ISSUE

I. Did Claimant prove by a preponderance of the evidence that the spinal cord stimulator trial is reasonable and necessary?

FINDINGS OF FACT

Based on the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained an admitted injury on December 7, 2016. A hearing was previously held in this matter on July 24, 2019 with ALJ Edie presiding. A copy of the Order entered following that hearing was admitted as Exhibit 4 for the Claimant. That Order contains detailed findings of fact that frame the case for the current issue.

2. Based on that order, the post-mmi peripheral nerve stimulator was implanted.

3. Following that surgery the Claimant had improvement in his upper back condition. However, his lower back problems worsened. He has sharp pain on the outside of his legs with standing, walking, sitting for a long time, bending down and kneeling.

4. Dr. Barolat, who performed the prior peripheral nerve stimulator implant, is now recommending a trial spinal cord stimulator in an effort to determine if that will resolve his lower back pain and avoid a fusion surgery.

5. Dr. Sparr is the Claimant's treating physician and agrees with Dr. Barolat's recommendation. Dr. Sparr referred Claimant to Dr. Sheper for a spinal cord stimulator (SCS) trial. As precondition for the trial, Claimant must undergo an evaluation by a psychologist and an evaluation by an occupational therapist. Claimant is willing to undergo both evaluations.

6. At the request of Respondent, Claimant has seen Dr. Goldman 4 times in 4 years. Based on the recommendations of Dr. Goldman, Claimant has undergone the treatment he recommended, without success.

7. Based on his experience, Dr. Sparr is recommending the trial spinal

cord stimulator since the trial will determine whether a spinal cord stimulator would be effective in controlling his pain. The conservative treatment recommended by Dr. Goldman has not been effective in controlling the Claimant's pain. In fact, the physical therapy made his pain worse.

8. In order to obtain good trial results, Dr. Sparr has recommended that the trial be done by Dr. Sheper in Dr. Sparr's office.

9. With respect to the trial SCS, Dr. Goldman, stated "I discussed my concern for high rate of false positive responses to stimulator trials as interpreted by clinicians who champion that technique". In his report of February 2025, Dr. Goldman also pointed out that Dr. Sparr previously did not support the spinal cord stimulator procedure recommended by Dr. Barolat. Dr. Sparr explained that he did not support a trial previously because Dr. Goldman proposed conservative care that Dr. Sparr took to heart and wanted to exhaust that treatment first.

10. Another reason Dr. Sparr did not previously agree with Dr. Barolat is that he did not think that Dr. Barolat should be doing both the trial and the implanting of the Spinal Cord stimulator. Currently, Dr. Sheper with be doing the trial and Dr. Sung would be doing the implant surgery.

11. In his testimony, Dr. Goldman reiterated that a trial fails to predict whether the permanent spinal cord stimulator will be effective due to the placebo effect. He stated that "In other words, the problem with placebo effects isn't that they're bad or wrong or aren't helpful, but if a patient is - - prone to that type of interpretation of symptoms, they're going to be giving not only their physician but themselves misinformation in terms of how likely, in this case, a spinal stimulator trial predicts what a permanent trial will result in".

CONCLUSIONS OF LAW

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Medical Benefits

D. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

E. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, the Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure

and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). I conclude that the recommendation for a SCS trial by Dr. Sparr and referral to Dr. Sheper for the trial is reasonable, necessary and related as maintenance medical treatment. I am persuaded by Dr. Sparr's analysis and approach to the trial and referral to another surgeon if the implant is determined to be appropriate. I also recognize that the Claimant must undergo a psychological evaluation and an occupational therapy evaluation as prerequisite to the trial. These evaluations were not previously done since the trial was denied and did not serve a purpose before the trial was approved.

ORDER

Based on the forgoing findings of fact, it is ORDERED:

1. Claimant's request for a Spinal Cord Simulator trial is granted.

2. Any issue not resolved herein is reserved for future determination.

Dated May 2, 2025

Michael A. Perales
Administrative Law Judge

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the surgery consisting of a right shoulder arthroscopy, rotator cuff repair, labrum repair, biceps tenodesis, and subacromial decompression, as recommended by Dr. Sauerbrey, is reasonably necessary to cure and relieve Claimant of the effects of his November 14, 2023 injury.

FINDINGS OF FACT

1. Claimant is a mechanic and owner of Alpenglow Auto Repair who sustained a compensable right shoulder injury on November 14, 2023, when he slipped on transmission fluid and fell backwards onto his outstretched right arm and rolling onto his right shoulder.

2. Claimant sought treatment at the UC Health Emergency Room where he complained of pain in his neck, back, and buttocks, but his most significant pain was in his right shoulder. On physical examination, Claimant exhibited tense palpation over his right acromioclavicular joint but full range of motion. A right shoulder X-ray was ambiguous as to acromioclavicular joint separation but an unremarkable glenohumeral joint.

3. Claimant pursued additional treatment with Steamboat Orthopaedic & Spine Institute, where he was attended by Margo Boatner, PA-C, on November 21, 2023. Claimant reported difficulty raising his arm up in abduction with a sensation that it was catching. Claimant also exhibited tenderness in his rotator cuff insertion and acromioclavicular joint as well as a positive Hawkins test and a positive Speed's test and O'Brien's test to the top of the shoulder. Claimant exhibited rotator cuff weakness with external rotation. Claimant also had right upper extremity symptoms extending to his thumb. PA Boatner recommended an MRI arthrogram of the right shoulder and an EMG of the right upper extremity.

4. Claimant underwent the MRI arthrogram of the right shoulder at Steamboat Orthopaedic on December 13, 2023. The MRI arthrogram demonstrated extensive tearing of the superior labrum with full-thickness chondral loss in the posterior glenoid and associated cystic changes, as well as slight posterior subluxation of the humeral head. High-grade bursal tearing of the anterior supraspinatus and high-grade intrasubstance tearing of the subscapularis were observed, alongside

medial subluxation of the biceps tendon and moderate tendinosis. The humeral head cartilage was preserved, but there was slight chronic superior subluxation of the distal clavicle and a type II acromion.

5. Claimant also underwent a right upper extremity EMG, which showed evidence of mild carpal tunnel syndrome and cubital tunnel syndrome, but no cervical radiculopathy or brachial plexopathy.

6. Claimant followed up with orthopedic surgeon Dr. Andreas Sauerbrey at Steamboat Orthopaedic later that same day. Dr. Sauerbrey examined Claimant and noted acromioclavicular joint tenderness with cross-body adduction, pain and weakness with rotator cuff maneuvers and a positive Jobe's test, and pain in the biceps tendon with positive Speed's and O'Brien's tests. Dr. Sauerbrey also reviewed the MRI arthrogram imaging. Dr. Sauerbrey recommended carpal tunnel and cubital tunnel surgeries be completed first, followed by shoulder surgery several months later.

7. Dr. Sauerbrey submitted a request for prior authorization to Respondents for right cubital tunnel release and right-hand carpal tunnel release. Respondents denied the request for prior authorization, relying on a record-review report by Dr. Matthew Delarosa. That surgery is not at issue in this case. Dr. Sauerbrey also submitted a request for prior authorization on December 19, 2023, for a right shoulder arthroscopic rotator cuff repair, a repair of the glenoid labrum, a biceps tenodesis, and a subacromial decompression. That request is at issue in this matter.

8. Claimant underwent a right carpal tunnel and cubital tunnel release surgery on February 5, 2024.

9. Respondents commissioned another record review to be performed by Dr. Delarosa, which was completed on May 9, 2024. Dr. Delarosa addressed Claimant's right shoulder symptoms and recommended treatment. Dr. Delarosa felt that the right shoulder conditions apparent on the MRI were chronic in nature. Although he felt that there was a chance that Claimant had sustained an exacerbation of his pre-existing right shoulder condition and that conservative care may be reasonable, he felt that a shoulder surgery would be unrelated and should be pursued outside of workers' compensation. Respondents denied the request for prior authorization for shoulder surgery based on Dr. Delarosa's report.

10. On May 21, 2024, Dr. David Niedermeier, Claimant's authorized treating physician at Steamboat Medical, issued a report addressing Claimant's right shoulder condition. Dr. Niedermeier opined that neither an injection nor physical therapy would heal Claimant's rotator cuff tear and that a shoulder surgery was scheduled to take place in two weeks.

11. Several weeks later, on June 25, 2024, Claimant returned to Dr. Niedermeier complaining of worsened shoulder pain expressing frustration with the delay in approval of the right shoulder surgery. Dr. Niedermeier recommended that Claimant proceed with surgery as soon as the procedure is approved.

12. Claimant returned to Dr. Sauerbrey on September 4, 2024. Claimant continued to complain of right shoulder pain and weakness, particularly at night. Dr. Sauerbrey noted that Claimant's right rotator cuff was weak in external rotation and abduction, that Claimant's rotator cuff insertion site was tender, and that there was a positive Speed's test on the right, but not on the left, as well as pain with a Hawkins test. Dr. Sauerbrey noted that Claimant had a good recovery for his wrist and elbow surgeries, but that Claimant needed to have shoulder surgery scheduled to take place in the next couple of months.

13. A request for prior authorization was submitted on September 13, 2024, for right shoulder arthroscopy, rotator cuff repair, labral repair, biceps tenodesis, and subacromial decompression.

14. In response to the request for prior authorization, Dr. Delarosa issued a subsequent medical record review report on September 22, 2024. Dr. Delarosa reiterated that the injury could very well have resulted in an acute rotator cuff injury, but that the rotator cuff condition could also be the result of a degenerative process that had "decompensated" from the injury itself, noting that bursal-sided tears could sometimes be the end result of impingement syndrome. Dr. Delarosa felt that a subacromial injection was appropriate to determine whether the limitation on the shoulder range of motion was the result of impingement or the result of a rotator cuff tear. Dr. Delarosa felt that the rotator cuff tear might not be Claimant's pain generator, noting that partial thickness tears in those in Claimant's age category are often not symptomatic, citing the Medical Treatment Guidelines, and hypothesizing that Claimant may have had an asymptomatic partial rotator cuff tear prior to the fall. Dr. Delarosa also pointed out that in patients over fifty-five years old with nontraumatic small tears of the supraspinatus achieved similar recoveries when engaged in a supervised home therapy program as those patients who underwent surgical repair and physical therapy. Ultimately, Dr. Delarosa felt that right shoulder surgery would be reasonable, but that Dr. Sauerbrey had not adequately established the causal relationship between Claimant's injury and his need for a surgical rotator cuff repair.

15. Dr. Niedermeier addressed causation in a report regarding a September 27, 2024 follow-up appointment with Claimant. Dr. Niedermeier opined that Claimant's rotator cuff was not a pre-existing injury, noting that Claimant had absolutely no history of shoulder injury, pain, or decreased mobility. On physical examination, Claimant exhibited right shoulder forward flexion above the head but could not perform the same range of motion laterally due to catching and pain beyond ninety degrees.

16. Dr. Delarosa performed another record review on September 22, 2024. Dr. Delarosa again expressed that he felt that the MRI findings were likely degenerative in nature, though he was equivocal as to whether Claimant's injury would have aggravated that condition. Dr. Delarosa again recommended subacromial injections for the diagnostic purpose of distinguishing between impingement-related pain and a true rotator cuff pathology.

17. On November 13, 2024, Dr. Failinger performed an IME on behalf of Respondents and issued a written report. As part of the IME, Dr. Failinger examined Claimant and reviewed Claimant's medical history.

18. Dr. Failinger ultimately opined that Claimant sustained an acceleration or permanent aggravation of pre-existing degenerative rotator cuff disease as a result of his work injury. Although Claimant's rotator cuff tear was largely degenerative and pre-dated the incident, Dr. Failinger found that Claimant's post-injury functional decline and his MRI findings of edema in the supraspinatus tendon supported the conclusion that the injury aggravated Claimant's underlying degenerative condition. Dr. Failinger also pointed out the temporal relationship between Claimant's shoulder pain and the injury itself. He also explained that while rotator cuff degeneration is common and often asymptomatic, it is not unusual for symptoms to develop after an event that causes further tearing.

19. However, with regard to the posterior glenoid and acromioclavicular joint arthritic changes observed on imaging, Dr. Failinger felt that these were not causally related to the injury, reasoning that there was no evidence of acute exacerbation of those pre-existing arthritic conditions following the injury. As for the biceps tendon, Dr. Failinger noted it was reasonable to believe that a sudden jarring event, such as the slip and fall, could have caused a transient subluxation, though he could not state with reasonable medical probability whether this had occurred.

20. Dr. Failinger recommended diagnostic injections into the subacromial space and glenohumeral joint to better localize the source of Claimant's shoulder pain before proceeding with any surgical intervention. He cautioned against addressing all degenerative findings surgically unless the structures were confirmed pain generators linked to the work incident. In particular, he found no medical basis for procedures aimed at the glenoid arthritis or distal clavicle resection absent future clinical findings specifically confirming that those areas were symptomatic. Dr. Failinger ultimately supported shoulder surgery only if the diagnostic injections significantly relieved Claimant's symptoms, thereby confirming the causal relationship between the injury and the current shoulder complaints.

21. On December 4, 2024, Claimant returned to Dr. Sauerbrey. Dr. Sauerbrey reviewed Dr. Failinger's report and opined that Dr. Failinger was incorrect in recommending diagnostic injections prior to surgery. Dr. Sauerbrey clarified that there had clearly been a change in Claimant's rotator cuff resulting from the fall and that there was acute-on-chronic tearing. He felt that the biceps tendon subluxation and the other shoulder conditions needed to be addressed surgically, as they would not heal on their own. Dr. Sauerbrey submitted another request for prior authorization for the right shoulder surgery on December 19, 2024.

22. Dr. Failinger testified at hearing regarding his IME and his opinions. Dr. Failinger testified that the range-of-motion and strength testing he performed at the IME elicited pain originating from the rotator cuff.

23. Dr. Failinger clarified that he disagreed with Dr. Delarosa's assessment that Claimant's rotator cuff pathology was degenerative in nature, noting that there was in fact some edema present on the MRI. Dr. Failinger also testified that conservative care was unlikely to result in improvement to the extent that it would have early on in the treatment, as a year and a half had passed since the injury. However, Dr. Failinger felt that injections were absolutely necessary to identify the pain generator before operating on Claimant.

24. Dr. Failinger testified that surgical repair of the labral tear would not be reasonably necessary and related to the work injury due to the absence of acute trauma to the labrum. As for the biceps tendon, Dr. Failinger testified that it may have been aggravated by the injury but that an injection would be necessary to verify the relatedness.

25. Dr. Failinger felt that it would not be reasonable to address all the shoulder conditions at once without identifying the specific pain generator. Dr. Failinger testified that while the rotator cuff tear was one possible pain generator, other alternative pain generators included the torn labrum, the subluxing biceps tendon, the subscapularis split, and the glenoid arthritis. He testified that the surgery would do nothing to help relieve arthritis pain in the glenohumeral joint. In his opinion, the odds of a successful outcome decrease with increased magnitude of the surgery.

26. The Court finds Dr. Failinger's testimony credible. However, the Court does not find Dr. Failinger's testimony persuasive insofar as he opines that there is insufficient diagnostic evidence supporting the need for the surgery recommended by Dr. Sauerbrey.

27. Claimant's physical examinations consistently demonstrated signs localizing pain and weakness to the biceps tendon and which were consistent with the injuries evident on the MRI. As early as November 21, 2023, PA Boatner documented objective findings including rotator cuff weakness, positive Hawkins, Speed's, and O'Brien's tests, and tenderness at the rotator cuff insertion, all of which are

consistent with the MRI findings obtained on December 13, 2023, which showed high-grade tearing of the supraspinatus and subscapularis tendons, as well as biceps tendon subluxation. Similarly, Dr. Sauerbrey during his evaluations on December 13, 2023, and September 4, 2024, and by Dr. Niedermeier on September 27, 2024, noted continued mechanical symptoms and limitations in range of motion. The Court finds these diagnostic examination results so probative as to the need for the shoulder surgery so as to render the diagnostic injections recommended by Dr. Failinger to be superfluous. Furthermore, Claimant's functional decline over the year and a half since injury, particularly with night pain and decreased range of motion, supports the urgency and necessity of surgical intervention.

28. Therefore, the Court finds that the surgery recommended by Dr. Sauerbrey is reasonably necessary to cure and relieve Claimant of the effects of his work injury.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Benefits

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

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

As found, the Court concludes that Claimant has proved by a preponderance of the evidence that the right shoulder surgery as recommended by Dr. Sauerbrey is reasonably necessary to cure and relieve Claimant of the effects of his November 14, 2023 injury.

ORDER

It is therefore ordered that:

1. Claimant has proved by a preponderance of the evidence that the surgery consisting of a right shoulder arthroscopy, rotator cuff repair, labrum repair, biceps tenodesis, and subacromial decompression, as recommended by Dr. Sauerbrey, is reasonably necessary to cure and relieve Claimant of the effects of his November 14, 2023 injury.

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

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

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

DATED: May 2, 2025.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-286-403-001

STIPULATIONS

The parties agreed to the following:

1. The right of selection passed to Claimant and he chose Primary Care Physician (PCP) Joshua Axman, D.O. as his Authorized Treating Provider (ATP).

2. Claimant earned an Average Weekly Wage of $1332.87.

3. Claimant's Temporary Total Disability (TTD) benefits rate is $888.58.

4. If Claimant is entitled to wage loss benefits, they are 100% offset by short-term disability benefits Claimant received from a plan fully funded by Respondents.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable left upper extremity injuries during the course and scope of employment with Employer on September 27, 2024.

2. Whether Kristin D. Mason, M.D. and Armodios M. Hatzidakis, M.D. are within the chain of authorized treating physicians.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable and necessary medical benefits that are causally related to his September 27, 2024 injuries.

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the periods September 27, 2024 until October 3, 2024 and October 10, 2024 until terminated by statute.

5. Whether Respondents have established by a preponderance of the evidence that Claimant's indemnity benefits should be reduced by 50% pursuant to §8-42-112(1)(d), C.R.S.

FINDINGS OF FACT

1. Claimant worked as a store manager for Employer. On September 27, 2024 he entered Employer's back room to retrieve a box from rolling shelves. He specifically reached about nine feet off the ground to grab the box with both hands. However, the shelf shifted and the box, weighing about 50 pounds, fell onto his head, neck and left shoulder.

2. Claimant had been working as a store manager for Employer since 2021. When applying for the position, Claimant reviewed the job description and stated he could perform all regular duties. The physical requirements for the store manager position included the ability to twist, bend, squat, reach, climb a ladder, stand for extended periods, repetitively use upper extremities, and lift, push, and pull occasionally up to 25-50 pounds. The job description did not specify the need to work overhead. Claimant testified that he could not remember anything that would have prevented him from carrying out the regular duties of a store manager. No treating physician had restricted him from working overhead or lifting more than 20 pounds.

3. Claimant testified that before the injury, he had no difficulties working overhead or lifting more than 20 pounds. He had never missed work or requested treatment related to his regular duties. Employer's District Manager and supervisor Lyn Walker noted that from 2021 to 2024, Claimant had not encountered any issues completing his required job duties. She commented that, even if an applicant had a 20-pound lifting restriction with no overhead work when applying for the store manager position, she would need to know more about those restrictions before offering the job.

