling the discovery if they were not received within five days, providing through January 11, 2023 to provide them.[1] Respondent acknowledge that they had received discovery on responses on April 1, 2023, when they also received the releases and list of providers/employers form. Claimant's counsel indicated that the responses were unsigned.

Sec. 8-43-207(e), C.R.S. (Cum. Supp. 2022) states that "[T]he director or administrative law judge may rule on discovery matters and impose the sanctions

[1] This is taken as Respondent's offer to extend the deadline.

provided in the rules of civil procedure in the district courts for *willful* failure to comply with permitted discovery." (*Emphasis added.)*

Trial courts have broad discretion to manage the discovery process, including the ability to impose sanctions. *Warden v. Exempla, Inc*., 2012 CO 74, ¶ 32, 291 P.3d 30 (Colo. App. 2012); *Reed v. Industrial Claim Appeals Office*, 13 P.3d 810, 813 (Colo. App. 2000). In order for a discovery violation to be considered "willful" the ALJ must determine that the conduct was deliberate or exhibited "either a flagrant disregard of discovery obligations or constitutes a substantial deviation from reasonable care in complying with discovery obligations." C.R.C.P. 37 governs sanctions for a party's failure to cooperate in discovery. The trial court may impose a variety of sanctions under that rule, including "orders requiring payment of attorneys' fees and costs, orders staying proceedings until discovery orders are complied with, orders prohibiting a disobedient party from introducing designated matters into evidence, orders striking pleadings, and orders entering default judgment." See 8-43-207(1)(p), C.R.S.; *Sheid v. Hewlett Packard,* 826 P.2d 396 (Colo. App. 1991); *Anderson v. Anderson Distributing,* WC 4-722-115 (April 8, 2008).

The ALJ has wide discretion in determining whether a discovery violation has occurred and, if so, the appropriate sanction to be imposed. *Pinkstaff v. Black & Decker (U.S.) Inc*., 211 P.3d 698, 702 (Colo. 2009). Whether to impose sanctions and the nature of the sanctions to be imposed are matters for the sound exercise of the trial court's discretion, and the courts are given flexibility in choosing the appropriate sanction." *Nagy v. Dist. Court*, 762 P.2d 158, 160 (Colo. 1988). A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, *Pinkstaff* @ 702 and the trial court's broad discretion is not without limits. *Id.* at 703. The Supreme Court has outlined the following guidelines for determining which sanction are appropriate. Generally, sanctions under C.R.C.P. 37 "should be applied in a manner that effectuates proportionality between the sanction imposed and the culpability of the disobedient party." If Rule 37 sanctions are warranted in a case, "the trial judge must craft an appropriate sanction by considering the complete range of sanctions and weighing the sanction in light of the full record in the case." When discovery abuses are alleged, courts should carefully examine whether there is any basis for the allegation and, if sanctions are warranted, impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party. *Id .* at 702 (citations omitted); *Kallas v. Spinozzi*, 2014 COA 164, 342 P.3d 607 (Colo. App. 2014).

The Supreme Court has generally disfavored litigation-ending sanctions, emphasizing that "litigation should be determined on the merits and not on formulistic application of [procedural] rules." *Id.* at 703. The Supreme Court has not altogether foreclosed the possibility of and need for litigation-ending sanctions, but has cautioned that such harsh sanctions should be imposed "only in extreme circumstances." *Nagy*, 762 P.2d at 161 ; see also *Pinkstaff* at 702; *Cornelius v. River Ridge Ranch Landowners Ass'n,* 202 P.3d 564, 571 (Colo. 2009); *Prefer v. PharmNetRx, LLC*, 18 P.3d 844, 850 (Colo. App. 2000) (Dismissal may be imposed as a sanction "for willful or deliberate disobedience of discovery rules, flagrant disregard of a party's discovery obligations, or a substantial deviation from reasonable care in complying with those obligations.")...

Respondents sent Claimant interrogatories on December 16, 2022. The interrogatories are were either appropriate or tangentially relevant to the issues set for hearing. Claimant had an obligation to provide the information requested by Respondents. On January 6, 2023, Respondent's counsel sent an email to Claimant's counsel inquiring as to the status of Claimant's Interrogatory responses and to confer regarding the filing of a motion to compel, if responses were not received within five days. On February 2, 2023 Respondents filed a motion to compel discovery, which was granted by PALJ Zarlengo on February 16, 2023 stating that verified responses were due within seven days. The purpose of verification of discovery is in order to cross examine Claimant and potentially impeach Claimant if he does not respond in the same manner as he provided responses to discovery.