4. Claimant reported his injuries and visited the St. Anthony's North Emergency Room for treatment on the day on the incident. He noted sharp shooting pain in his left trapezius/shoulder region, a posterior headache, and left cervical paraspinal muscle tenderness. Claimant underwent a CT scan of his cervical spine and x-rays of his left shoulder and humerus. The CT scan showed no cervical spine fracture, no subluxation, and well- preserved disc heights. X-rays of Claimant's left wrist, shoulder, humerus, and left hand were normal.

5. On October 3, 2024 Claimant sought treatment from Primary Care Physician (PCP) Joshua Axman, D.O. for an emergency department follow-up. Dr. Axman noted tenderness to palpation, restricted range of motion, and pain that limited the ability to perform several shoulder tests. He recorded that each symptom began after a box fell directly onto Claimant. Dr. Axman recommended physical therapy and advised that a specialist should be consulted for further management if the shoulder symptoms did not improve. He diagnosed adhesive capsulitis of the left shoulder, a contusion of the left thumb, derangement of the left shoulder, and cervical radiculopathy.

6. The record reveals that in June 2011 Claimant had been evaluated and treated for a work-related left shoulder injury. He was primarily treated by Authorized Treating Physician (ATP) Kristin D. Mason, M.D. On November 7, 2017 Brian J. Beatty, D.O. performed a 24-month Division Independent Medical Examination (DIME) and placed Claimant at MMI with a 20% whole person impairment rating, The rating consisted of a 14% right knee impairment, a 5% left knee impairment and a 2% whole person rating for left shoulder range of motion deficits. Additionally, Dr. Beatty placed Claimant on permanent work restrictions of "20 pounds lifting with no overhead type work and limitations of standing and walking of no more than 2-3 hours per day with no climbing, squatting, kneeling or crawling."

7. Claimant testified that he had not reviewed Dr. Beatty's DIME report before October 2024. He stated that he did not recall Dr. Beatty mentioning the suggested restrictions and was unaware of them until October 2024. Claimant also commented that he did not intentionally mislead Employer about his ability to perform the duties of the store manager position.

8. On September 10, 2024, or 17 days prior to the industrial injury, Claimant had presented to Dr. Axman for a routine evaluation. Claimant reported no complaints related to his left shoulder or cervical spine. The examination revealed no abnormalities involving the upper extremities or neck. Prior to the work-related incident, the last documented treatment for Claimant's left shoulder occurred in early 2018, or more than six years earlier. Although the medical record reflects minor inconsistencies in Claimant's pre-injury treatment history, a thorough review of the records reveals that Claimant was receiving treatment solely for his lower extremity conditions.

9. On October 10, 2024 Claimant visited Dr. Mason for an evaluation of his September 27, 2024 injury. After a physical examination and diagnostic testing, Dr. Mason assessed Claimant with a left shoulder contusion and possible rotator cuff tear, a cervical strain and contusion, a head contusion with possible mild concussion, and a thumb sprain/strain. Dr. Mason determined Claimant's objective findings were consistent with a work-related mechanism of injury. She assigned temporary work restrictions of no use of the left arm and recommended physical therapy twice weekly.

10. On October 16, 2024 Claimant underwent a left shoulder MRI. at the request of Dr. Axman. The imaging revealed mild supraspinatus and infraspinatus tendinosis, a moderately large glenohumeral joint effusion with mild synovitis and generalized thinning of the articular cartilage, fraying of the superior labrum, and mild AC joint arthrosis.

11. On October 22, 2024 Claimant returned to Dr. Mason for an examination. She recounted that Claimant had a non-contrast left shoulder MRI under his private health insurance that revealed a posterior labral tear. Her diagnoses included an acute shoulder injury with a posterior labral tear. Dr. Mason noted the MRI had revealed some arthritic changes as well as a joint effusion and bone marrow edema that suggested an acute injury.

12. On November 26, 2024 Claimant sought follow-up treatment from Dr. Axman. Dr. Axman noted the MRI showed a labral tear, joint effusion and chronic arthritis. Claimant's shoulder symptoms persisted, warranting continued treatment with a physiatrist for rehabilitation. Dr. Axman thus referred Claimant to Dr. Mason for treatment. Claimant understood that, because Dr. Mason was a physiatrist who had previously treated him in a Workers' Compensation setting, continuing his treatment with her would be the best option.

13. On December 3, 2024 Claimant returned to Dr. Mason for an examination. She continued to assess Claimant with a left shoulder posterior labral tear and recommended physical therapy. Dr. Mason assigned work restrictions limiting lifting,

carrying, crawling, kneeling, squatting, and climbing. Dr. Mason commented that Claimant would visit Armodios M. Hatzidakis, M.D. on December 17, 2024 for an evaluation.

14. On December 5, 2024 Claimant underwent an Independent Medical Examination (IME) with Michael Worrell, D.O. He explained that Claimant described a mechanism of injury to his left shoulder that did not objectively correlate with labral tearing. Dr. Worrell noted the mechanism of a labral tear can include repetitive overhead activities, degenerative fraying of the labrum, a fall onto an outstretched arm, traction to the arm, and injuries that involve dislocation or instability. Claimant had commented that the box impacted the left side of his neck, trapezius, and superior aspect of his left clavicle and acromion. Additionally, Claimant did not specify that he fell onto his left side, the box impacted the anterior/posterior/lateral aspect of his shoulder, or he sustained a traction type mechanism to his shoulder at the time of the injury. Based on the reported mechanism of injury, Dr. Worrell determined that it was not medically probable the September 27, 2024 incident caused, exacerbated, or aggravated Claimant's left shoulder labral tear.

15. On December 13, 2024 Claimant again visited Dr. Mason. She recounted that she had been Claimant's treating physician for his June 2, 2011 industrial injury. He then had an uneventful recovery from left shoulder surgery in 2013. Dr. Mason continued to treat Claimant and noted his shoulder issues became so minor that she forgot he had undergone surgery in 2013. She remarked that Claimant had a previous left shoulder labral repair that became asymptomatic over time. Dr. Mason assessed Claimant with a left shoulder posterior labral tear.

16. Dr. Mason provided Claimant with regular medical treatment from August 19, 2011 until November 7, 2017. Among other conditions, Dr. Mason treated Claimant's left shoulder. On December 13, 2024, in response to Claimant's attorney's letter, Dr. Mason commented she would not have prevented Claimant from performing any of the regular job duties of a store manager. Claimant remarked that he did not remember Dr. Mason imposing any permanent restrictions prior to the September 27, 2024 incident.

17. On January 2, 2024 Dr. Worrell issued an addendum report. He determined it was medically probable that the impact of the box falling on the area described by Claimant caused a contusion and resultant pain to the acromion, AC joint, clavicle, and trapezius on the left side. Moreover, the overhead position of the arm when reaching for and stabilizing the box weighing 50 pounds caused impingement of the rotator cuff tendons and resulted in the associated positive examination findings related to the rotator cuff. However, the reaching alone did not cause the symptoms related to the rotator cuff. Instead, the dynamic combination of reaching overhead with the reported attempt to stabilize the falling box caused the symptoms. Dr. Worrell further reasoned that it was unlikely the falling box caused the clinical findings suggestive of biceps pain or injury to the labrum. Finally, it was also unlikely the falling box caused the exam findings related to labral pathology because the mechanism for labral injury is more typically related to abrupt axial loading during a fall or repetitive overhead activities.

18. On January 14, 2025 Claimant returned to Dr. Mason for an examination. She had reviewed Dr. Worrell's IME report explaining there was no mechanism for Claimant's left shoulder labral injury during the September 27, 2024 incident. Dr. Mason deferred the causation assessment of shoulder pathology to Dr. Hatzidakis.

19. On January 16, 2025 Claimant visited Dr. Hatzidakis for an examination. Dr. Hatzidakis recounted that in 2013 he had performed surgery on Claimant consisting of a left shoulder arthroscopy with posterior labral repair. Claimant explained that his shoulder was doing well until a large box fell on him at work on September 27, 2024. Since the new injury, Claimant has noticed weakness and significant pain especially with overhead motion. A steroid injection with his PCP about one week after the accident only provided relief for two days. Dr. Hatzidakis noted in Claimant's history that his shoulder had functioned at 100% and was doing well until a box fell on him at work. He remarked that Claimant's left shoulder MRI revealed a moderately large glenohumeral joint effusion with inflammation of his rotator cuff tendons. Dr. Hatzidakis explained that Claimant would likely benefit from another ultrasound-guided steroid injection of his left shoulder. continuing physical therapy and a course of anti-inflammatories. He diagnosed Claimant with a left shoulder strain and commented that Claimant would not require surgical intervention unless he did not improve with conservative treatment.

20. Dr. Worrell testified at the hearing in this matter. He maintained that it was not medically probable the September 27, 2024 incident caused, exacerbated, or aggravated Claimant's left shoulder labral tear. Dr. Worrell determined that Claimant's injuries from the incident were limited to contusions of his collarbone and left thumb that would not require medical treatment. He noted that following his IME of Claimant, he received the shoulder MRI report and additional medical records. Dr. Worrell remarked that the left shoulder MRI findings were not the result of an acute event on September 27, 2024 incident. Instead, the imaging revealed chronic, arthritic left shoulder degeneration. Although he had read the medical reports from Dr. Mason and Dr. Hatzidakis that Claimant's upper extremity complaints, including his should and neck, were related to his mechanism of injury, the MRI did not reveal any acute findings regarding the left rotator cuff tendons. The MRI also did not reflect any soft tissue edema indicative of a high-impact injury. Dr. Worrell summarized that the left shoulder MRI findings represented the natural progression of a degenerative shoulder condition. Notably, he retracted his prior opinion that Claimant had rotator cuff impingement likely related to the overhead position of his arm because the MRI did not show the condition.

21. Claimant has established it is more probably true than not that he suffered compensable left upper extremity injuries during the course and scope of employment with Employer on September 27, 2024. Initially, Claimant testified that he injured his left shoulder and neck when a box weighing approximately 50 pounds fell on him. Claimant immediately experienced pain in his left shoulder and neck. He reported his injuries and visited the St. Anthony's North Emergency Room for treatment. Claimant complained of sharp shooting pain in his left trapezius/shoulder region, a posterior headache, and left cervical paraspinal muscle tenderness. Notably, on September 10, 2024, or 17 days prior to the industrial injury, Claimant had presented to PCP Dr. Axman for routine

evaluation and reported no complaints related to his left shoulder or cervical spine. Furthermore, prior to the work-related incident, the last documented treatment for Claimant's left shoulder occurred in early 2018, or more than six years earlier. Although the medical record reflects minor inconsistencies in Claimant's pre-injury treatment history, a thorough review of the records establishes that Claimant was receiving treatment solely for his lower extremity conditions.

22. On October 3, 2024 Claimant sought treatment from PCP Dr. Axman for an emergency department follow-up. Dr. Axman noted tenderness to palpation, restricted range of motion, and pain that limited the ability to perform several shoulder tests. He recorded that each symptom began after a box fell directly onto Claimant. Dr. Axman diagnosed adhesive capsulitis of the left shoulder, contusion of the left thumb, derangement of the left shoulder, and cervical radiculopathy. Similarly, on October 10, 2024 Claimant visited Dr. Mason for an evaluation of his September 27, 2024 injury. After a physical examination and diagnostic testing, Claimant was assessed with a left shoulder contusion and possible rotator cuff tear, a cervical strain and contusion, a head contusion with possible mild concussion, and a thumb sprain-strain. Dr. Mason determined Claimant's objective findings were consistent with a work-related mechanism of injury. She assigned temporary work restrictions of no use of the left arm and recommended physical therapy twice weekly. A subsequent MRI of the left shoulder revealed supraspinatus and infraspinatus tendinosis, glenohumeral joint effusion with synovitis, fraying of the superior labrum, and inflammation of the rotator cuff tendons. Finally, on January 16, 2025 Claimant visited Dr. Hatzidakis and explained that his shoulder was doing well until a large box fell on him at work on September 27, 2024. Claimant noticed weakness and significant pain especially with overhead motion. Dr. Hatzidakis noted in Claimant's history that his shoulder had functioned at 100% and was doing well until the box fell on him. He remarked that Claimant's left shoulder MRI revealed a moderately large glenohumeral joint effusion with inflammation of his rotator cuff tendons.

23. In contrast, IME physician Dr. Worrell maintained that it was not medically probable the September 27, 2024 incident caused, exacerbated, or aggravated a left shoulder labral tear. Dr. Worrell determined that Claimant's injuries from the incident were limited to contusions of his collarbone and left thumb. The contusions would not require medical treatment. Dr. Worrell remarked that the left shoulder MRI findings were not the result of an acute event on September 27, 2024. Instead, the imaging revealed chronic, arthritic left shoulder degeneration. Although he had read the medical reports from Dr. Mason and Dr. Hatzidakis that Claimant's upper extremity complaints, including his shoulder and neck, were related to his mechanism of injury, the MRI did not reveal any acute findings regarding the left rotator cuff tendons. The MRI also did not reflect any soft tissue edema indicative of a high-impact injury. Dr. Worrell summarized that the left shoulder MRI findings represented the natural progression of a degenerative shoulder condition.

24. The opinions of Drs. Axman, Mason, and Hatzidakis are supported by objective diagnostic findings, including MRI imaging and physical examination findings.

The record reflects that Claimant sustained compensable injuries to his left shoulder and cervical spine as a direct and proximate result of the work-related incident on September 27, 2024. Specifically, the temporal relationship between the mechanism of injury and the onset of symptoms, coupled with the objective medical evidence and persuasive expert opinions, supports a finding of causation. Dr. Worrell's opinions are less persuasive based on his cursory review of the medical records and failure to personally evaluate the MRI imaging. Notably, Drs. Axman and Mason have also consistently evaluated and treated Claimant over a lengthy period of time. Claimant's work activities on September 27, 2024 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered compensable left upper extremity injuries during the course and scope of his employment with Employer on September 27, 2024.

25. Claimant has proven it is more probably true than not that the right to select an ATP passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have thus not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him. Based on the parties' stipulation Claimant chose PCP Dr. Axman as his ATP.

26. Dr. Axman subsequently remarked that Claimant's shoulder symptoms persisted and warranted continued treatment with a physiatrist for rehabilitation. Dr. Axman thus referred Claimant to Dr. Mason for care. Claimant understood that, because Dr. Mason was a physiatrist and had previously treated him in a Workers' Compensation setting, continuing his treatment with her would be the best option. Dr. Mason was thus within the chain of authorized referrals. The record lacks evidence supporting Respondents' contention that Claimant directed the referral. Dr. Mason subsequently referred Claimant to Dr. Hatzidakis. Importantly, by December 3, 2024 Dr. Mason continued to assess Claimant with a left shoulder posterior labral tear and recommended physical therapy. She commented that Claimant would visit Dr. Hatzidakis on December 17, 2024 for an evaluation. Therefore, Claimant's medical treatment with Dr. Axman, his referral to Dr. Mason and her referral to Dr. Hatzidakis, are thus authorized.

27. Claimant has demonstrated it is more probably true than not that he is entitled to receive reasonable and necessary medical benefits that are causally related to his September 27, 2024 injuries. Claimant reported his injuries and visited the St. Anthony's North Emergency Room for treatment. On October 3, 2024 Claimant sought treatment from PCP Dr. Axman. As noted previously, Dr. Axman subsequently referred Claimant to Dr. Mason and Dr. Mason referred Claimant to Dr. Hatzidakis. All of the preceding providers diagnosed Claimant with a left shoulder injury. Dr. Mason also diagnosed him with a cervical injury. An October 16, 2024 left shoulder MRI reflected mild supraspinatus and infraspinatus tendinosis, a moderately large glenohumeral joint effusion with mild synovitis and generalized thinning of the articular cartilage, fraying of

the superior labrum, and mild AC joint arthrosis. Claimant ultimately received medical treatment including imaging, physical therapy and medications. The record thus demonstrates that Claimant's medical treatment was reasonable, necessary and causally related to his September 27, 2024 industrial left upper extremity injuries. Claimant is also entitled to receive continuing reasonable, necessary and causally related medical care.

28. Claimant has proven it is more probably true than not that he is entitled to receive TTD benefits for the periods September 27, 2024 until October 3, 2024 and October 10, 2024 until terminated by statute. Claimant's testimony and the medical records demonstrate that he was either unable to work or under restrictions that rendered him unable to perform his job duties and impaired his earning capacity. Notably, the record reveals that medical providers assigned work restrictions that rendered Claimant unable to perform his job duties. Specifically, Claimant was restricted from working from the date of injury until Dr. Axman cleared him to work on October 3, 2024. Furthermore, on October 10, 2024, Dr. Mason restricted Claimant from using his left upper extremity. On December 3, 2024 Dr. Mason assigned restrictions concerning lifting, carrying, crawling, kneeling, squatting, and climbing. The record reveals that Claimant has thus had physical restrictions related to the work incident from October 10, 2024 to the present. Respondents have not offered modified duty and Claimant has not returned to work. Claimant continues to receive medical care and has not yet reached Maximum Medical Improvement (MMI). The record reveals that Claimant's industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Accordingly, Claimant has proven that he is entitled to receive TTD benefits for the periods September 27, 2024 until October 3, 2024 and October 10, 2024 until terminated by statute.

29. Respondents have failed to establish it is more probably true than not that Claimant's indemnity benefits should be reduced by 50% pursuant to §8-42-112(1)(d), C.R.S. At the time of the injury, Claimant was a store manager who had been working for Respondent since 2021. When applying for the position, Claimant reviewed the job description and stated he could perform all regular duties. The physical requirements for the position included the ability to twist, bend, squat, reach, climb a ladder, stand for extended periods, repetitively use upper extremities, and lift, push, and pull occasionally up to 25-50 pounds. The job description did not specify the need to work overhead. Claimant testified that he could not remember anything that would have prevented him from carrying out the regular duties of a store manager. No treating physician had restricted him from working overhead or lifting more than 20 pounds.

30. Claimant testified that before the injury he had no difficulties working overhead or lifting more than 20 pounds. He had never missed work or requested treatment related to his regular duties. Employer's District Manager Ms. Walker noted that from 2021 to 2024, Claimant had not encountered any issues completing his required job duties. She commented that, even if an applicant had a 20-pound lifting restriction with no overhead work when applying for the store manager position, she would need to know more about those restrictions before offering the job.

31. On November 7, 2017 Dr. Beatty performed a 24-month DIME and placed Claimant at MMI with a 20% whole person impairment rating, The rating consisted of a 14% right knee impairment, a 5% left knee impairment and a 2% whole person rating for left shoulder range of motion deficits. Additionally, Dr. Beatty placed Claimant on permanent work restrictions of "20 pounds lifting with no overhead type work and limitations of standing and walking of no more than 2-3 hours per day with no climbing, squatting, kneeling or crawling." Claimant testified that he had not reviewed Dr. Beatty's DIME report before October 2024. He stated he did not recall Dr. Beatty mentioning the suggested restrictions and was unaware of them until October 2024. Claimant also commented that he did not intentionally mislead Employer about his ability to perform the duties of the store manager position. Furthermore, in response to Claimant's attorney's letter, Dr. Mason commented she would not have prevented Claimant from performing any of the regular job duties as a store manager. Claimant also noted that he did not remember Dr. Mason imposing any permanent restrictions.

32. The preceding testimony from Claimant and persuasive medical opinion of Dr. Mason reflects that Claimant did not willfully mislead Employer about his physical abilities to perform the job. Notably, Claimant testified that before the injury he had no difficulties working overhead or lifting more than 20 pounds. Furthermore, Ms. Walker noted that from 2021 to 2024, Claimant had not encountered any issues completing his required job duties. Although DIME Dr. Beatty assigned a 20-pound lifting restriction, recommended no overhead work and noted restrictions on climbing, squatting, kneeling and crawling, Claimant credibly remarked he was unaware of the limitations. Importantly, Dr. Beatty was not a treating provider and Dr. Mason commented that she would not have prevented Claimant from performing any of his regular job duties. Because Claimant did not willfully or deliberately mislead Employer about his abilities, Respondents have failed to demonstrate they are entitled to a 50% reduction in Claimant's benefits.

CONCLUSIONS OF LAW

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

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

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

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

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

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

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician may provide diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms, there is no mandate that the claimant suffered a compensable injury. *Fay v. East Penn Manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) (“right to workers' compensation benefits, including medical payments,

arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has established by a preponderance of the evidence that he suffered compensable left upper extremity injuries during the course and scope of employment with Employer on September 27, 2024. Initially, Claimant testified that he injured his left shoulder and neck when a box weighing approximately 50 pounds fell on him. Claimant immediately experienced pain in his left shoulder and neck. He reported his injuries and visited the St. Anthony's North Emergency Room for treatment. Claimant complained of sharp shooting pain in his left trapezius/shoulder region, a posterior headache, and left cervical paraspinal muscle tenderness. Notably, on September 10, 2024, or 17 days prior to the industrial injury, Claimant had presented to PCP Dr. Axman for routine evaluation and reported no complaints related to his left shoulder or cervical spine. Furthermore, prior to the work-related incident, the last documented treatment for Claimant's left shoulder occurred in early 2018, or more than six years earlier. Although the medical record reflects minor inconsistencies in Claimant's pre-injury treatment history, a thorough review of the records establishes that Claimant was receiving treatment solely for his lower extremity conditions.

9. As found, on October 3, 2024 Claimant sought treatment from PCP Dr. Axman for an emergency department follow-up. Dr. Axman noted tenderness to palpation, restricted range of motion, and pain that limited the ability to perform several shoulder tests. He recorded that each symptom began after a box fell directly onto Claimant. Dr. Axman diagnosed adhesive capsulitis of the left shoulder, contusion of the left thumb, derangement of the left shoulder, and cervical radiculopathy. Similarly, on October 10, 2024 Claimant visited Dr. Mason for an evaluation of his September 27, 2024 injury. After a physical examination and diagnostic testing, Claimant was assessed with a left shoulder contusion and possible rotator cuff tear, a cervical strain and contusion, a head contusion with possible mild concussion, and a thumb sprain-strain. Dr. Mason determined Claimant's objective findings were consistent with a work-related mechanism of injury. She assigned temporary work restrictions of no use of the left arm and recommended physical therapy twice weekly. A subsequent MRI of the left shoulder revealed supraspinatus and infraspinatus tendinosis, glenohumeral joint effusion with synovitis, fraying of the superior labrum, and inflammation of the rotator cuff tendons. Finally, on January 16, 2025 Claimant visited Dr. Hatzidakis and explained that his shoulder was doing well until a large box fell on him at work on September 27, 2024. Claimant noticed weakness and significant pain especially with overhead motion. Dr. Hatzidakis noted in Claimant's history that his shoulder had functioned at 100% and was doing well until the box fell on him. He remarked that Claimant's left shoulder MRI revealed a moderately large glenohumeral joint effusion with inflammation of his rotator cuff tendons.

10. As found, in contrast, IME physician Dr. Worrell maintained that it was not medically probable the September 27, 2024 incident caused, exacerbated, or aggravated a left shoulder labral tear. Dr. Worrell determined that Claimant's injuries from the incident were limited to contusions of his collarbone and left thumb. The contusions would not require medical treatment. Dr. Worrell remarked that the left shoulder MRI findings were not the result of an acute event on September 27, 2024. Instead, the imaging revealed chronic, arthritic left shoulder degeneration. Although he had read the medical reports from Dr. Mason and Dr. Hatzidakis that Claimant's upper extremity complaints, including his shoulder and neck, were related to his mechanism of injury, the MRI did not reveal any acute findings regarding the left rotator cuff tendons. The MRI also did not reflect any soft tissue edema indicative of a high-impact injury. Dr. Worrell summarized that the left shoulder MRI findings represented the natural progression of a degenerative shoulder condition.

11. As found, the opinions of Drs. Axman, Mason, and Hatzidakis are supported by objective diagnostic findings, including MRI imaging and physical examination findings. The record reflects that Claimant sustained compensable injuries to his left shoulder and cervical spine as a direct and proximate result of the work-related incident on September 27, 2024. Specifically, the temporal relationship between the mechanism of injury and the onset of symptoms, coupled with the objective medical evidence and persuasive expert opinions, supports a finding of causation. Dr. Worrell's opinions are less persuasive based on his cursory review of the medical records and failure to personally evaluate the MRI imaging. Notably, Drs. Axman and Mason have also consistently evaluated and treated Claimant over a lengthy period of time. Claimant's work activities on September 27, 2024 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered compensable left upper extremity injuries during the course and scope of his employment with Employer on September 27, 2024.

Medical Benefits/Right of Selection

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

13. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

14. 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. *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Appeals Off.,* 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. Indus. Claim Appeals Off.,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

15. As found, Claimant has proven by a preponderance of the evidence that the right to select an ATP passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have thus not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him. Based on the parties' stipulation Claimant chose PCP Dr. Axman as his ATP.

16. As found, Dr. Axman subsequently remarked that Claimant's shoulder symptoms persisted and warranted continued treatment with a physiatrist for rehabilitation. Dr. Axman thus referred Claimant to Dr. Mason for care. Claimant understood that, because Dr. Mason was a physiatrist and had previously treated him in a Workers' Compensation setting, continuing his treatment with her would be the best option. Dr. Mason was thus within the chain of authorized referrals. The record lacks evidence supporting Respondents' contention that Claimant directed the referral. Dr. Mason subsequently referred Claimant to Dr. Hatzidakis. Importantly, by December 3, 2024 Dr. Mason continued to assess Claimant with a left shoulder posterior labral tear and recommended physical therapy. She commented that Claimant would visit Dr. Hatzidakis on December 17, 2024 for an evaluation. Therefore, Claimant's medical treatment with Dr. Axman, his referral to Dr. Mason and her referral to Dr. Hatzidakis, are thus authorized.

17. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable and necessary medical benefits that are causally related to his September 27, 2024 injuries. Claimant reported his injuries and visited the

St. Anthony's North Emergency Room for treatment. On October 3, 2024 Claimant sought treatment from PCP Dr. Axman. As noted previously, Dr. Axman subsequently referred Claimant to Dr. Mason and Dr. Mason referred Claimant to Dr. Hatzidakis. All of the preceding providers diagnosed Claimant with a left shoulder injury. Dr. Mason also diagnosed him with a cervical injury. An October 16, 2024 left shoulder MRI reflected mild supraspinatus and infraspinatus tendinosis, a moderately large glenohumeral joint effusion with mild synovitis and generalized thinning of the articular cartilage, fraying of the superior labrum, and mild AC joint arthrosis. Claimant ultimately received medical treatment including imaging, physical therapy and medications. The record thus demonstrates that Claimant's medical treatment was reasonable, necessary and causally related to his September 27, 2024 industrial left upper extremity injuries. Claimant is also entitled to receive continuing reasonable, necessary and causally related medical care.

Temporary Total Disability Benefits

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

19. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the periods September 27, 2024 until October 3, 2024 and October 10, 2024 until terminated by statute. Claimant's testimony and the medical records demonstrate that he was either unable to work or under restrictions that rendered him unable to perform his job duties and impaired his earning capacity. Notably, the record reveals that medical providers assigned work restrictions that rendered Claimant unable to perform his job duties. Specifically, Claimant was restricted from

working from the date of injury until Dr. Axman cleared him to work on October 3, 2024. Furthermore, on October 10, 2024, Dr. Mason restricted Claimant from using his left upper extremity. On December 3, 2024 Dr. Mason assigned restrictions concerning lifting, carrying, crawling, kneeling, squatting, and climbing. The record reveals that Claimant has thus had physical restrictions related to the work incident from October 10, 2024 to the present. Respondents have not offered modified duty and Claimant has not returned to work. Claimant continues to receive medical care and has not yet reached Maximum Medical Improvement (MMI). The record reveals that Claimant's industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Accordingly, Claimant has proven that he is entitled to receive TTD benefits for the periods September 27, 2024 until October 3, 2024 and October 10, 2024 until terminated by statute.

Reduction in Benefits

20. Section 8-42-112(d), C.R.S. provides for a 50% reduction in benefits when an injured employee willfully misleads an employer about his physical ability to perform the job. The provision specifically notes a 50% reduction in compensation "[w]here the employee willfully misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job as a result of the physical ability about which the employee willfully misled the employer."

21. As found, Respondents have failed to establish by a preponderance of the evidence that Claimant's indemnity benefits should be reduced by 50% pursuant to §8-42-112(1)(d), C.R.S. At the time of the injury, Claimant was a store manager who had been working for Respondent since 2021. When applying for the position, Claimant reviewed the job description and stated he could perform all regular duties. The physical requirements for the position included the ability to twist, bend, squat, reach, climb a ladder, stand for extended periods, repetitively use upper extremities, and lift, push, and pull occasionally up to 25-50 pounds. The job description did not specify the need to work overhead. Claimant testified that he could not remember anything that would have prevented him from carrying out the regular duties of a store manager. No treating physician had restricted him from working overhead or lifting more than 20 pounds.

22. As found, Claimant testified that before the injury he had no difficulties working overhead or lifting more than 20 pounds. He had never missed work or requested treatment related to his regular duties. Employer's District Manager Ms. Walker noted that from 2021 to 2024, Claimant had not encountered any issues completing his required job duties. She commented that, even if an applicant had a 20-pound lifting restriction with no overhead work when applying for the store manager position, she would need to know more about those restrictions before offering the job.

23. As found, on November 7, 2017 Dr. Beatty performed a 24-month DIME and placed Claimant at MMI with a 20% whole person impairment rating, The rating consisted of a 14% right knee impairment, a 5% left knee impairment and a 2% whole person rating for left shoulder range of motion deficits. Additionally, Dr. Beatty placed

Claimant on permanent work restrictions of "20 pounds lifting with no overhead type work and limitations of standing and walking of no more than 2-3 hours per day with no climbing, squatting, kneeling or crawling." Claimant testified that he had not reviewed Dr. Beatty's DIME report before October 2024. He stated he did not recall Dr. Beatty mentioning the suggested restrictions and was unaware of them until October 2024. Claimant also commented that he did not intentionally mislead Employer about his ability to perform the duties of the store manager position. Furthermore, in response to Claimant's attorney's letter, Dr. Mason commented she would not have prevented Claimant from performing any of the regular job duties as a store manager. Claimant also noted that he did not remember Dr. Mason imposing any permanent restrictions.

24. As found, the preceding testimony from Claimant and persuasive medical opinion of Dr. Mason reflects that Claimant did not willfully mislead Employer about his physical abilities to perform the job. Notably, Claimant testified that before the injury he had no difficulties working overhead or lifting more than 20 pounds. Furthermore, Ms. Walker noted that from 2021 to 2024, Claimant had not encountered any issues completing his required job duties. Although DIME Dr. Beatty assigned a 20-pound lifting restriction, recommended no overhead work and noted restrictions on climbing, squatting, kneeling and crawling, Claimant credibly remarked he was unaware of the limitations. Importantly, Dr. Beatty was not a treating provider and Dr. Mason commented that she would not have prevented Claimant from performing any of his regular job duties. Because Claimant did not willfully or deliberately mislead Employer about his abilities, Respondents have failed to demonstrate they are entitled to a 50% reduction in Claimant's benefits.

ORDER

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

1. Claimant suffered compensable left upper extremity injuries while working for Employer on September 27, 2024.

2. The right of selection passed to Claimant. He chose Dr. Axman as his ATP. Claimant's medical treatment with Dr. Axman and any referrals, including Dr. Mason and Dr. Hatzidakis are thus authorized.

3. Claimant's medical treatment including medications, physical examinations, injections and diagnostic testing was reasonable, necessary and causally related to his September 27, 2024 work-related left shoulder and neck injuries. Because he has not yet reached MMI, Claimant is entitled to receive additional reasonable, necessary and causally related medical care for his industrial injuries.

4. Claimant earned an AWW of $1,332.87.

5. Claimant is entitled to receive TTD benefits at a rate of $888.54 from September 27, 2024 to October 3, 2024, and again starting October 10, 2024 until terminated by statute without a 50% reduction. Claimant's entitlement to TTD benefits during the preceding periods is set off to the extent of the short-term disability payments he received.

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 5, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the spinal cord stimulator trial as recommended by Dr. Barolat is reasonably necessary to cure and relieve Claimant of the effects of his work injury.

FINDINGS OF FACT

1. Claimant sustained a compensable injury on November 17, 2022, when he slipped on ice while at work and slid down a flight of concrete steps, sustaining injuries to his elbow, left shoulder, back, buttocks, and left sacral region.

2. Claimant initially sought treatment with Concentra provider, Dr. Michael Chiang, through telehealth, on November 19, 2022. Claimant exhibited no soft tissue swelling, erythema, or deformities to the back. Claimant had some ribcage pain in his thoracic spine without shortness of breath. Dr. Chiang assessed Claimant with contusions of the left elbow, back, and left hip. Dr. Chiang referred Claimant for further evaluation and treatment. He released Claimant to return to modified duty with a temporary restriction of no lifting greater than ten pounds.

3. On November 21, 2022, Claimant saw Dr. Theodore Villavicencio at Concentra. On physical examination, Claimant exhibited tenderness in the left paraspinal area of his thoracic spine in the left rhomboid muscle as well as in his left paraspinal of the lumbosacral spine and the left sciatic notch with spasms.

4. Claimant returned to Dr. Villavicencio on December 7, 2022. Claimant reported ongoing slow improvement and denied any new or worsening symptoms. Claimant had been working modified duty and was tolerating it well, and he reported that his medications were helping. Claimant's temporary work restrictions were further loosened.

5. However, a week later, on December 14, 2022, Claimant reported worsening symptoms, including pain going from his tailbone all the way up to his neck. Dr. Villavicencio ordered an MRI of Claimant's lumbar spine and placed Claimant on temporary work restrictions of sedentary work from home only and two hours per day.

6. The lumbar MRI was performed two days later on December 14, 2022, and showed "[m]oderate-severe degenerative changes including multilevel grade 1

spondylolisthesis and moderate-severe left L5-S1 neural foraminal narrowing " and "[c]hronic left L5 pars defect".

7. At the referral of Dr. Villavicencio, Claimant saw Dr. Robert Kawasaki on January 4, 2023. Dr. Kawasaki assessed Claimant with multilevel age-related degenerative changes of the lumbar spine. He suspected that Claimant may have some facetogenic pain and that Claimant's pain was primarily coming from his left sacroiliac joint region. Dr. Kawasaki recommended sacroiliac joint injections. Dr. Villavicencio also examined Claimant that same day and noted on physical examination that Claimant exhibited full—albeit painful—range of motion in the lumbar spine and a negative straight leg raises bilaterally.

8. On February 20, 2023, Claimant underwent a left sacroiliac joint injection with Dr. Kawasaki. Claimant reported some pain relief with pain worsening that evening. When Claimant returned to Dr. Kawasaki on March 8, 2023, Dr. Kawasaki noted that Claimant did not have significant improvement of the pain in the low back or sacral region. Claimant continued to report achy, burning, stabbing, and throbbing sensations throughout his spine emanating from the lumbosacral junction and radiating up through the spine to his head. Claimant also reported new urinary incontinence. Claimant denied radicular symptoms into his legs. Dr. Kawasaki ordered a repeat MRI to rule out cauda equina syndrome in light of Claimant's incontinence. Dr. Kawasaki also prescribed cyclobenzaprine.

9. Claimant returned to Dr. Kawasaki on March 29, 2023. In his report, Dr. Kawasaki noted Claimant had undergone the medial branch blocks without a diagnostic response. Claimant continued to have left axial back pains without radicular symptoms. Dr. Kawasaki also reviewed the repeat MRI, which he noted to show no significant change from the prior imaging from December 2022. Dr. Kawasaki referred Claimant to Dr. Gary Ghiselli for a surgical consultation.

10. Claimant was seen by Renee Schuster, PA-C, at Dr. Ghiselli's office on April 19, 2023. PA Schuster noted that Claimant did have an L5-S1 spondylolisthesis with a unilateral lysis, but she also noted that Claimant's pain and examination suggested the sacroiliac joint as the source of Claimant's pain, noting the lack of weakness or radicular symptoms. PA Schuster recommended Claimant discuss with Dr. Kawasaki a repeat medial branch blocks to try to isolate Claimant's symptoms. She noted that Claimant could require possible radiofrequency ablations or rhizotomy if the sacroiliac joint was found to be the pain source.

11. Claimant underwent block injections of the left-sided L5 dorsal ramus and S1-3 lateral branch on September 20, 2023, with Dr. Kawasaki. Claimant had a diagnostic response to these. Claimant also underwent medial branch blocks for the lower lumbar facet joints, however the results were nondiagnostic. Dr. Kawasaki recommended another set of dorsal ramus and lateral branch blocks, which Claimant underwent with Dr. Kawasaki on November 1, 2023, and for which Claimant again had a diagnostic response.

12. Claimant underwent a rhizotomy on December 13, 2023. Claimant reported experiencing relief for a week but that the pain flared up again and was no longer any better than it had been prior to the procedure. He continued to have left lower lumbosacral pain without radiculopathy.

13. Claimant underwent an MRI of the pelvis and lumbar spine at Dr. Kawasaki's recommendation on May 3, 2024, that showed mild degenerative changes of the sacroiliac joints, degenerative lumbar spondylosis at L4-L5 and L5-S1, with a central disk protrusion at L4-L5, resulting in mild left lateral recess stenosis at L4-L5. Claimant also had a broad-based disc bulge at L5-S1.

14. Claimant returned to Dr. Kawasaki on June 10, 2024. Dr. Kawasaki reviewed the MRI results and noted no worsening of pain resulting from the rhizotomy. Dr. Kawasaki felt that Claimant had run out of treatment options aside from chronic pain medications. Therefore, he referred Claimant to neurosurgeon Dr. Giancarlo Barolat for a consultation regarding potential neuromodulation treatments.