Respondent did not subpoena Claimant to attend the hearing so was not intending to utilize the responses to question and challenge Claimant's testimony in any manner. The penalty here is Respondent's subsequent act of moving to compel claimant to respond to the discovery which was a reasonable next step to take when discovery violations neither affected Claimant nor Respondent in any significant manner. It did not delay the process or the timeline in which Respondent's prosecuted the case. Neither did Respondent's prove that the failure to complete discovery was willful.

G. Penalty for failure to comply with Order of February 16, 2023

W.C.R.P. Rule 9-1(G) states that "Once an order to compel has been issued and properly served upon the parties, failure to comply with the order to compel shall be presumed willful." Therefore, once Respondent's filed the Motion to Compel and an order was issued by PALJ Zarlengo on February 16, 2023 to be provided within 7 days.[2] This deadline was February 23, 2023. Claimant failed to provide responses to discovery until April 1, 2023 a 37 day period. Respondents have shown that Claimant willfully disregarded to his discovery obligations in this matter. Therefore, the penalty, when considering other similar cases, is $25.00 per day beginning as of February 23, 2023 and ending as of April 1, 2023 when Claimant provided responses to discovery. This is a period of 37 days.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant shall pay $10.00 per day beginning January 9, 2023 through January 18 and January 25, 2023 through April 1, 2023 a period of 75, in the amount of 750.00

2. Claimant shall pay Respondent $25.00 per day from February 23, 2023 to April 1, 2023, a period of 37 days, in the amount of $925.00.

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[2] This ALJ considered the fact that Respondents did not file to provide notice of their pursuit of penalties for failure to respond to discovery until February 15, 2023, which would entitle Claimant to a 20 days to cure. That deadline was March 7, 2023 and Claimant failed to avail himself of this relief.

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

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

DATED this 31st day of May, 2023.

Elsa Martinez Tenreiro

Digital Signature

By: Elsa Martinez Tenreiro

Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that neuropsychological testing with Dr. Treihaft is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement?

- At the commencement of the hearing, Respondent noted that they had previously agreed to pay for Claimant's return to Dr. Stakiw, the audiologist, as maintenance medical treatment.

- Claimant raised issues at the commencement of the hearing that included penalties against Respondent that were not endorsed on Claimant's application for hearing. The ALJ sustained Respondent's objection to the issues being addressed at hearing. While Claimant has again raised those issues in her post-hearing submissions, the ALJ will not address those issues as they were not properly before the court.

FINDINGS OF FACT

1. Claimant sustained a compensable work related injury on April 1, 2013 when she fell at work. The medical records indicate Claimant lost consciousness and woke up on the ground. Claimant underwent a course of medical treatment for various issues related to the fall including persistent headache and loss of hearing.

2. On June 13, 2013, Claimant was examined by Dr. Treihaft for a neurological evaluation. Dr. Treihaft noted Claimant reported a history of head injuries and concussions predating her work injury. Dr. Treihaft noted that Claimant was evaluated by a neurologist for episodes associated with right-sided numbness and complicated migraines that pre-dated her work injury.

3. Dr. Treihaft reviewed Claimant's brain MRI which showed several nonspecific frontal white matter lesions. Dr. Treihaft opined that these may relate to the Claimant's prior concussion or may represent age-related microvascular change. Dr. Treihaft opined that the brain MRI did not explain Claimant's current presentation.

4. Dr. Treihaft diagnosed Claimant with multiple neurologic symptoms, including memory loss, imbalance, panic attacks, anxiety and difficulty sleeping that Dr. Treihaft noted appeared to be related to Claimant's underlying depression. Dr. Treihaft noted that these were being addressed by medications and psychiatric evaluation. Dr. Treihaft opined that from a neurological standpoint, these represent a pseudodementia

rather than a neurologically related cognitive disorder. Dr. Treihaft noted that no further evaluation was recommended related to Claimant's work injury.