15. Claimant saw Dr. Barolat on July 3, 2024. Dr. Barolat reviewed Claimant's history and noted that Claimant had undergone extensive physical therapy, chiropractic care, massage therapy, sacroiliac joint blocks, lateral branch blocks, lumbar epidural steroid injections, and rhizotomies, all without relief. He also noted that Claimant did not have radicular symptoms and that Dr. Ghiselli had opined that Claimant was a poor surgical candidate given that Claimant's low back pain was only axial. Dr. Barolat also reviewed Claimant's MRI. Dr. Barolat felt that Claimant would be a good candidate for a temporary trial of a spinal cord stimulator to determine whether it would reduce his pain. Dr. Barolat indicated that he would refer Claimant to Dr. Masri for the trial and that Claimant was to return to Dr. Barolat to evaluate the efficacy of the trial.

16. On November 21, 2024, Dr. Carlos Cebrian performed an IME at Respondents' request. Dr. Cebrian ultimately concluded, with regard to the spinal cord stimulator trial recommendation, that the spinal cord stimulator trial would not be reasonably necessary in light of Claimant's medical history. Dr. Cebrian observed that traditional spinal cord stimulators are not recommended for patients with the major limiting factor of persistent axial spine pain. Dr. Cebrian cited a systematic review published in Pain Medicine in 2020 that evaluated the effectiveness of spinal cord stimulators for axial low back pain and which concluded that the evidence was insufficient to firmly establish the effectiveness of a spinal cord stimulators for axial low back pain, noting that even the evidence supporting high-frequency stimulation for axial low back pain was of low quality. Dr. Cebrian further opined that there existed a significant psychological component to Claimant's low back pain based on Claimant's low back pain progressing from insignificant initially to worsened low back pain with further medical engagement.

17. Claimant testified at hearing on his own behalf. Claimant testified that he initially worked modified duty after his injury but that he stopped working when his temporary work restrictions were tightened. Claimant testified that he had two

months of physical therapy, that injections provided a small amount of relief, and that the rhizotomies did not help. Claimant confirmed that his low back pain was axial and not radiating to his extremities. Regarding Dr. Barolat's recommendation for a spinal cord stimulator trial, Claimant testified that Dr. Barolat advised him that it would be a ten-day trial and guaranteed that the procedure would take away a lot of the pain. Claimant testified that he has not refused any medical treatment and no other treatment was currently recommended aside from the spinal cord stimulator trial.

18. The Court finds Claimant's testimony credible, except insofar as his testimony conflicts with that of Dr. Barolat regarding what results Dr. Barolat guaranteed.

19. Claimant also called Dr. Barolat to testify at hearing. Dr. Barolat testified that his is board certified in both the American and Italian boards of neurosurgery. He testified that he performed general neurosurgery, spinal surgery, and brain surgery over the past twenty years, but that his focus has been on neurostimulation and that he had performed six thousand permanent spinal cord stimulatory implants since 1976. Regarding spinal cord stimulators, Dr. Barolat testified that patients must have, in order to be eligible for consideration, severe pain for more than six months and failed all other conservative treatments. Dr. Barolat testified that he performs a trial stimulator first that—unlike the permanent spinal cord stimulator implant—is not invasive and that is comparable to an epidural steroid injection involving injection of an electrode rather than a fluid. The trial lasts ten days, and Dr. Barolat evaluates whether Claimant achieved at least a fifty-percent reduction in pain and improved function. Dr. Barolat denied guaranteeing Claimant good results, but he testified that roughly eighty percent of patients have significant improvement in pain and that the spinal cord stimulator trial is fairly representative as to whether the permanent spinal cord stimulator implant will be effective. Furthermore, Dr. Barolat testified that he had performed hundreds of spinal cord stimulator implants on patients with just axial back pain and has had a sixty-eight percent rate of success in achieving pain reduction of sixty to seventy percent. He acknowledged that spinal cord stimulators have been more effective in those who have radicular back pain, with a success rate of eighty-eight percent.

20. Dr. Barolat testified that Claimant had exhausted conservative treatments and that no other treatments remained that could be beneficial for Claimant. He recommended a spinal cord stimulator trial for Claimant and testified that the procedure would not exacerbate Claimant's symptoms if it were to fail. On the flip side, Dr. Barolat testified, Claimant's continued use of oxycodone does pose risks of addiction and constipation.

21. Dr. Barolat also addressed in his testimony the systemic review that Dr. Cebrian cited in his IME report. Dr. Barolat testified that he disagreed with the review, noting that in 2024, the FDA approved spinal cord stimulators axial low back pain.

22. Dr. Barolat acknowledged on cross examination that he had not reviewed the Medical Treatment Guidelines, that he was familiar with them only by virtue of

having reviewed Dr. Cebrian's report, and that the Medical Treatment Guidelines on their own would mitigate against a spinal cord stimulator in this case. Dr. Barolat also acknowledged that Claimant would need to stop smoking before the permanent spinal cord stimulator implant and that he had not yet discussed this with Claimant.

23. The Court finds Dr. Barolat's testimony credible but not persuasive.

24. Respondents called Dr. Cebrian to testify by deposition. He diagnosed Claimant with a lumbar strain and an aggravation of degenerative disc disease. Dr. Cebrian clarified that Claimant had not sustained a permanent nerve injury. He testified that early in Claimant's treatment, medical records showed full lumbar range of motion and no reports of intractable, incapacitating pain. However, Claimant's pain worsened after undergoing a rhizotomy, and none of the diagnostic injections provided any therapeutic benefit. Dr. Cebrian also testified that the specific pain generator had not been adequately identified.

25. Dr. Cebrian testified that Claimant did not meet the Medical Treatment Guidelines criteria for neurostimulation because he did not have a failed back surgery, CRPS, or radicular symptoms. He testified that spinal cord stimulators are significantly less successful in patients like Claimant who experience only axial back pain. Dr. Cebrian stated that the overall success rate of spinal cord stimulators after two years is less than fifty percent, with up to forty percent of patients experiencing complications within that timeframe. He further noted that stimulator implants are typically twenty-five to forty percent less effective than stimulator trials, and that the placebo effect often inflates trial success rates, especially in workers' compensation cases.

26. Addressing risk factors, Dr. Cebrian testified that smoking impairs tissue oxygenation, slows healing, increases infection risk, and compromises tissue viability, making it a risk factor for spinal cord stimulator failure. He explained that it takes several years for tissues to normalize after cessation of smoking. Additionally, Dr. Cebrian expressed concern that Dr. Barolat planned to assess the effectiveness of the spinal cord stimulator trial himself, despite Medical Treatment Guidelines recommending that such evaluations be conducted by someone not associated with the implanting surgeon.

27. Dr. Cebrian testified that spinal cord stimulators carry risks including nerve lesions, seromas, lead migration, overstimulation, infection, paralysis, or death. He also noted that stimulators often lose effectiveness after approximately three years, sometimes necessitating surgical removal or lead repositioning even in successful cases. Based on these factors, Dr. Cebrian concluded that there was no sound reason to deviate from the Medical Treatment Guidelines in Claimant's case.

28. The Court finds Dr. Cebrian's testimony credible and persuasive.

29. The Colorado Medical Treatment Guidelines, Rule 17, Exhibit 9, *Chronic Pain Disorder*, describe spinal cord stimulation as "the delivery of low-voltage electrical stimulation to the spinal cord or peripheral nerves to inhibit or block the sensation of pain. The system uses implanted electrical leads and a battery powered implanted pulse generator." At page 157. The Guidelines go on to explain that "[s]pinal cord stimulation for spinal axial pain has traditionally not been very successful. . . . Currently, traditional spinal cord stimulators are not recommended for axial spine pain." At page 158. However, the Guidelines provide that high-frequency stimulators may be used for patients with predominantly axial back pain. At page 159.

30. The Court recognizes that a spinal cord stimulator trial is a relatively non-invasive modality relative to a permanent spinal cord stimulator implant. The Court also recognizes that Claimant has exhausted conservative treatments and that his continued use of oxycodone to manage chronic pain poses risks of addiction.

31. On the other hand, the Court recognizes that the evidence to support spinal cord stimulation for axial low back pain is weak and that the trial success rates are not a very reliable predictor of outcomes with a permanent spinal cord stimulator implant, particularly given the presence of placebo effects in trials. Additionally, the rate of complications with spinal cord stimulators is high, and Claimant's cigarette smoking poses an additional risk factor.

32. The Court relies on the Medical Treatment Guidelines as a starting point in evaluating whether a spinal cord stimulator trial is reasonably necessary to cure and relieve Claimant of the effects of his injury. While the Court is not bound by the Medical Treatment Guidelines, the Court does not, in this particular case, find adequate evidence to justify deviation from the Medical Treatment Guidelines. While Dr. Barolat presented credible testimony regarding the potential benefits of spinal cord stimulation, there remain significant concerns raised by the Medical Treatment Guidelines, Dr. Cebrian's testimony, and the evidentiary weaknesses inherent in the use of spinal cord stimulation for axial low back pain without radiculopathy.

33. Therefore, the Court finds that Claimant has not proved by a preponderance of the evidence that a spinal cord stimulator trial, as recommended by Dr. Barolat, is reasonably necessary to cure and relieve Claimant of the effects of his November 17, 2022 injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits

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

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

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

Medical Benefits

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

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

As found, the Court concludes that Claimant has not proved by a preponderance of the evidence that the spinal cord stimulator trial as recommended by Dr. Barolat is

reasonably necessary to cure and relieve Claimant of the effects of his work injury. As found and reasoned above, Dr. Barolat presented credible testimony regarding the potential benefits of spinal cord stimulation. However, there are significant concerns raised by the Medical Treatment Guidelines, Dr. Cebrian's testimony, and the evidentiary weaknesses inherent in the use of spinal cord stimulation for axial low back pain without radiculopathy which mitigate against a finding that a spinal cord stimulator trial would be reasonably necessary to cure and relieve Claimant of the effects of his injury.

ORDER

It is therefore ordered that:

1. Claimant has not proved by a preponderance of the evidence that the spinal cord stimulator trial recommended by Dr. Barolat is reasonably necessary to cure and relieve him of the effects of his work injury.

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

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

DATED: May 5, 2025.

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

ISSUES

1. Whether Respondents established by clear and convincing evidence that the impairment rating assigned by the Division Independent Medical Examination (DIME) physician is incorrect.

2. Whether Claimant established by a preponderance of the evidence entitlement to maintenance medical benefits.

FINDINGS OF FACT

1. Claimant worked as a project manager assistant for Employer, a roofing company. Claimant alleges he sustained injuries arising out of the course of his employment with Employer on September 20, 2023. Claimant did not testify at hearing and evidence regarding the underlying incident is primarily limited to Claimant's medical records. Although Claimant saw several health care providers in September and October 2023, the first documentation indicating Claimant notified Employer of a work-related injury was on December 14, 2023 (see ¶9 below).

2. The first health care Claimant sought after September 20, 2023 was on September 25, 2023, when he saw Trenton Scott, D.C., at Scott Family Chiropractic. Claimant reported to Dr. Scott that he was injured on Friday, September 22, 2023, while "he was working in [Wyoming] inspecting roofs and was climbing off [and on] ladders and doing strenuous activities accompanie[d] with long travel time." He reported moderate-to-severe neck and lower back pain, both rating 8/10, with his neck pain radiating into his thoracic area. Claimant reported a history of back pain resulting from a rock-climbing fall in 2008, and two car accidents, resulting in a daily back pain rating 2/10. He indicated that his neck and back pain increased after performing work in Wyoming. (Ex. I).

3. Claimant returned to Dr. Scott on September 28, 2023, and reported that his neck and low back pain had decreased from an 8/10 to 2/10 after his initial chiropractic visit, and that his range of motion and function had increased. Claimant was advised to return on a monthly or bimonthly basis for treatment. (Ex. I).

4. Eleven days later, on October 9, 2023, Claimant returned to Dr. Scott and reported that he now had pain in his lower and mid-back rating a 9/10. Claimant reported that "yesterday [he] was painting his house and was reaching up painting and felt lower thoracic/upper lumbar soreness and tightness, went in the house sat for a bit and symptoms really became painful and tight." He described his symptoms as a deep, dull pressure, and that he found it difficult to bend, cough, sit, and stand due to "intense deep pain." (Ex. I).

5. On October 11, 2023, Claimant saw Bruce Conaway, M.D., at Kaiser Permanente, reporting severe upper back pain. Claimant reported a history of back pain on and off for ten years. Claimant indicated he "had been painting his house all summer," and "finished up doing some painting on Sunday and was sitting on his couch when he developed severe mid-back pain. There were no falls of injuries." Nothing in the record indicates that Claimant attributed his mid-back pain to his work activities at that time. A thoracic x-ray was performed and showed a mild compression fracture of the T8 vertebral body, "age indeterminate." (Ex. H). Dr. Conaway prescribed medication and ordered an MRI, indicating Claimant may be a candidate for kyphoplasty. (Ex. J).

6. An MRI was performed on October 18, 2023, and showed small disc protrusions at T6-7, T7-8, T8-9, and T9-10, without significant stenosis. The radiologist characterized the findings as mild degenerative spondylosis without significant stenosis or neural impingement. No fracture was identified on the MRI. (Ex. H).

7. Claimant returned to Kaiser on October 23, 2023, and saw Brian Kingston, M.D., who prescribed prednisone, and referred Claimant to a neurosurgeon for evaluation. At this visit, Claimant indicated that his symptoms began five weeks earlier. (Ex. J).

8. On November 1, 2023, Claimant began physical therapy at Banner North Colorado Medical Center. At the initial visit, Claimant reported his symptoms began at the end of September 2023, after "reaching out to catch an oversized ladder from falling. Claimant reported his pain level was 1/10. At a November 8, 2023 physical therapy visit, Claimant reported his pain level as 0/10. Later, Claimant reported various pain levels between 3/10 and 8/10. (Ex. 4 & G).

9. On December 14, 2023 Employer completed a First Report of Injury (FROI), indicating that Claimant alleged he sustained a back injury while "bringing down a 38ft fiberglass ladder" while working at a school in Cheyenne, Wyoming. (Ex. S). The following day, December 15, 2023, Claimant completed a "Report of Injury Form" for Employer, in which he described incident as follows: "I was checking progress on the subcontractor I climbed down the ladder positioned myself between the building and the ladder. [A]s I was lowering the ladder I lost control of it, falling away from the building I tried to stop it, it was too heavy so I slowed it down an cotrolled [sic] the fall keeping it from hurting/damaging people propery [sic]. I felt a strain but was able to continue to work." Claimant indicated that he sustained an injury to his mid-back at "T8 and surrounding discs." In the Report of Injury Form, Claimant also indicated that he had not told his supervisor about the injury. (Ex. L).

10. On January 8, 2024, Claimant saw Eric Chau, M.D., at Concentra within the workers' compensation system. Claimant reported he was injured when an 18-foot ladder, weighing 80-90 pounds, was pushed away from a house, and he bent forward and to the left to prevent the ladder from falling. Claimant stated that he initially felt a muscle twinge that progressively worsened over the following days. Claimant reported seeing a chiropractor, Dr. Kingston, and also a physical medicine and rehabilitation physician – Dr. Shonk – who recommended an injection that Claimant had not yet received. (No records from Dr. Shonk were offered or admitted into evidence). Claimant reported at T8 vertebral

fracture, although imaging was apparently not available for Dr. Chau's review. Based on his examination, Dr. Chau diagnosed Claimant with a neck strain, lumbar strain, and traumatic T8 compression fracture. Dr. Chau indicated that that causation of the T8 fracture was "in question" noting Claimant sustained no major impact or mechanism of injury, although muscular and disc injuries would make sense. (Ex. F).

11. On January 9, 2024, Respondent filed a General Admission of Liability (GAL) admitting for medical benefits only. (Ex. R).

12. On January 25, 2024, Dr. Chau referred Claimant to a physiatrist, John Sacha, M.D. (Ex. F). Claimant saw Dr. Sacha on February 14, 2024, reporting that he was at work holding a ladder when a gust of wind hit, straightening the ladder, causing Claimant to twist. Claimant reported pain in his mid-back, radiating to the right flank, without numbness or weakness. Claimant reported that he had no low back or neck pain. Dr. Sacha indicated that based on the reported mechanism of injury, he believed Claimant's pain was discogenic. He diagnosed Claimant with thoracic radiculopathy, and secondary myofascial pain, and recommended T8-9 interlaminar epidural injections. (Ex. E).

13. On March 29, 2024, Dr. Sacha performed a T8-9 interlaminar epidural injection resulting in immediate pain relief. (Ex. E). When Claimant returned to Dr. Sacha on April 24, 2024, he reported the relief was not lasting. Dr. Sacha opined that the injections confirmed discogenic pain. He noted that Claimant had had treatment for seven months without significant improvement, and placed Claimant at MMI. Dr. Sacha assigned Claimant a 3% medical impairment due to a thoracic displaced disc, and 2% impairment for range of motion deficits. The combined values correspond to a 5% whole person impairment. Dr. Sacha also recommended maintenance care, including pool therapy and a gym pass for one year. He indicated chiropractic or acupuncture could be considered for maintenance care. (Ex. D).

14. On April 26, 2024, Claimant saw Qing-Min Chen, M.D., for a Respondent-requested independent medical examination (IME). Dr. Chen concluded that Claimant did not suffer a work-related injury, based on his conclusion that Claimant was inconsistent in describing the reported date and mechanism of injury. Dr. Chen concluded, erroneously, that Claimant's first report of an issue involving a ladder was January 8, 2024. He further opined that if the incident occurred as described by Claimant (*i.e.*, stopping a ladder from falling), it would not likely have caused a T8 compression fracture. Finally, Dr. Chen speculated that comparison of Claimant's previous MRIs to his most recent MRI, the films would not show an acute injury. (Ex. 4). Dr. Chen's opinion as to whether an incident occurred on September 20, 2023 is not an opinion within his expertise, and is of no assistance to the ALJ. Similarly, his statement regarding comparison of MRIs is merely unsupported speculation and is of no evidentiary value. The ALJ finds credible his opinion that the incident as described would not likely cause a T8 fracture.

15. On May 14, 2024, Respondents requested a DIME. (Ex. 1).

16. On September 12, 2024, Claimant saw Robert Mack, M.D., for the DIME. Claimant reported he was working with a 180-pound, 16-foot-long ladder that he had set up against a building. Claimant reported he lost control of the ladder and twisted his mid-back while attempting to prevent the ladder from falling. Claimant then drove 2 ½ hours home, noting his back was sore. Dr. Mack reviewed Claimant's medical records and provided a brief summary. Dr. Mack's examination of Claimant's thoracic spine showed normal alignment, no tenderness, negative provocative testing, and some limitations in range of motion.