5. Claimant returned to Dr. Treihaft on April 2, 2018 for a neurological evaluation. According to the note, Claimant was referred to Dr. Treihaft by Dr. Strahan. Dr. Treihaft noted that Claimant had previously been evaluated in 2013 for a possible concussion secondary to traumatic brain injury. Dr. Treihaft noted that her neuro behavioral symtpoms included headaches and cognitive difficulties and had resolved over the next several months, but she continued to be followed by Dr. Strahan for tinnitus and hearing loss.

6. Dr. Treihaft noted that Claimant was complaining of increased memory loss and diminished cognitive dysfunction over 2 years, greatest over the past 6 months. Claimant reported slow processing at work; writing, researching and analyzing. Claimant reported individuals tell her she does not understand what they are saying and writing. Claimant also reported she doesn't transition well from "up to down". Claimant reported falling a lot for indeterminate reasons, but denied losing consciousness or tripping over objects. Dr. Treihaft also noted that Claimant occasionally experiences migraines, but could not quantify or identify the most recent migraine.

7. Dr. Treihaft noted his prior examination on June 14, 2013 along with a review of Claimant's medical records from June 2013 up to the present time. On physical examination, Dr. Treihaft noted Claimant was in no apparent distress and oriented to time, place and person. Dr. Treihaft reported Claimant's attention and concentration were normal and Claimant's recent and remote memory were intact to conversation. Dr. Treihaft noted Claimant's recurrent neurobehavioral symptoms had developed over the past 2 years, greatest over the past six months, and noted the etiology and relationship to the April 1, 2013 work injury was underdetermined.

8. Dr. Treihaft recommended neuropsycholgical battery tests, but noted that the work relatedness of this evaluation needed to be determined.

9. Dr. Treihaft issued a letter dated April 3, 2018 noting that Claimant's original fall appeared to be from a syncopal spell or fall, the cause of which was never identified, but Claimant experienced no further spells. Dr. Treihaft noted that during the June 14, 2013 evaluation, Claimant focused the neurological evaluation on a 2 year history of multiple neurological and psychological symptoms "on the setting of a divorce, anteceding the presumed head injury." Dr. Treihaft noted that the recurrance of symptoms in 2016-2017 does not fit the typical course of a post-concussive syndrome. Dr. Treihaft reported that post-concussive symptoms may remain the same or more commonly improve. Dr. Treihaft opined that recurrence or deterioration of symptoms reflects alterative medical or psychological problems. Dr. Treihaft opined that Claimant's current symptoms do not appear related to the 2013 accident. Or. Treihaft noted that there was a possibility of a cumulative trauma encephalopathy which would require clarification with the neuropsychological battery and additional medical and work history. Dr. Treihaft opined that if the symptoms are considered work related, Claimant

would require additional treatment for a mild traumatic brain injury including cognitive and behavioral therapy, counseling and social service intervention.

10. Claimant underwent a Division-sponsored Independent Medical Evaluation ("DIME") on May 29, 2019 with Dr. McLaughlin. Dr. McLaughlin reviewed Claimant's medical records, obtained a medical history and pertormed a physical examination in connection with the DIME. Dr. McLaughlin noted Claimant's medical treatment with Dr. Strahan and Dr. Treihaft documenting Claimant's symptoms from her concussion, including ongoing memory problems, tinnitus, sensorineural hearing loss in both ears and health problems.

11. Dr. McLaughlin noted that Claimant did report a history of migraines. Claimant also reported ongoing tinnitus. Claimant reported the hearing aids she received in 2016 had helped somewhat but she still has difficulty hearing background noises and understanding people.

12. Dr. McLaughlin noted Claimant's past audiograms and performed an audiogram on the day of the DIME appointment. Dr. McLaughlin noted that the audiogram did show consistent high frequency hearing loss, left greater than right, without significant change from the date of injury.

13. Claimant reported to Dr. McLaughlin that she had one prior concussion at age 25 when she was riding a bicycle and fell. Claimant reported to Dr. McLaughlin that she did not think she was even treated for the concussion and had no symptoms the next day. Dr. McLaughlin reviewed Claimant's April 3, 2013 MRI and noted that it showed no evidence for an acute intracranial abnormality such as recent infarct, hemorrhage, mass or hydrocephalus. With regard to the small foci of white matter signal abnormality in the frontal lobe, Dr. McLaughlin noted that this was nonspecific but most likely represented minimal chronic small vessel ischemic disease or the sequelae of prior migraine headaches or remote head trauma. Dr. McLaughlin explained later in his report that MRI showed some preexisting change not attributable to the fall and may be leading to neurological issues.