17. Dr. Mack acknowledged that causation of Claimant's injuries was an issue and concluded "it is my impression that [Claimant] has aggravation of a preexisting condition, namely the degenerative disk disease documented by MRI at four levels of the thoracic spine." He offered no further explanation for this determination. He also concluded that Claimant's compression fracture was most likely pre-existing. Dr. Mack assigned Claimant a 3% medical impairment for specific disorders of the thoracic spine, and a 3% rating for thoracic range of motion measurements. (Ex. B). In his report, Dr. Mack did not discuss Claimant's report to Dr. Scott or Dr. Conaway that he began experiencing thoracic pain after painting his house in October 2023.

18. On January 23, 2025, Claimant saw Lawrence Lesnak, D.O., for a Respondent-requested IME. Dr. Lesnak testified at hearing and was admitted as an expert in physical medicine and rehabilitation. Based on his examination and review of records, Dr. Lesnak opined that Claimant had subjective complaints without reproducible objective findings, and exhibited diffuse pain behaviors and non-physiologic findings. Dr. Lesnak opined that "there is absolutely no medical evidence to support that the patient sustained any type of acute injuries or any trauma that would in any way be related to his alleged work incident of 9/20/2023." He further opined, that based on his testing and observations, Claimant's presentation suggested the presence of an underlying symptom somatic disorder/somatoform disorder. He therefore opined that Dr. Mack erred in assigning Claimant an impairment rating. He further opined that Claimant did not require maintenance treatment related to a September 20, 2023 work incident.

19. In large measure, Dr. Lesnak's opinions regarding causation appear to be based on own assessment of the veracity of Claimant's claims, rather than medical conclusions within his expertise. For example, Dr. Lesnak expressed his opinion that Claimant provided Dr. Sacha with "an inaccurate/false" history of the onset of his symptomatology, and postulated that Claimant's reported thoracic pain "actually occurred after painting his house." He also concluded that Dr. Scott's initial September 25, 2023 report contained "no documentation that the patient recently sustained any type of mid back injuries or worsen [sic] symptoms as a result of any type of work activities that he was performing on about 09/20/2023." As noted above, Dr. Scott's September 25, 2023 report (Ex. I, p. 140) indicates Claimant reported a significant increase in his lower back and neck pain climbing on and off ladders at work on September 22, 2023. Dr. Lesnak's report includes quotations from the same paragraph of Dr. Scott's report (*e.g.*, noting Claimant's complaint of "mid neck pain that radiates into his right thoracic spine,") but omits the portion Claimant's report of increase in pain following work activities is documented.

(Compare Ex. A, p. 7 with Ex. I, p. 140). The selective omission of such relevant information undermines the credibility of Dr. Lesnak's opinions.

20. As with Dr. Chen, Dr. Lesnak's opinions as to whether an incident occurred, and Claimant's credibility are within his expertise and are of no evidentiary value, except to the extent it offers context for Dr. Lesnak's opinions on causation.

21. Dr. Mack was present throughout the hearing and for Dr. Lesnak's testimony. Dr. Mack testified that he relied on the Claimant's report of injuring himself using a ladder, and Dr. Scott's September 25, 2023 record that Claimant reported injuring himself at work as evidence that Claimant sustained a work-related injury. In addressing Claimant's report that he had pain after painting his house, Dr. Mack indicated that it could constitute an aggravation of his underlying condition, but also that it would depend on whether the aggravation was permanent and the severity of the injury. He indicated that he would need to know whether the activity resulted in a decrease in Claimant's range of motion (information he did not have). While Dr. Mack's testimony was equivocal and difficult to follow, he ultimately testified that his opinion that Claimant sustained an aggravation of a pre-existing condition was unchanged.

CONCLUSIONS OF LAW

Generally

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

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

186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Overcoming DIME Opinion on Impairment

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

Respondents contend that the DIME physician, Dr. Mack, erred in assigning an impairment rating, contending that no work-related event occurred on September 20, 2023, and that if an event did occur, there is no evidence of an aggravation of Claimant's pre-existing degenerative conditions. Although the evidence demonstrates delays in Claimant reporting the September 20, 2023 incident to Employer, and inconsistencies regarding the onset and cause of his thoracic pain, Respondents have failed to produce evidence that is unmistakable and free from serious down demonstrating that it is highly probable that the DIME physician was incorrect.

Respondents contention that Claimant did not report work-related injury to Dr. Scott on September 25, 2023 is not supported by the record. While Dr. Scott's record does not document a ladder falling, it clearly documents Claimant's report of an increase in his neck and back pain caused by "working in [Wyoming] inspecting roofs and was climbing [off and on] ladders doing strenuous activities…" Claimant's first documented report of experiencing back pain after catching a falling ladder was on November 1, 2023 when he reported this to physical therapy. (Not January 8, 2024, as indicated by Dr. Chen). After November 1, 2023, with some minor discrepancies regarding the ladder length and weight, Claimant consistently reported how the incident occurred to his providers. Dr. Mack reviewed Claimant's records, including the records from Dr. Scott and Kaiser as well as Dr. Chen's report, which all documented complaints of pain after Claimant painted his house. Dr. Mack, nonetheless, determined that Claimant's initial

incident aggravated his underlying degenerative changes, assigned Claimant a thoracic impairment, and testified at hearing that he agreed that his opinion was unchanged.

While the IME physicians raise legitimate questions regarding the occurrence of an incident and Claimant's inconsistent reports, their lay opinions on whether an incident or injury occurred do not constitute evidence demonstrating that is unmistakable and free from serious or substantial doubt demonstrating it is highly probable that the DIME physician's impairment rating is incorrect. Similarly, Dr. Lesnak's opinion that Claimant sustained no aggravation of a pre-existing condition is a difference of opinion and does not constitute clear and convincing evidence that Dr. Mack is incorrect. Respondents have failed to meet their burden of establishing through evidence that is unmistakable and free from serious and substantial doubt that the DIME physician erred in assigning Claimant a thoracic impairment rating.

Maintenance Medical Benefits

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). "An award of Grover medical benefits is typically general in nature and is subject to the respondent's subsequent right to challenge particular treatment." *Trujillo v. State of Colorado*, W.C. 4-668-613-03 (ICAO Aug. 21, 2021).

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,* 759 P.2d at 710-13; *Stollmeyer v. Indus. 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 Dist. 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*, 77 P.3d at 866; *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Ctr.,* 919 P.2d at 704.

Claimant has failed to establish by a preponderance of the evidence an entitlement to maintenance medical benefits. Claimant did not address the issue in his Position Statement, and the only relevant evidence Claimant offered on this issue was Dr. Sacha's March 2024 recommendation for a one-year gym membership and potential for referral to chiropractic or acupuncture treatment. No credible evidence was admitted demonstrating that Claimant has a present, existing need for additional maintenance treatment, or that any further treatment is currently recommended.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish by clear and convincing evidence that the 6% impairment thoracic rating assigned by the DIME physician is incorrect.

2. Claimant has failed to establish by a preponderance of the evidence an entitlement to maintenance medical treatment.

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

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

DATED: May 5, 2025

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

ISSUES

1. Have Respondents demonstrated, by a preponderance of the evidence, that their General Admission of Liability (GAL) should be withdrawn?

2. If Respondents' GAL is not withdrawn, has Claimant demonstrated, by a preponderance of the evidence, that the anterior cervical discectomy (with either disc fusion or replacement) recommended by Dr. Robert Benz is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement (MMI)?

STIPULATION

At the hearing, the parties stipulated that Claimant's average weekly wage (AWW) is $1,243.30.

FINDINGS OF FACT

1. Employer operates a construction supply company. Claimant works for Employer as a truck driver. Claimant's job duties include delivering customer orders to job sites. Drivers are also assigned contractor returns which involves collection and inventory of unused materials at customer job sites.

2. On May 2, 2024, Claimant was assigned a return in Denver, Colorado. The materials were to be left on the sidewalk outside of the actual construction site. However, when Claimant arrived at the location, the material that was to be collected was on the job site and behind chain link fencing.

3. Claimant testified that due to the location of the materials he was unable to drive his forklift onto the property to move the items. Claimant further testified that he contacted Chris Frank, Dispatcher, regarding his inability to easily access the materials and provided photographs of the items. Claimant testified that he was instructed by Mr. Frank to "hand chuck" the items onto the forklift and/or truck. Based upon this directive, Claimant set about hand carrying various items.

4. Claimant testified that because he was working by himself, it took him approximately two hours to move all of the material. With regard to the nature and weight of the items he moved, Claimant listed the following: i-joists that were each approximately 20 feet long and 12 inches wide; rim board that was 12 feet long and weighed approximately 50 pounds each; four foot by 8 foot by three inch thick flooring material (that weighed between 60 and 80 pounds); and some ten foot posts that were six inches by six inches.

5. Claimant testified that he carried the flooring material overhead by "resting" the boards on his head and bending his neck. In addition, he carried the ten foot posts by balancing them on his shoulder. Claimant also testified that after he finished banding some four by eight sheets, he noticed that he was losing strength in his right arm. Claimant further testified that he had sharp pain in the middle of his neck, and down his right arm, with numbness into his right hand. Claimant believes that his neck pain was caused by the way he was balancing materials on his head. Claimant also testified that he experienced more symptoms when he was seated in his work truck.

6. Chris Frank[1], Dispatcher with Employer, testified at the hearing. Mr. Frank testified that he did not receive a telephone call or a text message from Claimant on May 2, 2024 regarding the state of materials at the job site. Mr. Frank further testified that he would not require Claimant or any of his drivers to hand carry the plywood that was depicted in the photographs of the site. Mr. Frank testified that Claimant did not inform him that he carried material by hand on May 2, 2024.

7. Despite his neck and arm symptoms after May 2, 2024, Claimant continued to work his regular job, which included returns. Claimant testified that his symptoms became worse and on May 10, 2024 he reported the May 2, 2024 incident to Mr. Frank.

8. A May 10, 2024 text message admitted into evidence from Claimant to Mr. Frank notes that Claimant was unable to complete a return on that day because he was having difficulty driving the truck. Specifically, Claimant texted:

> I have been dealing with that pinched nerve I got a few years back - its been flaring up for the last couple weeks - I have done a few heavy returns over the last two weeks and it's gotten worse .. .its really bad when I'm driving - something about that position is horrible .... its the same exact problem I had when they did the mri and electric testing before.

9. Claimant provided other testimony regarding the onset of his symptoms and when he reported his concerns to Mr. Frank. Claimant testified that he could not remember exactly when he first informed Mr. Frank of his injury, but it was after a return involving "a whole lot of hardware" when he had trouble holding a pen, and had to ask for assistance in documenting the return information.

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[1] Additional witnesses testified on behalf of Respondents at hearing (Mr. Feeney, Mr. Reichert, and Mr. Taylor). These witnesses provided testimony that was consistent with that of Mr. Frank. Therefore, the ALJ does not recite that testimony here.

10. Records admitted into evidence show that the large return of hardware occurred on April 30, 2024, and no other hardware returns were handled after that date. Therefore, Claimant was experiencing right arm numbness in the days prior to the May 2, 2024 incident.

Medical treatment prior to May 2, 2024

11. On June 4, 2017, Claimant underwent a computed tomography (CT) scan of his cervical spine. The results of the CT scan showed, inter alia, mild spondylotic changes, with mild disc space narrowing at the C5-C6 and C6-C7 levels, with endplate osteophyte formation.

12. On September 30, 2019, Claimant sought treatment at Concentra for right sided neck, shoulder, and back pain. In the medical record of that date, Claimant reported that he had these symptoms for 10 days and was unable to turn his head to the right. Claimant also reported that he "did not have any injury or strain, he just started feeling the pain after work and assumed it was work related." At that time, Dr. Jeffry Baker opined that Claimant's symptoms are related to hypertension and Claimant was immediately referred to the emergency department (ED).

13. Claimant suffered a work related injury while employed with Employer in 2019. On September 30, 2019, Claimant was seen in the ED at Poudre Valley Hospital At that time, Claimant reported that ten days prior he had woken up with pain radiating into his right arm and right lateral neck. The injury was to the right side of his neck such that he could not turn his head to the right, with pain radiating down his right arm. Claimant further reported that the symptoms started after having to "muscle" a 200-pound beam onto a forklift. In the medical record of that date, Dr. Jeffry Backer noted that Claimant sustained no injury or strain, "he just started feeling the pain after work and assumed it was work related". Dr. Backer referred Claimant for magnetic resonance imaging (MRI) of his cervical spine and electromyography (EMG) testing of his right upper extremity.

14. On October 21, 2019, Dr. Justin Green administered EMG testing and nerve conduction studies (NCS) on Claimant's right upper extremity. Dr. Green found mild to moderate right C7 radiculopathy, with ongoing denervation.

15. On October 23, 2019, the recommended cervical spine MRI was performed. The MRI showed moderate cervical spondylosis; multilevel disc disease, facet arthropathy, disc bulges and protrusions. The radiologist, Dr. Eric Handley, also noted moderate bilateral neuroforaminal narrowing at the C6-C7 level, with a partial compression of the exiting bilateral C7 nerve roots; and moderate right lateral recess narrowing at the C5-C6 level.

16. On November 22, 2019, Claimant was seen by Dr. Matthew Pouliot for a physical medicine and rehabilitation consultation. Dr. Pouliot identified Claimant's diagnosis as cervical radiculopathy. Dr. Pouliot recommended a 6-C7 epidural steroid injection (ESI). Dr. Pouliot opined that Claimant was not a candidate for surgery and would likely reach maximum medical improvement (MMI) in a "few months".

17. On February 1, 2022, Claimant was seen by his primary care provider (PCP) Dr. Ranjot Basram at UC Health. At that time, Claimant reported worsening right shoulder pain that worsened with sitting. Dr. Basram noted that although Claimant reported pain in his shoulder, on examination the pain was "elicited in the upper back area" Dr. Basram recommended to proceed with x-rays, magnetic resonance imaging (MRI), and referral to an orthopedic surgeon. However, Claimant declined pursuing additional treatment due to "financial cost". Claimant returned to Dr. Basram one week later on February 7, 2022 with worsening shoulder pain. However, Dr. Basram noted no change on examination. At that time, Dr. Basram identified a diagnosis of "chronic pain syndrome".

Medical treatment after May 2, 2024

18. On May 13, 2024, Claimant was seen by Dr. Daniel Bates at Medicine for Business and Industry (MBI). At that time Claimant reported pain, numbness, and weakness in his right upper extremity. With regard to the mechanism of injury, Claimant reported to Dr. Bates that on May 2, 2024 he was lifting heavy posts and developed worsening pain over the last two weeks. Claimant also reported that he had a prior "cervical disc injury" that resolved after physical therapy and modified duty. Dr. Bates listed Claimant's diagnoses as cervical disc disorder with radiculopathy and referred Claimant for a cervical spine MRI.

19. On May 13, 2024, an MRI of Claimant's cervical spine showed multi level moderate spondylosis that was similar to that found on the 2019 MRI. Radiologist Dr. Austin Starnes also noted degenerative changes resulting in mild spinal stenosis at the C4-C5, C5-C6, and C6-C7 levels. The MRI also showed severe neural foraminal stenosis on the right at C5-C6, and moderate to serve on the left at that same level; and moderate bilateral foraminal stenosis at the C6-C7 level.

20. On May 14, 2024, Claimant returned to Dr. Bates and discussed the MRI results. Dr. Bates noted that the MRI showed "significant degenerative changes of the cervical spine with severe C5-C6 neural foraminal stenosis with C7 nerve root compression." Based upon the MRI findings, Dr. Bates referred Claimant for a surgical consultation.

21. On May 21, 2024, Claimant completed a "Report of Claim." In that document Claimant reported that on May 2, 2024, he began to experience neck pain and arm numbness "on the drive back to Ft. Collins from Denver."

22. On May 29, 2024, Respondents filed a General Admission of Liability {GAL) admitting for medical treatment related to the May 2, 2024 injury and temporary total disability (TTD) benefits.

23. On May 31, 2024, Claimant was seen for consultation by Dr. Robert Benz with Orthopaedic and Spine Center of the Rockies. Claimant reported his mechanism of injury as occurring when "he was lifting some heavy beams." Claimant also reported to Dr. Benz that at the time of his injury on May 2, 2024, "he felt pain in his neck with radiation down into his right arm". Dr. Benz diagnosed Claimant with cervical disc herniation and osteophyte formation causing severe foraminal stenosis on the right at the C5-C6 and C6-C7 levels. Dr. Benz recommended Claimant undergo cervical spine surgery. Dr. Benz ordered a computed tomography (CT) scan of Claimant's cervical spine to determine if the pursued surgery would involve a fusion or artificial disc replacement.

24. On June 4, 2024, Claimant underwent the recommended cervical CT scan. Dr. Starnes was the radiologist that reviewed this imaging. Dr. Starnes found a minimal dorsal bulge at C3-C4; a mild dorsal disc bulge and endplate spurring at C4-C5; mild bilateral facet arthropathy and a broad based dorsal disc osteophyte at C5-C6 and C6-C7; and mild facet joint space narrowing at C7-T1. Dr. Starnes summarized that there was degeneration at multiple levels, but most prominent at the C5-C6 level.

25. Claimant returned to Dr. Benz on June 5, 2024 to discuss the results of the CT scan. Based upon the CT findings, Dr. Benz recommended that Claimant undergo artificial disc replacements at the C5-C6 and C6-C7 levels. However, Dr. Benz also noted that it might be necessary, during surgery, to in fact perform a fusion of those levels. Dr. Benz explained that it would depend upon how much vertebral body is resected.

26. At the request of Respondents, on July 30, 2024, Claimant attended an independent medical examination (IME) with Dr. Qing-Min Chen. In connection with the IME, Dr. Chen reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In the IME report, Dr. Chen identified two diagnoses. The first diagnosis is multilevel cervical spine degenerative disc disease and facet arthritis. The second diagnosis Dr. Chen identified as right sided foraminal stenosis from C5 to C7, with radiculopathy. Dr. Chen opined that both of these diagnoses are pre-existing conditions. Dr. Chen further opined that on May 2, 2024, Claimant did not suffer an injury to his cervical spine. In support of this opinion, Dr. Chen noted the similarity between the May 2024 symptomology and that of the prior 2019 incident. Dr. Chen noted that with both incidents there was no specific mechanism of injury. Dr. Chen stated that "[e]verything appears to be chronic, age related, and degenerative in nature without any evidence of [a work related] aggravation."

27. Dr. Chen also stated an opinion regarding the reasonableness and necessity of the surgery recommended by Dr. Benz. It is Dr. Chen's opinion that Claimant is not yet a candidate for surgery as he had not exhausted conservative treatment, including injections. Dr. Chen also noted that prior to pursuing surgery Claimant would need to undergo a psychological examination, and cease tobacco usage.

28. On August 26, 2024, Claimant underwent further EMG/NCS testing of his right upper extremity. This testing was performed by Dr. Alicia Feldman. In her report, Dr. Feldman found evidence of right sided median sensory neuropathy at Claimant's right wrist. Dr. Feldman also noted evidence of right sided subacute to chronic radiculopathy at C7, with "a very small amount" of denervation.

29. In a medical record dated November 18, 2024, Dr. Benz noted that Dr. Feldman administered an interlaminar ESI at C7-T1. Claimant reported to Dr. Benz that the injection provided temporary relief. Dr. Benz continued to recommend cervical surgery, pending cognitive behavioral therapy.