14. Dr. McLaughlin noted that Claimant was put at MMI on August 22, 2013 and opined in his report that this was the correct date of MMI. Dr. McLaughlin performed audiology testing and determined that the medical records were consistent with Claimant developing tinnitus since the reported April 1, 2013 injury. Dr. McLaughlin provided Claimant with a permanent impairment rating of 5% for the hearing loss. Dr. McLaughlin noted that this hearing loss rating converted to a whole person rating of 2%.

15. Dr. McLaughlin further opined that it would be prudent under post-MMI maintenance care to have a neuropsychological battery of testing performed to see if the testing indicates that there are cognitive issues that are sequelae from the reported April 1, 2013 injury. Dr. McLaughlin opined that if there were cognitive issues, they should be treated per the Division guidelines for traumatic brain injuries.

16. Respondents filed a final admission of liability ("FAL") on June 28, 2019 admitting for the impairment rating provided by Dr. McLaughlin and post-MMI maintenance medical treatment.

17. The ALJ credits the medical reports and opinions expressed by Dr. Treihaft in his reports and finds that Claimant has failed to establish that the neuropsychological testing is reasonable medical treatment related to Claimant's April 1, 2013 work injury. Additionally, Claimant has failed to establish that the neuropsychological testing is necessary to maintain Claimant at MMI.

18. Notably, in Dr. Treihaft's reports, Dr. Treihaft does not opine that the neuropsychological testing is related to Claimant's work injury. As noted by Dr. Treihaft, Claimant's neuro behavioral symptoms following her work injury resolved by the June 13, 2013 examination. Claimant then had an additional onset of reported neuro behavioral symptoms she reported in the April 2, 2018 evaluation that had developed two years prior. As noted by Dr. Treihaft, this is not the typical course of a post- concussive syndrome and the record contains no credible evidence that the recurrence of symptoms was related to the April 1, 2013 fall.

19. Likewise, Dr. McLaughlin while noting that neuropsychological testing would be appropriate, Dr. McLaughlin at no time relates the need for the neuropsychological testing to the April 1, 2013 work injury.

20. Notably, Claimant testified at hearing that she had concussions at age 6, age 24, age 43 and age 48. However, Claimant only reported to Dr. McLaughlin a concussion she had at age 25. Both Dr. McLaughlin and Dr. Treihaft opined that the abnormalities shown on the MRI of Claimant's brain were not related to the work injury and could be causing Claimant's current need for medical treatment. Neither Dr. McLaughlin nor Dr. Treihaft provided an opinion that indicated that Claimant's neuro behavioral symptoms for which Dr. Treihaft evaluated Claimant for in April 2018 were related to her work injury. As noted by Dr. Treihaft, Claimant's initial neuro behavioral symptoms had resolved shortly after her April 1, 2013 injury. Dr. Treihaft also opined that the development of symptoms years after the injury does not fit the typical course of post-concussive syndrome.

21. Claimant argued at hearing that the Colorado Treatment Guidelines Rule 17 involving traumatic brain injuries establish that she is entitled to the medical treatment referenced by Dr. Treihaft. However, those guidelines only come into play if Claimant has proven that it is more likely than not that the medical treatment is related to Claimant's work injury. In this case, the ALJ credits the reports of Dr. Treihaft and finds that Claimant has failed to establish that the medical treatment is related to her April 1, 2013 work injury.

22. The ALJ would further note that Claimant's testimony at hearing regarding her prior concussions was inconsistent with the report of prior concussions Claimant provided to Dr. McLaughlin. The ALJ notes that Dr. McLaughlin appeared to be only

aware of one prior concussion as opposed to the multiple concussions Claimant testified to at hearing.

23. Based on the credible evidence that was presented at hearing in this case, the ALJ finds that Claimant has failed to prove that it is more likely than not that the neuropsychological testing referenced by Dr. Treihaft in his April 2, 2018 report and by Dr. McLaughlin in his May 29, 2019 DIME report, is reasonable medical treatment related to Claimant's April 1, 2013 work injury. Moreover, Claimant has failed to establish that it is more probable than not that the neuropsychological treatment is necessary to maintain Claimant at MMI.