30. On November 25, 2024, Claimant was seen by Dr. Bates. At that time, Dr. Bates noted Dr. Benz's recommendation for psychological therapy. Dr. Bates opined that Claimant had completed any necessary therapy, and could proceed with surgery. Dr. Bates referred Claimant for a second opinion.

31. On January 8, 2025, Claimant attended an IME with Dr. Allison Fall. In connection with the IME, Dr. Fall reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. At the IME, Claimant specifically reported to Dr. Fall that his neck started to get sore on May 2, 2024, when he got in his truck. Dr. Fall opined that Claimant did suffer a cervical spine injury at work on May 2, 2024. In support of this opinion, Dr. Fall noted Claimant's description to her of how he carried the items. Claimant reported to Dr. Fall that he balanced the boards on the right side of his head, causing his neck to push to the left. Dr. Fall opined that this was the specific activity that caused the injury. Dr. Fall further noted that Claimant was able to work full duty prior to May 2, 2024, and experienced a significant change in his function following the injury. Dr. Fall opined that surgery would be reasonable, necessary, and related to the work injury. However, Dr. Fall recommended further cognitive behavioral therapy. She also recommended a second opinion from an orthopedic spine surgeon or neurosurgeon for purposes of clarifying whether the fusion would be one level or two.

32. Following his review of additional medical records, Dr. Chen authored a reported date January 15, 2025. Dr. Chen stated that his review of the additional records did not change his opinions. Specifically, Dr. Chen noted that there is "no evidence of aggravation" of Claimant's pre-existing and chronic condition. Dr. Chen also stated that Claimant is not a surgical candidate for a number of reasons, including Claimant's diabetes and his continued use of tobacco.

33. Dr. Chen's deposition testimony was consistent with his written report. During his testimony Dr. Chen reiterated his opinion that Claimant did not sustain a work injury on May 2, 2024. In support of that opinion, Dr. Chen noted that there was no specific trauma or mechanism of injury. In addition, the imaging does not show any acute findings. Dr. Chen also testified that in comparing the MRIs, there are no findings of worsening or aggravation. Dr. Chen further testified that when the EMG studies are also compared, both indicate right-sided subacute to chronic C7 radiculopathy and denervation. Dr. Chen testified that although the recommended surgery is reasonable treatment of Claimant's cervical spine, the need for surgery is not related to a work injury. Rather, Claimant's need for surgery is due to age related chronic changes.

34. Dr. Fall's deposition testimony was consistent with her written reports. Dr. Fall testified that it continues to be her opinion that due to his performance of heavy lifting on May 2, 2024, Claimant sustained a work injury. In support of her opinion, Dr. Fall noted that Claimant experienced a change in his physical function and he needed medical treatment. Dr. Fall also testified that treatment of Claimant's cervical spine (including the surgery recommended by Dr. Benz) is related to the May 2, 2024 work injury. In her testimony, Dr. Fall recognized that Claimant' suffered the prior 2019 injury that resulted in occasional "flare-ups" of his symptoms. Dr. Fall explained that Claimant's prior work injury involved the same degenerative condition in his neck. However, it is Dr. Fall's opinion that on May 2, 2024, Claimant experienced further aggravation to this underlying condition that resulted in the need for treatment.

35. In the present matter, Respondents wish to withdraw their GAL. Therefore, Respondents are effectively contesting the issue of the compensability of Claimant's previously admitted May 2, 2024 work injury.

36. The ALJ has considered all evidence and testimony presented at hearing and does not find Claimant to be credible or persuasive. Claimant's version of the events that led to his neck and arm symptoms are inconsistent and unclear. The ALJ credits the medical records and the opinions of Dr. Chen over the contrary opinions of Dr. Fall. The ALJ specifically credits Dr. Chen's opinion that Claimant did not suffer an injury to his cervical spine on May 2, 2024, nor did he suffer an aggravation of a pre-existing condition. Based upon all of the foregoing, the ALJ finds that Respondents have successfully demonstrated that they should be allowed to withdraw the GAL in this case because Claimant did not suffer an injury arising out of and in the course and scope of his employment with Employer on May 2, 2024.

37. As the ALJ has found that Respondent's GAL shall be withdrawn, the reasonableness and necessity of the cervical surgery recommended by Dr. Benz is dismissed as moot.

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. 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. Section 8-43-201 (1), C.R.S.; *Salisbury v. Prowers County School District,* W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District,* W.C. No. 4-750-735 (ICAO, July 8, 2011). Section 8-43-201 (1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to Section 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,* W.C. No. 4-754-838-01 (ICAO, Oct. 1, 2013).

5. As noted above, the respondents' attempt to withdraw their admission of liability becomes an analysis of the compensability of the previously admitted May 2, 2024 injury. Therefore, the ALJ considers whether Claimant suffered an injury arising out of and in the course and scope of his employment with Employer.

6. 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. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *H & H Warehouse v. Vicory, supra.*

7. As found, Respondents have successfully demonstrated, by a preponderance of the evidence, that Claimant did not suffer an injury arising out of and in the course and scope of his employment with Employer on May 2, 2024. Therefore, the ALJ concludes that it is appropriate for Respondents' to withdraw their GAL. As found, the medical records and the opinions of Dr. Chen are credible and persuasive on this issue.

ORDER

It is therefore ordered that Respondents' request to withdraw the General Admission of Liability (GAL) regarding a May 2, 2024 date of injury is granted.

Dated May 6, 2025.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

ISSUES

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

FINDINGS OF FACT

1. Claimant was employed with Employer as a Pre Low Backer working at Employer's meat processing plant. Claimant testified he began his employment with Employer on March 22, 2017, but left the employment before returning on or about November 2024. Claimant testified his job duties included using a blade that is propelled by air in order to remove the skin from the carcass of cows. Claimant explained at hearing that he would pull the cow carcass with one hand while using the other hand to cut with the blade.

2. Claimant testified that on December 21, 2023 he clocked into work at 3:37 p.m. Claimant testified that at around 6:00 p.m. he was performing his work when two of the cows that were on the delivery line got stuck together. Claimant testified this was a common occurrence and because the machine that moves the carcasses was malfunctioning. Claimant testified when this occurs, he and his supervisor, Ms. Quintana, would need to separate the cows Claimant testified that while he was pushing the carcass towards Ms. Quintana, Ms. Quintana hooked the other cow causing the cow he was pushing to suddenly move backwards and pulled on his left arm.

3. Claimant testified he felt sharp pain and had to release the hook or he would have fallen down. Claimant testified that in addition to the intense pain, he also felt heat in his left shoulder. Claimant also reported hearing a noise that sounded like the breaking of a bone. Claimant testified he reported the injury to Ms. Quintana and asked Ms. Quintana to take him to the nurse.

4. Ms. Quintana, the Harvest Supervisor for Employer, testified at hearing in this matter. Ms. Quintana confirmed in her testimony that the machine that moved the cow carcasses had an issue with cows getting stuck together, although Ms. Quintana testified it happened up to 10 times a day on a bad day and 2-3 times per day on a good day. Ms. Quintana confirmed that Claimant had an incident on December 21, 2023 while attempting to separate cows. Ms. Quintana testified at hearing that moving the cows could be difficult and separating the cows could take significant force.

5. Ms. Quintana testified that after Claimant had the incident attempting to separate the cows, Claimant came back to work and was able to continue to perform his job. Ms. Quintana testified that Claimant was able to move cows without complain before and after the December 21, 2023 incident. Ms. Quintana testified that Claimant reported to her the next day that his shoulder hurt and she took him to the nurse.

6. The records from Employer's on-site clinic document that Claimant was evaluated on December 21, 2023 at 19:55 at which time Claimant reported that he had injured his left shoulder when he was pushing a cow so Ms. Quintana could separate the cows' feet. Claimant was "to remain on OHO" for the remainder of his December 21, 2023 shift and instructed to follow up with the clinic at the start of his December 22, 2023 shift. Claimant was instructed to take over-the-counter medications for his pain.

7. Insofar as the testimony of Claimant conflicts with the testimony of Ms. Quintana regarding the timing of when Claimant requested to be taken to the nurse and the reporting of the injury to Ms. Quintana, the ALJ credits the testimony of Claimant over the testimony of Ms. Quintana as Claimant's testimony is supported by the corresponding medical records from the on-site clinic dated December 21, 2023.

8. Prior to Claimant's December 21, 2023 injury, Claimant had another left shoulder injury while working for employer with a date of injury of May 2, 2023. Claimant was treated for the left shoulder injury by Dr. Cebrian. Claimant's treatment with Dr. Cebrian lasted until June 20, 2023.

9. Respondents presented the deposition testimony of Dr. Cebrian. Dr. Cebrian testified that following the May 2, 2023 injury, Claimant presented with a positive impingement which could indicate some type of tendonitis or rotator cuff pathology. Dr. Cebrian testified he recommended a magnetic resonance image ("MRI") of Claimant's left shoulder which showed some elements that were suggestive of strains of the supraspinatus and infraspinatus tendons along with some degenerative findings in Claimant's labrum and the shoulder joint itself. Dr. Cebrian testified that the finding that were suggestive of strains of the supraspinatus and infraspinatus were likely an acute event related to his work as a low-backer for Employer. Dr. Cebrian testified that he eventually released Claimant from care on June 20, 2023 after Claimant reported to the nursing staff that he wanted to be released from care and was doing better. Dr. Cebrian testified he performed a physical examination on June 20, 2023 and Claimant presented with a completely normal left shoulder exam with normal range of motion, normal strength and no pain.

10. Dr. Cebrian testified that he next examined Claimant on March 26,2024 when Claimant reported he had reinjured his shoulder on December 21, 2023 when he injured his shoulder trying to separate two cows with his supervisor. Dr. Cebrian testified that although Claimant was reporting pain, that did not necessarily mean that Claimant had sustained an injury. Dr. Cebrian testified that Claimant reported to him on the March 26, 2024 evaluation that he had never fully recovered from the prior injury and had ongoing pain since that time.

11. Dr. Cebrian noted that Claimant was previously scheduled to be seen by Dr. Cebrian on January 16, 2024, February 13, 2024, February 27, 2024 and March 12, 2024, but Claimant had failed to appear at any of those appointments. Dr. Cebrian testified Claimant was complaining of left shoulder pain and was tender on his trapezius, but nothing more specific from when he was previously evaluated by Dr. Cebrian. Dr. Cebrian testified that there were no specific objective findings on examination that were truly objective. Dr. Cebrian testified that Claimant did present with decreased range of motion and tenderness in the trapezius, but noted that these findings were not truly objective.

12. Dr. Cebrian testified he referred Claimant for another MRI of the left shoulder. Dr. Cebrian testified that the new MRI had a change in that there was a cyst that was present in the humeral head. Dr. Cebrian described this cyst as an incidental degenerative finding that wasn't present before, but noted that there was not evidence of any strained tissues that were present on the prior MRI. Dr. Cebrian testified that the cyst was an incidental finding that was an idiopathic change. Dr. Cebrian testified there was no objective evidence of an injury occurring on December 21, 2023 on the MRI.

13. Dr. Cebrian eventually referred Claimant to Dr. Hsin. Dr. Hsin examined Claimant on June 4, 2024. Dr. Hsin obtained a medical history and performed a physical examination and noted Claimant's prior MRI studies. Dr. Hsin diagnosed Claimant with left shoulder impingement syndrome. Dr. Hsin reviewed the MRI with Claimant and noted that it demonstrated some evidence of rotator cuff tendinopathy, but no full thickness tear along with some degenerative changes in the labrum. Dr. Hsin noted that Claimant's reports of pain were out of proportion to his examination. Dr. Hsin provided Claimant with a lidocaine and Marcaine injection to the left shoulder.

14. Claimant returned to Dr. Cebrian on July 24, 2024. Dr. Cebrian noted that Claimant's range of motion of his left shoulder was markedly worse during this examination, with diffused tenderness everywhere. Dr. Cebrian opined that these were an expansion of Claimant's non-physiologic or non-organic complaints.

15. Dr. Cebrian opined in his testimony in this case that Claimant's incident on December 21, 2023 did not cause an injury to Claimant's left shoulder and did not aggravate, accelerate or exacerbate to any substantial degree Claimant's pre-existing condition.

16. The ALJ credits Claimant's testimony at hearing along with the corroborating records from the on-site clinic that document Claimant reported an injury on December 21, 2023 to his left shoulder, along with the corroborating testimony from Ms. Quintana regarding the incident in question and finds that Claimant has proven that it is more likely than not that he sustained an injury arising out of and in the course of his employment with Employer on December 21, 2023.

17. The ALJ notes that Claimant had a prior work-related injury to his left shoulder in May 2023. However, the records and testimony at hearing establish that Claimant was not under any active care for the shoulder injury and Claimant was not subject to any work restrictions related to the May 2023 injury at the time of the December 21, 2023 work injury.

18. The ALJ notes that Claimant has presented with pain complaints that are not in proportion to his examination. Nonetheless, Dr. Hsin has diagnosed Claimant with a shoulder impingement syndrome and has performed treatment that includes an injection into the left shoulder. The AJL finds that this represents treatment that is reasonable, necessary and related to Claimant's December 21, 2023 injury.

19. The ALJ acknowledges the medical opinions expressed by Dr. Cebrian but finds Claimant's testimony regarding the injury taking place on December 21, 2023 along with the medical records entered into evidence to provide credible evidence that the Claimant sustained a compensable injury arising out of his employment on December 21 , 2023.

20. The ALJ therefore finds that Claimant has proven that it is more likely than not that Claimant sustained a compensable injury on December 21, 2023 that resulted in Claimant receiving medical treatment that was reasonable, necessary and related to the December 21, 2023 work injury.

CONCLUSIONS OF LAW

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

2. The 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. To qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of his employment at the time of the injury. *See* Section 8-41-301 (1)(b), C.R.S. For an injury to occur "in the course of' employment, the claimant must demonstrate that the injury occurred within the time and place limits of the employment and during an activity that had some connection with the work-related function. *See Triad Painting* Co. *v. Blair,* 812 P.2d 638 641 (Colo. 1991). The "arising out of' requirement is narrower than the "in the course of" requirement. *See Id.* For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Id.* at 641-642.

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

6. As found, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer on December 21, 2023. As found, as a result of the injury on December 21, 2023, Claimant was required to seek medical treatment that was reasonable and necessary to cure and relieve the Claimant from the effects of the injury, including Claimant's treatment with Dr. Cebrian, the MRI of the left shoulder, and the referral to Dr. Hsin, which resulted in an injection into Claimant's left shoulder.

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 December 21, 2023 work injury.

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 6, 2025

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-168-372-003

ISSUE

I. Whether Claimant overcame the opinions of the DIME physician by clear and convincing evidence?

FINDINGS OF FACT

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

1. Claimant was employed by the employer when he slipped and fell in the employer's parking log on November 21, 2019. As the result of the slip and fall, Claimant injured his back. Claimant did seek medical treatment the following day with Action Potential. Claimant saw physical therapist Phillip Plante.

2. Medical treatment continued thereafter and included physical therapy and spinal injections. In addition to physical therapy, Claimant was evaluated by Dr. Kenneth Finn who provided the injections.[1] Claimant testified that he had 75 physical therapy treatments and 10 spinal injections.

3. Claimant does have a history of medical treatment to his low back and hip for which he received treatment with Dr. Hanna Finn and physical therapy with Action Potential following a motor vehicle accident in 2015. The treatment began in 2015 and continued until 2017. During the course of this treatment an MRI of the lumbar spine was performed on August 15, 2016.

4. The Claimant was placed at MMI on May 16, 2023. Dr. Finn made this determination on March 28, 2024 in correspondence to Respondents' attorney.

5. There is a note in the file that Dr. Finn referred the Claimant to Dr. Sandell to do an impairment rating . The note is dated April 4, 2023 and is from Capitol Pain Institute.

6. Dr. Sandell did see the Claimant on August 7, 2023. Dr. Sandell gave the Claimant a 15% whole person impairment which included a table 53 rating of 5%. Medical maintenance treatment was deferred to his treating providers. However, on that same

[1] For clarification, Dr. Hanna Finn treated the Claimant following his motor vehicle accident in 2015, while Dr. Kenneth Finn treated the Claimant following his work related slip and fall on the ice.

date, Dr. Finn, the treating provider wrote to Claimant that he would no longer treat the Claimant due to inappropriate behavior in his office. So, medical maintenance treatment was not addressed by Dr. Finn.

7. Claimant did continue to receive physical therapy at Action Potential including a visit on December 28, 2023.

8. Dr. Hughes saw Claimant on August 12, 2021 at the request of Respondents. He issued a report, but noted that he was missing significant medical records. On May 11, 2022 he authored a second report and noted that since the initial report, he received missing medical records. Of note were a comparison of an MRI of the lumbar spine which was done on August 15, 2016. It was compared by radiologist Dr. Kahn to a second MRI taken on March 10, 2020. She opined "There is no significant change when compared to the exam dated August 15, 2016".

9. Claimant underwent a Division IME with Dr. Caughfield on August 13, 2024. Dr. Caughfield determined that the Claimant was at MMI on October 28, 2020 with 0% impairment. In the pertinent medical issues section of the report, Dr. Caughfield notes that the Claimant denies any back or leg pain prior to the 11/21/2019 injury. His MMI determination was based on documentation of resolution of lumbar spine pain and normal range of motion on October 28, 2020. His 0% rating was based on "no objective evidence of lumbar pathology on examination and therefore, based on desk aid 11, page 4 of section 1 a ROM impairment is not appropriate as his table 53 diagnosis is IIA for an impairment of 0%".

10. Claimant was seen by Dr. Yamamoto on January 28, 2025 for an independent medical examination. Dr. Yamamoto states in his report that "I found this report was difficult because it appears that the patient is not a good historian if he is in fact being honest. He did not disclose previous injuries such as the motor vehicle accident on the questionnaire when I saw him. Dr. Hughes did document the inconsistencies in his history". Nonetheless, he provided the Claimant with a 15% whole person impairment. Further, Dr. Yamamoto does not provide any opinion with regard to whether he agreed or disagreed with Dr. Caughfield's determination of MMI or impairment. There is not mention of Dr. Caughfield's DIME report. Dr. Yamamoto only comments on Dr. Hughes' reports.

11. At hearing, Dr. Hughes provided his opinion that there were no errors in the performance of the DIME by Dr. Caughfield.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Overcoming the DIME

D. A DIME's determination regarding MMI and 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).

E. Claimant failed to overcome Dr. Caulfield's determinations that the Claimant is at MMI as of October 28, 2020 and has 0% impairment as the result of his work injury. Initially, the Claimant is a poor historian and could not remember prior treatment to his low back and hip which dates back to 2015. Since that is the case, I rely on the contemporaneous medical records documenting the prior low back and hip treatment. In reviewing Dr. Yamamoto's report, I don't see any opinions on how Dr. Caughfield's DIME opinions on MMI or impairment are clearly incorrect. In fact there is no mention of Dr. Caughfield's DIME report which predates the report of Dr. Yamamoto. In contrast, Dr. Hughes testified that Dr. Caughfield's DIME contained no errors. I find Dr. Hughes' opinion to be credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME's determination that the Claimant is at MMI and has 0% impairment is denied and dismissed.