CONCLUSIONS OF LAW

1. The purpose of the 'Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that 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., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

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

4. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an

order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

5. As found, Claimant has failed to establish by a preponderance of the evidence that the neuropsychological testing is reasonable medical treatment related to Claimant's industrial injury and necessary to maintain Claimant at MMI. As found, the ALJ credits the reports of Dr. Treihaft regarding the cause of Claimant's neuro behavioral symptoms and the recurrence of the symptoms in 2016-2017 and finds that Claimant has failed to establish that her symptoms are causally related to the April 1, 2013 work injury. Therefore, Claimant's request for an order requiring Respondent to pay for neuropsychological testing is denied and dismissed.

ORDER

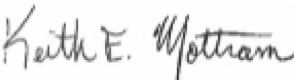
It is therefore ordered that:

1. Claimant's request for a return evaluation with Dr. Stakiw, the audiologist, is GRANTED pursuant to the agreement of the parties.

2. Claimant's request for an Order requiring Respondent to pay for neuropsychological testing is denied and dismissed.

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

DATED: May 31, 2023



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
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ISSUES

I. Whether Claimant proved Respondents failed to pay Claimant permanent partial disability (PPD) benefits pursuant to a settlement agreement.

PROCEDURAL MATTERS

Claimant's Application for Hearing ("AFH") dated October 11, 2022 and Case Information Sheet ("CIS") dated March 30 2023 endorse, inter alia, penalties under section 8-43-204(7), C.R.S. for Respondents' failure to timely pay benefits in accordance with the settlement agreement signed on August 31, 2022 and approved on September 1, 2022. At the commencement of the hearing in this matter, the ALJ asked the parties to identify the issues. Claimant's counsel stated that, as of the day prior, he and opposing counsel had "narrowed down the issue" and Claimant no longer sought to "negate or cancel" the settlement agreement. He stated that the dispute had been narrowed to a dispute of the amount of the PPD award that should have been issued and that he was seeking to enforce the settlement agreement as Claimant believed the full amount of PPD was not paid pursuant to the settlement agreement. Respondents' counsel agreed as to the issue identified. Neither party identified any other issues, including penalties. The parties did not call witnesses and rested their respective cases on exhibits admitted into the record.

Both parties submitted post-hearing position statements. Claimant identified the following issues in her position statement: (1) Remaining PPD owed to Claimant by Respondents pursuant to the June 22, 2022 FAL and September 1, 2022 Settlement Agreement; (2) Penalties pursuant to 8-43-204(7) and 8-43-304(1); and (3) Interest pursuant to C.R.S. 8-43-410(2). Respondents did not address penalties in their position statement.

Despite endorsing penalties in her AFH and CIS, Claimant did not identify penalties as an issue at hearing nor did Claimant argue the issue at hearing. Respondents did not try to the issue by consent. Accordingly, the issue of penalties is reserved for future determination.

FINDINGS OF FACT

1. Claimant is a 47-year-old banquet server who was employed with Employer since December 5, 2017.

2. Claimant sustained a work injury to her right knee while working for Employer on September 12, 2019.

3. Respondents filed a General Admission of Liability ("GAL") dated April 3, 2020 admitting for medical benefits and temporary total disability ("TTD") benefits at a rate of $562.51 per week, commencing on March 16, 2020.

4. On May 20, 2022 authorized treating physician ("ATP") Carrie Burns, M.D. placed at maximum medical improvement ("MMI") with 31% lower extremity impairment rating.

5. Dr. Burns' report placing Claimant at MMI was faxed to Insurer on June 21, 2022.

6. As Claimant was paid TTD every two weeks, on May 26, 2022, Insurer issued Clamant a check for $1,125.02 in TTD for the period of May 14 – 27, 2022 and another check on June 9, 2022 in the amount of $1,125.02 in TTD for the period of May 28 – June 10, 2022.