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

DATED: May 20, 2025

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-293-216-001

ISSUES

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

2. If Claimant's injury is compensable, whether Claimant established by a preponderance of the evidence that he is entitled to medical benefits reasonably necessary to cure and relieve him of the effects of his psychological injury.

FINDINGS OF FACT

1. Claimant was hired by Employer sometime in 2022. Claimant's job title was "Guest Event Expert" and he worked banquet events for Employer. *See* Ex. J.

2. Claimant underwent a transsphenoidal resection of a pituitary adenoma on February 22, 2024. Ex. D. Claimant provided Employer with a letter from Erin Berry, RN, which requested Claimant be excused from work until June 22, 2024, to allow time for post-operative recovery. *Id.*

3. Claimant testified that the brain surgery he had was not caused by an injury at work.

4. Latoya Gaines-Plunkett, Ph.D., testified on Claimant's behalf. Dr. Gaines-Plunkett is a licensed clinical social worker and has a doctorate in social work. Dr. Gaines-Plunkett is not a licensed psychologist or a licensed psychiatrist.

5. Dr. Gaines-Plunkett testified that Claimant first met with her on June 20, 2024, with complaints of anxiety and depression. As she continued to meet with Claimant, he also demonstrated symptoms of Attention Deficit Hyperactivity Disorder (ADHD).

6. Claimant returned to work with Employer sometime between June 20, 2024 and August 20, 2024.

7. Dr. Gaines-Plunkett testified that as she continued to see Claimant he had more depressive symptoms and more anxiety which seemed exacerbated by some of Employer's demands, mainly timeliness. The more Claimant was reprimanded at work, the more progressive his anxiety and depressive-like symptoms became.

8. Dr. Gaines-Plunkett did not testify what Claimant's psychological diagnoses are.

9. On August 20, 2024, Claimant submitted to Employer a Request for Reasonable Accommodation. Ex. E. Claimant left the section "reason for request" blank on the form. *Id.*

10. Sometime prior to November 26, 2024, Dr. Gaines-Plunkett authored a letter "Re: Work Accommodations for ADHD for [redacted] Ex. G. Dr. Gaines-Plunkett testified that she authored this letter based on what Claimant reported to her was happening at work and to help Claimant relieve stress.

11. On December 10, 2024, Claimant submitted to Employer a second Request for Reasonable Accommodation. Ex. H. Again, the section "reason for request" was left blank on the form. *Id.*

12. Claimant met with Claudia Sojo and Russell Connally on December 13, 2024. Ex. I. According to Claimant, that meeting was to discuss his request for reasonable accommodation and instead he was told at the meeting that he would be assigned server duties instead of bartender duties. *Id.* After that meeting, Claimant submitted an ethics report to Employer alleging workplace discrimination by Ms. Sojo and Mr. Connally. *Id.*

13. Claimant testified that the accommodation process with Employer made him feel horrible, that Employer treated him as "less-than-human," and that he believed Employer engaged in harassment and retaliation for his accommodation request.

14. Claimant testified that he was terminated by Employer on December 18, 2024.

15. Claimant testified that he never experienced problems at work prior to his February 2024 brain surgery.

16. Claimant testified that his claim for worker's compensation was based "partially" on the stress of the accommodation process. Claimant testified that he did not sustain a physical injury at work that precipitated his claim for workers' compensation benefits.

17. Claimant's Application For Expedited Hearing includes an injury date of December 13, 2024.

18. The ALJ found Claimant to be forthright. However, based upon the evidence presented, the ALJ finds that Claimant failed to present both the necessary expert testimony as required by statute and sufficient persuasive lay testimony to support his claim for a psychological injury arising out of and in the course of his employment with Employer.

CONCLUSIONS OF LAW

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 318 (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 must be decided on the merits. § 8-43-201, C.R.S.

2. Assessing the 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 Off.*, 43 P.3d 637, 641 (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*. 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. *Bodensieck v. Indus. Claim Appeals Off.*, 183 P.3d 684, 687 (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 Off.*, 55 P.3d 186, 191 (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*, 165 Colo. 504, 506 (1968).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385, 389 (Colo. App. 2000).

Compensability – Injury Due to Mental Impairment

4. Claimant testified at hearing that he is alleging a claim of mental impairment based "partially" on the stress of Employer's reasonable accommodation process. No matter what other emotional stimulus Claimant alleges is the basis for his mental impairment claim, Claimant is alleging a "mental-mental" impairment in which a "mental impairment follows solely an emotional stimulus" rather than a "mental-physical" impairment in which "physical injury causes mental impairment." *Oberle v. Indus. Claim Appeals Off.*, 919 P.2d 918, 920 (Colo. App. 1996).

> (2)(a) A claim of mental impairment must be proven by evidence supported by the testimony of a licensed psychiatrist or psychologist. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim must have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.
>
> (3)(a) "Mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves

> no physical injury and consists of a psychologically traumatic event.
>
> (3)(b)(I) "Psychologically traumatic event" means an event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances.

§ 8-41-301, C.R.S.; *see Kieckhafer v. Indus. Claim Appeals Off.*, 2012 COA 124, 284 P.3d 202 (Colo. App. 2012). "Expert testimony must prove that the claimant suffered a recognized, permanent disability as a result of a psychologically traumatic event." *See Davidson v. Indus. Claim Appeals Off.*, 84 P.3d 1023, 1029 (Colo. 2004).

5. The issues of whether the "psychologically traumatic event" is one "generally outside of a worker's usual experience," and of a type which would "evoke significant symptoms of distress in a worker in similar circumstances," are questions of fact. *Jasso v. City of Littleton*, W.C. No. 5-057-876-01 (ICAO, Mar. 29, 2018).

6. Here, Claimant failed to present the testimony of a licensed psychiatrist or psychologist to support his claim of mental impairment. For that reason alone, Claimant's claim must be denied. § 8-41-301(2)(a), C.R.S.; *Davidson*, 84 P.3d at 1029.

7. The ALJ understands that Claimant presented the testimony of Dr. Gaines-Plunkett, but Dr. Gaines-Plunkett is not a licensed psychiatrist or a licensed psychologist, and, therefore, does not satisfy the requirements of section 8-41-301(2)(a). As advised by the ALJ at the outset of the hearing, Claimant, who undertook his own representation, is expected to know the law applicable to his claim. *See, e.g.*, *Viles v. Scofield*, 261 P.2d 148, 149 (Colo. 1953) ("If a litigant, for whatever reason, sees fit to rely upon his own understanding of legal principals and the procedures involved in the courts, he must be prepared to accept the consequences of his mistakes and errors."). And the ALJ is not at liberty to ignore required elements of the statute to conclude that Claimant has proven his claim of mental impairment. Without an opinion from a licensed psychiatrist or psychologist that Claimant suffered a psychologically traumatic work-related event resulting in a recognized, permanent disability, Claimant's claim must be denied.

8. Further, Claimant failed to clearly identify at hearing what recognized, permanent disability followed Employer's reasonable accommodation process. As stated above, a mental impairment is "a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event." § 8-41-301(3)(a). Concerning "a recognized, permanent disability," there was brief testimony at hearing of anxiety, depression symptoms, and ADHD, but no testimony, expert or lay, established by a preponderance which disability Claimant alleges arose out of and in the course of his employment. And regarding the statutory requirement of a "psychologically traumatic event," Claimant did not present expert testimony to prove by a preponderance that Employer's reasonable accommodations process itself, or his meeting with his supervisors on December 13, 2024, were "an event that is generally outside of a worker's

usual experience and would evoke significant symptoms of distress in a worker in similar circumstances." § 8-41-301(3)(b)(I).

9. Additionally, Claimant did not establish by a preponderance that his anxiety, depression symptoms, or ADHD arose "primarily from the claimant's then occupation and place of employment." § 8-41-301(2)(a). Instead, the testimony at hearing was that when Dr. Gaines-Plunkett met with Claimant in June 2024, he had anxiety and depression symptoms. Meanwhile, Claimant started Employer's reasonable accommodations process in August 2024, and, therefore, his anxiety and depression symptoms did not arise primarily from his occupation and place of employment. And no testimony linked Claimant's ADHD to his employment.

10. For the foregoing reasons, the ALJ determines Claimant has failed to establish by a preponderance of the evidence all necessary statutory elements to prove he suffered a compensable mental impairment injury pursuant to section 8-41-301(2)(a), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet the statutory requirements set forth in section 8-41-301(2), C.R.S. to establish a claim of mental impairment. Accordingly, his claim is **denied** and **dismissed**. Because Claimant failed to carry his burden to prove the compensable nature of his psychological injury, his remaining claims need not be addressed.

SIGNED: May 20, 2025.

Robin E. Hoogerhyde
Administrative Law Judge

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

ISSUES

1. Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for her termination on February 10, 2023, warranting a termination of temporary disability benefits as of that date pursuant to §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S.

2. Whether Claimant proved by a preponderance of the evidence that Claimant's condition worsened after her termination so as to reestablish the causal relationship between her work injury and her wage loss.

FINDINGS OF FACT

1. Claimant began working for Respondent-Employer on October 24, 2022, as an HVAC foreman earning $35 per hour. The HVAC foreman would run and organize the project, attend meetings, deal with customer relations, make sure the subcontractors were doing the work that was required, and conduct quality assurance and quality control. For the remainder of the role, the foremen could set their own schedules and could delegate tasks and physical work as they pleased. The job could involve very little to no lifting if the foreman so chose. However, Claimant preferred to be physically involved in the installation of ductwork, and the Employer was supportive of Claimant's physical participation.

2. On December 21, 2022, Claimant sustained a back injury while installing ductwork. Claimant had been carrying duct up a flight of stairs at a job site when the duct caught on plastic sheeting, causing her to twist to the left and fall backwards. She landed on the stairs on her back holding the duct in front of her. Claimant rested in her car, believing she had a muscle strain and that she would wake up the next day feeling better. After work, she left the job site and drove sixty-eight miles home.

3. The next day, Claimant sent an e-mail to several people in management at Respondent-Employer reporting her work injury, including Jesse Valencia (supervisor), Jim Hughes (senior project manager and hiring manager), Tanner Rubio (supervisor), and Renee Bryant. In her e-mail, Claimant stated:

> *In an effort to help pull our team out of the situation we found ourselves in I decided to bag up and run the L2 amenity ductwork personally, In the*

process of staging and hanging the ductwork I strained my back. I'm in severe pain and cannot sit or stand for long periods so I do not feel that the hour drive down and back will be beneficial to my recovery. Hopefully, it's better tomorrow but if it is not I will let everyone know. I will be answering phone calls and emails so if any issues arrive please feel free to reach out. Thank you and stay warm!

4. None of the recipients responded to or took any action in response to Claimant's e-mail.

5. Mr. Hughes credibly testified that, other than the December 22, 2023 e-mail, he never had any further communications with Claimant about a back injury.

6. Claimant remained off work on December 22 and December 23, which were followed by a weekend and a holiday on that Monday. Claimant returned to work that Tuesday, December 27, 2022. Claimant continued to work her regularly scheduled shifts through January 2023, with the exception of days missed due to personal reasons, including bereavement leave, weather, and COVID. Claimant missed work approximately once a week during that time period. None of the lost time was due to Claimant's December 21, 2022 injury.

7. The HVAC senior project manager, Mr. Hughes testified that about this time, in January of 2023, he had regular conversations with Claimant that her work attendance needed to improve. It was Mr. Hughes's understanding that Claimant had called off work due to colds, sickness, and issues with long distance driving from her home to work. Mr. Hughes was not aware of Claimant ever calling off work in this time period due to back pain. In order to try to improve Claimant's attendance, Mr. Hughes authorized a $400.00 a month gas allowance that he hoped would be an incentive to help Claimant get to work and improve her attendance. However, even after this, Claimant's attendance did not improve.

8. In January, Claimant was transitioned to work as a foreman at a bigger project on 37th and Downing. Claimant was proud to be transitioned to the new project. With that project, Claimant was working under a new supervisor, Dustin Shanley.

9. Claimant testified that every time she spoke with Mr. Shanley, she mentioned her back problems. Mr. Shanley, in his testimony, denied that Claimant reported these back problems, despite speaking with Claimant every day that Claimant was on the 37th and Downing project. The Court finds Mr. Shanley's testimony more credible in this regard.

10. Claimant testified that at some point Mr. Shanley threatened Claimant's job due to Claimant missing too much work. Claimant also testified that she explained to Mr. Shanley that she had a back injury. Mr. Shanley testified that he did mention that Claimant had missed a lot of work and that it was going to become an issue, but

he denied threatening Claimant's job or even having the capacity to do so. The Court finds Mr. Shanley's testimony more credible than Claimant's in this regard.

11. Mr. Shanley later credibly testified that roughly 90% of Claimant's job as foreman on the 37th and Downing project would have been administrative, clerical, or light work, consisting of mostly scheduling subcontractors and deliveries, scheduling with the general contractor, planning, determining what materials are needed, and marking out the worksite for where the HVAC equipment was to be installed. Mr. Shanley credibly testified that some foremen "don't even leave the trailer and they're successful." He described that while some foremen engage in physical tasks, others manage entirely from the trailer, focusing on administrative and supervisory duties. He testified, "the person that took [the 37th and Downing project] over... didn't leave the trailer very much the whole project." The only physical labor Claimant was expected to do, according to Mr. Shanley, was to set cylindrical plastic sleeves—weighing less than a pound each—into the floor. Those sleeves acted as forms such that there remained a conduit for HVAC ducting even after the concrete was poured.

12. Between January 31 and February 1, 2023, Claimant had a miscommunication with her supervisor, Mr. Shanley, regarding when to show up on a particular project. Mr. Shanley scheduled Claimant for February 1, 2023, but Claimant mistakenly arrived on January 31, 2023, due to not seeing Mr. Shanley's clarification e-mail.

13. On February 2, 2023, Claimant was sent to Employer's Crossing Point jobsite to assist with "crane pick day." Over the course of the day, the Claimant was upset with Ernesto, the foreman on that job, who she had just met for the first time, because he referred to her as "hey you" instead of by her name. Claimant was also upset with what she felt were safety issues. She also felt "let down" by the way her coworkers were treating her. Claimant called Mr. Shanley to discuss what was happening on February 2, 2023, at Crossing Point. Mr. Shanley later recalled that Claimant was upset with Ernesto, the foreman running that project, as she felt Ernesto had been disrespectful to her. Mr. Shanley told Claimant to contact Victor as it sounded like a human resources issue.

14. Claimant sent an e-mail that afternoon to the human resources manager, Victor Avila, as well as several others in management communicating her complaints. Claimant complained of safety issues in the workplace as well as being disrespected and demeaned by the foreman on site. She reported that Ernesto was dismissive of her advice, referred to her as "hey you," and generally treated her as unskilled labor, assigning her to pick up trash. Claimant concluded with, "I love my job, I love what I do, but it's not easy and has been a constant fight to be accepted out in the field and to be disrespected by my own teammates Is disheartening, unproductive, and unprofessional." Claimant made no reference in the roughly 1400-word e-mail to being unable to work due to her work injury other than a single comment that, "Ernesto told me that I needed to start unloading the

stacked [condensers], I explained to him that my back was injured and I could not lift the [condensers] off of each other."

15. Mr. Avila—understanding Claimant's grievances to be of sexual harassment—conducted an investigation beginning the following day. He spoke with several witnesses individually and ultimately concluded that there was no sexual harassment taking place. To the contrary, Mr. Avila found that Claimant was not providing "any measurable contributions" in the workplace on February 2. Witnesses reported to him that Claimant would become defensive when asked to do a task.

16. Mr. Avila called Claimant on February 7, 2023, and advised her that his investigation did not substantiate the claim that she was being discriminated against because she was a woman.

17. Claimant called in sick the following day due to having an RSV infection and a corresponding fever.

18. On February 10, 2023, Claimant showed up on the worksite for the Edera project. However, Mr. Shanley had already completed the project and advised Claimant by e-mail to clock out of the project and help at a different worksite, the Novel project. Claimant called Mr. Shanley and expressed frustration regarding miscommunications she and Mr. Shanley had via e-mail. Claimant then proceeded to the Employer's administrative offices rather than going to the Novel project worksite. When she arrived at the administrative offices, she reported to Mr. Avila that she had a back injury and that nobody had responded to her e-mails, and "so, therefore, I could no longer work for a company that did not take care of its employees." Claimant also complained of the lack of communication with her supervisor, Mr. Shanley. Claimant told Mr. Avila that she was turning in her things because she was quitting. At some point, Mr. Hughes joined the conversation as well, and both Mr. Hughes and Mr. Avila accepted Claimant's resignation. As Claimant was leaving, she mentioned that her back injury had never been addressed, at which point Mr. Avila took the information from Claimant so that he could complete a report of injury. Both Mr. Avila and Mr. Hughes credibly testified that Claimant's primary grievance leading her to quit consisted of the communication issues with her supervisor, Mr. Shanley.

19. That same day, Mr. Avila provided Claimant with a letter formally accepting Claimant's resignation and advising Claimant that she would be paid for all work performed up through that date.

20. The Court finds that Claimant's wage loss began upon and because of her resignation on February 10, 2023.

21. The Court finds that there is no credible evidence that Claimant had any temporary work restrictions on the date of her resignation and that Claimant's injury, up to

that point, was not disabling and did not impair Claimant's ability to perform the duties of her employment. Insofar as Claimant alleged that she missed work due to her back injury prior to her termination—aside from taking off work on December 22, 2022—the Court finds Claimant's testimony not credible. Claimant continued to perform her regular job duties through January and early February 2023, including being physically present on job sites and participating in fieldwork, and her explanations for her missed time prior to her termination consistently cited unrelated causes. The Court gives greater weight to the testimonies of Mr. Shanley, Mr. Avila, and Mr. Hughes, all of whom denied receiving any formal or informal indication prior to Claimant's resignation that Claimant was unable to work due to injury.

22. Claimant first obtained medical treatment with her authorized treating physician at Banner Health on February 24, 2023, where she was attended by Matthew Harris, PA-C. Claimant explained her injury to PA Harris and reported that she was currently experiencing consistent pain across her low back with occasional and temporary radicular symptoms migrating between her lower extremities. Claimant reported that she had seen the chiropractor three times and had missed several days of work due to back pain. PA Harris felt that Claimant likely had a low back soft tissue strain. However, he recommended a lumbar X-ray and MRI to evaluate the extent of Claimant's injury. In the meantime, Claimant was given temporary work restrictions of twenty-five pounds lifting, carrying, pushing, and pulling, and no twisting at the waist while carrying or lifting or while bending at the waist or crouching.

23. Respondents filed a general admission of liability (GAL) on March 7, 2023, admitting for TTD benefits from February 24, 2023, onward at a rate of $832.81.

24. Claimant returned to Banner Health on March 10, 2023, where PA Harris reviewed Claimant's MRI results. PA Harris noted that the MRI showed degenerative changes, leading him to opine that Claimant's low back injury was likely a soft-tissue injury. PA Harris left Claimant's restrictions unchanged.