7. Insurer filed a Final Admission of Liability ("FAL") on June 22, 2022 consistent with Dr. Burn's report placing Claimant at MMI on May 20, 2022. The FAL admits for 31% scheduled impairment and reasonable, necessary and related post-MMI medical treatment. The FAL admitted for a total of $63,885.06 in TTD benefits for the period of 3/16/2020 through 5/19/2022, a total of $20,691.63 in permanent partial disability ("PPD") benefits for the period of 5/20/2022 through 8/13/2023, and disfigurement benefits in the amount of $1,000.00. The "Amount Overpaid" section states "$0.00". (R. Ex. B, p. 5). The FAL further states, "Insurer reserves the right to claim any and all offsets, recover any and all overpayments, and recover all advances made on account of the claimants indigency, whether specifically referenced in this admission or not". (Id. at p.7).

8. Claimant filed an Objection to FAL and Notice and Proposal and Application for Division Independent Medical Examination ("DIME") on June 28, 2023.

9. Prior to the DIME, the parties engaged in settlement negotiations. On August 10, 2022, the claims adjuster for Insurer, [Redacted, hereinafter AS], responded to a settlement demand from Claimant. In his response, AS[Redacted] stated,

> Thank you for your settlement demand in this case. Which I understand is $60,000 total, inclusive of the PPD amount owed. Please correct me if I am wrong. I show the remaining PPD balance as $15,348.00. At this time I can make an offer of $15,000 plus the remaining PPD due to settle the claim fully and finally.

10. As of August 10, 2022, Claimant had been paid $3,575.74 in PPD benefits ($1,650.34 on June 22, 2022 for the period of 5/20/2022 through 6/24/2022, plus $641.80 on July 5, 2022, $641.80 on July 19, 2022, and $641.80 on August 2, 2022). Claimant was also paid $1,000.00 in disfigurement benefits on June 22, 2022.

11. Claimant was also paid $641.80 in PPD on August 16, 2022 and $641.80 in PPD on August 30, 2022.

12. On August 31, 2022 the parties entered into a settlement agreement (the "Settlement Agreement"). Paragraph 2 of the Settlement Agreement provides,

> In full and final settlement of all benefits, compensation, penalties and interest to which Claimant is or might be entitled to as a result of these alleged injuries or occupational diseases, Respondents agree to pay and Claimant agrees to accept the following **Twenty Five Thousand Dollars and No Cents ($25,000.00)**, and payment of any remaining unpaid permanent partial disability benefits in one lump sum without discount, in addition to all benefits that have previously been paid to or behalf of the Claimant.

(R. Ex. H, p. 49).

13. The Settlement Agreement does not specify the amount of remaining unpaid PPD benefits, specifically refer to the amount of PPD identified in the FAL, nor otherwise reference the FAL. The parties stipulated and agreed that the claim would never be reopened except on the grounds of fraud or mutual mistake of material fact. The Director of the Division of Workers' Compensation approved the Settlement Agreement on September 1, 2022.

14. On September 2, 2022 Insurer issued Claimant a settlement check for $25,000.00 as well as a check for $14,064.40 lump sum remaining unpaid PPD benefits pursuant to the Settlement Agreement.

15. On September 19, 2022 Claimant's counsel contacted AS[Redacted] regarding a "missing" $1,767.89 in payments. AS[Redacted] responded that Insurer's payout log reflected Claimant was fully paid. On September 20, 2022, Claimant's counsel stated, "The FAL shows benefits totaling $21,691.63, and then we have the $25,000 settlement, totaling $46,691.63. It looks like the ledger only shows $44,923.74 as paid out for PPD + settlement. The difference is the $1,767.89 I listed below. Are we able to get those funds issued?" (Cl. Ex. 8, p. 54).

16. On September 22, 2022 AS[Redacted] informed Claimant's counsel that the "missing" amount referred to by Claimant was the amount paid in TTD past the date of MMI. He wrote,

> Date of MMI was 5/20/22. We paid TTD through 6/10/22. Which you can verify in the ledger. That overpayment for 22 days of TTD (until the FA was filed) = $1,767.89. When the FA is filed it reconciles the balances due and payable and credits any overpayments. That, plus the benefits paid (balance) in PPD and the settlement equal out.

(Id. at p. 52).

17. Claimant alleges Respondents owe her $1,767.89 in remaining unpaid PPD benefits under the Settlement Agreement, as Respondents admitted to $20,691.63 in PPD benefits on the FAL and have only paid $18,923.74 in PPD benefits.

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).

Enforcement of a Settlement Agreement

Section 8-43-201, C.R.S. authorizes the ALJ to hear and decide all matters arising under the Workers' Compensation Act. This includes the authority to interpret a settlement agreement entered into and approved pursuant to the Act. *See* §8-42-101(1)(a), C.R.S.; *McCord v. Nabors Drilling U.S.A. Inc.,* WC 4-347-186 (ICAO, Feb. 7, 2000).

A settlement agreement may only be reopened upon a showing of fraud or mutual mistake of material fact. § 8-43-204(1) and § 8-43-303(2)(a) & (b) C.R.S.

Claimant does not seek to reopen the Settlement Agreement but, rather, requests that the ALJ enforce the terms of the Settlement Agreement. Claimant argues she was not paid the entirety of remaining unpaid PPD benefits pursuant to the Settlement Agreement and is owed $1,767.89 in PPD benefits, representing the difference between $20,691.63 in PPD listed in the FAL and $18,923.74 in PPD benefits she has received. Claimant contends that any credit Respondents may have been entitled to for overpayment of TTD was waived by their failure to indicate the credit on the FAL. Claimant relies on Cibola Construction v. ICAO, 971 P.2d 666 (Colo.App.1998).

In *Cibola*, the claimant received an award of $25,869.84 in PPD benefits. The claimant's condition later worsened, requiring additional surgery. The employer voluntarily reopened the claim and filed a GAL notifying the claimant of its intent to apply the PPD benefits already paid against any future award of permanent benefits. After reaching MMI for his worsened condition, the claimant received a whole person impairment rating of 16%, equivalent to PPD benefits in the amount of $36,568.90. The employer subsequently filed a FAL for PPD benefits in the amount of $36,568.90, stating that benefits had been or would be paid in that amount. The employer paid the claimant only $8,222.10, representing the difference between the earlier award of PPD and the total amount of benefits due. The Court of Appeals concluded that, in accordance with the requirements of § 8-43-203(2)(b)(I), C.R.S., the employer was obligated expressly to inform claimant of any credit or set off in the final admission. The Court of Appeals reasoned that notification of the credit in the previously filed general admission did not adequately preserve the employer's right to a reduction because it is the final admission which dispositively settles an employer's liability when uncontested. The Court of Appeals held that the final admission was legally insufficient to preserve the claimed credit and that the employer was bound to pay benefits in accordance with the amount represented in that document.

Cibola is distinguishable in that it involved the disposition of a case pursuant to a closed FAL whereas the case at bench involves the disposition of a case pursuant to an enforceable settlement agreement. The Settlement Agreement does not specify a particular amount of remaining unpaid PPD benefits nor does it specifically reference or incorporate the FAL. The terms of the Settlement Agreement provides for "payment of any remaining unpaid permanent partial disability benefits."

It is undisputed Claimant was paid TTD benefits beyond the date of MMI. WCRP Rule 5-6(D) provides "an insurer shall receive credit against permanent disability benefits for any temporary disability benefits paid beyond the date of maximum medical improvement." Accordingly, Respondents were entitled under WCRP Rule 5-6(D) to take a credit of $1,767.89. of overpaid TTD against Claimant's PPD. Additionally, Respondents preserved the right to claim any and all offsets and recover any and all overpayments specifically referenced in the FAL or not.

Prior to entering into the Settlement Agreement, Claimant was made aware of Respondents' calculations regarding the amount of unpaid remaining PPD benefits, which took into account the credit of TTD against PPD. The Settlement Agreement required Claimant to pay $25,000 and payment of any remaining unpaid PPD benefits. At the time of entering into the Settlement Agreement, the amount of remaining unpaid PPD benefits was $14,064.40 ($18,923.74 minus $4,859.34 paid prior to August 31, 2022). Claimant was paid $25,000 and a lump sum of $14,064.40 in remaining unpaid PPD benefits. Accordingly, Claimant was paid all remaining unpaid PPD benefits pursuant to the Settlement Agreement.

ORDER

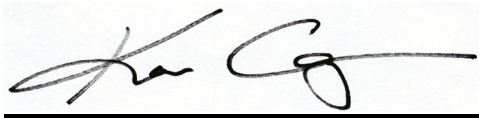
It is therefore ordered that:

1. Claimant's claim for $1,767.89 in unpaid PPD benefits pursuant to the Settlement Agreement is denied and dismissed.

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

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

DATED: May 31, 2023



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