25. After several months of conservative treatment with some relief, Claimant returned to Banner Health on October 10, 2024, where she was attended by Dr. Robert Nystrom. Dr. Nystrom loosened Claimant's restrictions to lifting, pushing, pulling, or carrying no more than twenty-five pounds. Dr. Nystrom again continued those restrictions on November 27, 2024.

26. The Court finds the witnesses' testimonies credible insofar as they are consistent with the above. However, the Court finds Claimant's testimony less credible than those of Mr. Shanley, Mr. Avila, and Mr. Hughes.

27. The Court finds that Claimant has not proved by a preponderance of the evidence that she was entitled to TTD benefits, in the first instance, prior to February 24, 2023. Claimant missed one day of work—December 22, 2022—as a result of her

injury. Claimant's wage loss following her resignation resulted from her resignation, not from her injury. Furthermore, as found, Claimant's injury was not disabling and did not impair Claimant's ability to perform the duties of her employment prior to her date of resignation.

28. Respondents have proved by a preponderance of the evidence that Claimant was not entitled to TTD benefits from February 24, 2023 onward. Although Claimant was issued temporary work restrictions on February 24, 2023, those restrictions did not render her unable to perform the essential functions of her job as foreman. The credible testimony of Mr. Shanley established that the foreman position at the 37th and Downing project was primarily administrative and supervisory in nature, with minimal to no physical labor required. Claimant had successfully performed these duties without accommodation up to the date of her voluntary resignation. There is no credible evidence that Claimant's condition deteriorated or that her restrictions were incompatible with the essential job functions she would have continued to perform. Therefore, any wage loss experienced by Claimant after February 24, 2023, was not causally related to her industrial injury but rather resulted from her own decision to resign.

29. The Court finds that Respondents have proved by a preponderance of the evidence that Claimant was responsible for her termination on February 10, 2023. The credible testimonies of Mr. Avila and Mr. Hughes, both of whom were present at the time of Claimant's resignation, demonstrated that Claimant's decision to quit was primarily motivated by dissatisfaction with workplace communication and interpersonal conflicts, particularly with her supervisor, Mr. Shanley. Claimant expressed frustration over perceived miscommunications and a lack of responsiveness from management but did not assert an inability to work due to injury as the basis for her resignation. Although Claimant mentioned her back injury during her exit, this was raised only in passing and not as the principal reason for her departure. The Court finds that interpersonal and communication concerns, not physical incapacity, were the driving factors behind Claimant's voluntary resignation.

30. Furthermore, Claimant has not proved by a preponderance of the evidence that her condition worsened after her termination so as to reestablish the causal relationship between her injury and her wage loss. Although Claimant obtained medical treatment on February 24, 2023, and was given work restrictions by PA Harris, Claimant's role primarily involved administrative and supervisory responsibilities, including scheduling, coordination, and quality control, and that the only physical task required was placing lightweight sleeves. To the extent that Claimant engaged in more physically demanding labor, she did so voluntarily, not out of necessity. Thus, the temporary work restrictions later imposed by PA Harris would not have prevented Claimant from continuing to perform the essential functions of her job as foreman had she remained employed. There is no credible evidence that Claimant's condition deteriorated in a way that would have precluded

her from performing the required duties of her job, and therefore, finds no causal relationship between Claimant's post-termination wage loss and her work injury.

CONCLUSIONS OF LAW

Generally

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

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

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

TTD and Termination for Cause

4. In cases where the injury or occupational disease causes disability lasting more than three days, a claimant is entitled to TTD benefits in the amount of 66 and 2/3% of the claimant's average weekly wage. Sections 8-42-103(1) and 8-42-105, C.R.S. Claimant bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and lasts more than three working days. *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo.App.1997).

5. In this case, Respondents admitted for ongoing TTD benefits from February 24, 2023, onward. Claimant bears the burden to prove by a preponderance of the evidence entitlement to TTD benefits prior to February 24, 2023; Respondents bear the burden to prove by a preponderance of the evidence that Claimant was not entitled to TTD from February 24, 2023 onward. Section 8-43-201(1), C.R.S. ("a party seeking to modify an issue determined by a general or final admission. . . shall bear the burden of proof for any such modification." *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014).

6. As found, Claimant has not proved by a preponderance of the evidence that she was entitled to TTD, in the first instance, prior to February 24, 2023. Claimant missed one day of work—December 22, 2022—as a result of her injury. Claimant's wage loss following her resignation resulted from her resignation, not from her injury. Furthermore, as found, Claimant's injury was not disabling and did not impair Claimant's ability to perform the duties of her employment prior to her date of resignation.

7. As found, however, Respondents have, however, proved by a preponderance of the evidence that Claimant was not entitled to TTD benefits from February 24, 2023 onward, despite their GAL. Although Claimant was issued temporary work restrictions on February 24, 2023, those restrictions did not render her unable to perform the essential functions of her job as foreman. The credible testimony of Mr. Shanley established that the foreman position at the 37th and Downing project was primarily administrative and supervisory in nature, with minimal to no physical labor required. Claimant had successfully performed these duties without accommodation up to the date of her voluntary resignation. There is no credible evidence that Claimant's condition deteriorated or that her restrictions were incompatible with the essential job functions she would have continued to perform. Therefore, any wage loss experienced by Claimant after February 24, 2023, was not causally related to her industrial injury but rather resulted from her own decision to resign.

8. The statutes state that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v.*

Industrial Claims Appeals Office, 58 P.3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced the concept of "fault" into the Workers' Compensation Act. "Fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994) opinion after remand, 908 P.2d 1185 (Colo. App. 1995). That determination must be based upon an examination of the totality of circumstances. *Id*. The burden to show that the claimant was responsible for his discharge is on the respondents. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000).

9. The Court concludes, as found, that Respondents have proved by a preponderance of the evidence that Claimant was responsible for her termination on February 10, 2023. The credible testimonies of Mr. Avila and Mr. Hughes, both of whom were present at the time of Claimant's resignation, demonstrated that Claimant's decision to quit was primarily motivated by dissatisfaction with workplace communication and interpersonal conflicts, particularly with her supervisor, Mr. Shanley. Claimant expressed frustration over perceived miscommunications and a lack of responsiveness from management but did not assert an inability to work due to injury as the basis for her resignation. Although Claimant mentioned her back injury during her exit, this was raised only in passing and not as the principal reason for her departure. The Court finds that interpersonal and communication concerns, not physical incapacity, were the driving factors behind Claimant's voluntary resignation.

10. In addition, where a claimant's condition worsens subsequent to termination and the worsened condition itself is what causes the wage loss, rather than the termination of employment, a claimant may establish, by a preponderance of the evidence, that they remain entitled to TTD benefits. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d. 323 (Colo. 2004). A wage loss is "caused by a worsened condition if the worsening results in physical limitations or restrictions which did not exist at the time of the termination, and these limitations or restrictions cause a limitation on the claimant's temporary earning capacity which did not exist when the claimant caused the termination. *Martinez v. Denver Health*, W.C. No. 4-527-415 (August 8, 2005). Nevertheless, deference is given to an ALJ's determination that a claimant's condition has not worsened where there were no additional restrictions that would prevent the claimant from performing a modified job, thus supporting the conclusion that TTD benefits are not owed after termination per C.R.S. 8-42-103(1)(g). *Barnett v. Wal-Mart Stores, Inc.*, W.C. No. 4-769-486 (October 27, 2010). A claimant also fails to prove by a preponderance of the evidence that she suffered a worsening of condition and increased disability after termination of employment where symptoms improve with treatment. *Noble v. Staples, Inc.*, W.C. No. 4-842-470 (November 9, 2011).

11. The Court concludes, as found, Claimant has not proved by a preponderance of the evidence that her condition worsened after her termination so as to reestablish

the causal relationship between her injury and her wage loss. Although Claimant obtained medical treatment on February 24, 2023, and was given work restrictions by PA Harris, Claimant's role primarily involved administrative and supervisory responsibilities, including scheduling, coordination, and quality control, and that the only physical task required was placing lightweight sleeves. To the extent that Claimant engaged in more physically demanding labor, she did so voluntarily, not out of necessity. Thus, the temporary work restrictions later imposed by PA Harris would not have prevented Claimant from continuing to perform the essential functions of her job as foreman had she remained employed. There is no credible evidence that Claimant's condition deteriorated in a way that would have precluded her from performing the required duties of her job, and therefore, finds no causal relationship between Claimant's post-termination wage loss and her work injury.

ORDER

It is therefore ordered that:

1. Respondents have proved by a preponderance of the evidence that Claimant was responsible for her termination on February 10, 2023, warranting a termination of temporary disability benefits as of that date pursuant to §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S.

2. Claimant has not proved by a preponderance of the evidence that Claimant's condition worsened after her termination so as to reestablish the causal relationship between her work injury and her wage loss pursuant to *Anderson v. Longmont Toyota, Inc.*, 102 P. 3d. 323 (Colo. 2004).

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

DATED: May 20, 2025.

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-284-023

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability ("TTD") benefits from August 28, 2024 – September 30, 2024, and from January 1, 2025, ongoing.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary partial disability ("TPD") benefits from October 1, 2024 – December 31, 2024.

III. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Employer is a home remodeling company, focusing on exterior remodels and interior wet areas and bathrooms. Employer hired Claimant as a salesperson in November 2023.

2. Claimant's primary job duties as a salesperson included driving to a homeowner's property, performing an inspection of the property, and giving an estimate of the cost of work to be performed.

3. Claimant credibly testified at hearing. Claimant testified that even if the homeowner requested a specific product, Employer encouraged the salespeople to do a full inspection of the home, to potentially make additional sales. The inspections involved, among other things, walking an entire house, climbing ladders, and going on roofs, in attics and in crawl spaces.

4. Claimant's sales area covered approximately three hours to east and west of the Denver metro area**.** Claimant testified that each sales call often took approximately three to five hours. He testified that, prior to the work injury, he went on an average of 12 sales calls per week. Claimant testified that the company usually closes out one in every three deals.

5. Claimant arrived at the office at 8:00 a.m. and Employer provided him leads at 10:00 a.m., 2:00 p.m. and/or 6:00 p.m. Claimant was paid solely on commission. As a salesperson Claimant earned ten percent of the total sale once the project was completed.

6. Claimant sustained an admitted industrial injury on August 28, 2024 during a sales call. While inspecting an attic, Claimant fell approximately 12-13 feet off a ladder and landed on his feet on a slanted hill.

7. Claimant was transported by ambulance to St. Vincent General Hospital and diagnosed with a closed trimalleolar fracture of the left ankle. Upon his release from the hospital Claimant was non-weightbearing on crutches. It was recommended Claimant find a specialist for surgical repair of the ankle fracture.

8. As a result of the work injury, Claimant did not return to work nor earn any wages from August 29, 2024 to September 30, 2024.

9. Claimant returned to work for Employer on October 1, 2024 to attend Employer's management training program. The management training program took place in a classroom and was taught virtually. The training was three hours per week for eight weeks. Employer paid Claimant $20.00 per hour for the training. Claimant graduated from the training program on January 1, 2025. Participants in the management training program were expected to go out on sales calls when he or she was not participating in the classroom training. Claimant did not go out on any sales calls during his management training because he was not physically capable of conducting a sales call. Claimant remained non-weightbearing at this time, using a scooter instead of crutches.

10. Upon graduating from the management training program, Claimant became a team lead. Claimant was responsible for hiring and training in office as well as going out on sales calls with his team to give feedback and contribute to the sale. If one of these team sales calls resulted in a sale, Claimant would be paid five percent of the total sale once completed. As a team lead, Claimant was also expected to continue to do his own sales calls, continuing to earn ten percent commission.

11. Claimant did not go out on any sales calls of his own after the work injury because he was physically incapable of conducting the type of complete inspection typically involved in the sales calls. At this point, Claimant had transitioned to a boot but his mobility remained limited. Claimant testified he was in a lot of pain, and experienced back issues when driving. Claimant remained unable to climb ladders or get into crawl spaces. Claimant testified that the frequency of the physical therapy appointments also made it difficult to schedule any sales calls.

12. Claimant contacted his supervisor, Jordan Richmond, and inquired if Employer could make any changes to his pay structure in light of his physical inability to go on his own sales calls. Employer ultimately did not make any changes to Claimant's pay structure.

13. Claimant did not earn any wages after January 1, 2025. Between December 2024 and early February 2025, Claimant went on approximately eight to nine sales calls with his team as team lead. Claimant was unable to assist with any physical inspections. These sales calls did not result in any completed sales.

14. Jordan Richmond credibly testified at hearing on behalf of Respondents. Mr. Richmond is the district manager for Employer. Mr. Richmond testified that approximately twenty to twenty-five percent of Employer's deals close, as opposed to one in three. Mr. Richmond testified that salespeople are not required to perform whole

house inspections on sales calls, but that they are encouraged to do so, as permitted by the homeowner, as doing so may lead to bigger sales.

15. Mr. Richmond testified that Claimant was an exceptional salesperson which resulted in his placement in the management training program. Mr. Richmond testified that he was aware of Claimant's injuries and physical limitations and that he did not want to put Claimant in any uncomfortable situation on sales calls where Claimant was not physically capable of performing the work. Mr. Richmond testified that he was aware Claimant could not physically able to do certain things while on a sales call.

16. Woodrow Hill, NP testified by post-hearing deposition on behalf of Respondents. NP Hill first examined Claimant on February 10, 2025. NP Hill testified that Claimant sustained injuries to his left ankle, back, and neck as a result of the August 28, 2024 work injury. NP Hill removed Claimant from all work as of February 10, 2025.

17. Per the 1099 form in Respondents' Exhibit B and Claimant's Exhibit 2, Claimant earned $57,286.71 in 2024. This includes the management training earnings after the date of injury. Some commissions were paid after the date of injury but were the result of sales calls made prior to the date of injury.

18. According to Respondents' Exhibit C 2024 Excel Spreadsheet, Claimant earned $100,097.40 between November 17, 2023 through December 13, 2024. Mr. Richmond testified that the spreadsheet contains duplicate entries. Claimant's Exhibit 6 Summary Earning Sheet shows total earnings of $94,602.20 between November 17, 2023 through August 23, 2024. Claimant's Summary Earning Sheet also appears to contain duplicate entries. Claimant acknowledged at hearing he did not make $100,000 in 2024.

Ultimate Findings

19. Claimant proved it is more likely than not the industrial injury caused a disability and such disability resulted in an actual wage loss. Claimant met his burden to prove he is entitled to TTD from August 28, 2024 through September 30, 2024 and January 2, 2025, ongoing; and to TPD from October 1, 2024 through January 1, 2025.

20. Claimant's 1099 form is the most accurate evidence regarding Claimant's earnings. After the date of injury, Claimant earned $20 per hour/three hours per week for management training, equating to $480.00 dollars over the eight-week training period. Thus, Claimant's total pre-injury wages in 2024 (from January 1, 2024 to August 27, 2024, a period of 240 days) were $56,806.71 ($57,286.71 - $480.00 = $56,806.71). Accordingly, the ALJ finds that the most fair and accurate approximation of Claimant's wage loss and diminished earning capacity is an AWW of $1,656.86 ($56,806.71 / 240 days = $236.69. $36.69 x 7 = $1,656.86).

CONCLUSIONS OF LAW

Generally

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

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

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

Temporary Disability Benefits

A claimant's entitlement to temporary disability benefits is dependent on proof that the claimant has suffered a "disability" as a result of an industrial injury, and that the "disability" has caused an actual wage loss. Section 8-42-103(1) C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to

resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). Where the wage loss is total, the claimant is entitled to temporary total disability benefits, and where the wage loss is less than total, the claimant is entitled to temporary partial disability benefits. *University Park Holiday Inn v. Brien*, 868 P.2d 1164 (Colo. App. 1994).

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.; s*ee Chavez v. Costco Wholesale, Inc.*, WC 5-096-055-003 (ICAO, Feb. 4, 2022) (noting that, where TTD benefits had not commenced, they could not be terminated based on the ATP's MMI determination).

As found, Claimant proved by a preponderance of the evidence he is entitled to TTD from August 28, 2024 through September 30, 2024 and January 2, 2025, ongoing; and TPD from October 1, 2024 through January 1, 2025.

Claimant's regular job duties involve traveling to a homeowner's property and conducting inspections of the home, requiring walking, climbing ladders and going on roofs, and in attics and crawl spaces. As a result of the industrial injury, Claimant has been physically unable to perform such duties on sales calls. This disability resulted in Claimant leaving work and not earning any wages from August 28, 2024 through September 30, 2024, entitling him to TTD for such period.

Claimant returned to work for Employer in a modified capacity in the management training program, earning less than his AWW from October 1, 2024 through January 1, 2025. As a result of the disability, Claimant remained unable during this time period to go on any sales calls and thus was unable to earn any commission. Accordingly, Claimant is entitled to TPD benefits from October 1, 2024 through January 1, 2025.

Claimant subsequently continued to work as a team lead with his pay based solely on commission. As a result of the disability, Claimant remained unable to conduct his own sales calls and was only able to oversee team sales calls. Prior to the work injury Claimant went on an average of 12 sales calls a week. Between December 2024 and the beginning of February 2025, Claimant was only able to go on eight to nine team sales calls because of his disability. Claimant's team made no sales from December 2024 to early February 2025. Claimant subsequently has been removed from all work by NP Hill, as of February 10, 2025. Claimant has not earned any wages since January 2, 2025 as a result of the disability caused by his August 28, 2024 work injury. Claimant is therefore entitled to TTD from January 2, 2025, ongoing, until terminated by operation of law.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see, e.g. Tatman v. Morgan County*, WC 5-090-379 (ICAO, Sept. 8, 2022) (because the claimant's lodging for ambulance job had no economic value, it was not added to her AWW); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

Claimant acknowledged he did not make around $100,000 in 2024. Both Employer's spreadsheet and Claimant's summary of earnings contain duplicate entries. Moreover, there was insufficient testimony or other evidence adequately explaining the content of the documents or otherwise demonstrating such records are accurate representations of Claimant's earnings. Accordingly, as found, Claimant's 1099 form is the most accurate evidence regarding Claimant's earnings. Based on such evidence, the most fair and accurate approximation of Claimant's wage loss and diminished earning capacity is an AWW of $1,656.86, with a corresponding TTD rate of $1,104.57.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $1,656.86, with a TTD rate of $1,104.57.

2. Respondents shall pay Claimant TTD from August 28, 2024 through September 30, 2024, and January 2, 2025, ongoing until terminated by operation of law.

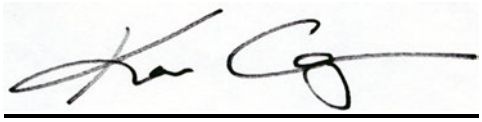
3. Respondents shall pay Claimant TPD from October 1, 2024 through January 1, 2025.

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

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 21, 2025



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-176-341

PROCEDURAL HISTORY

At the commencement of the hearing, Claimant initially identified the following issues for hearing, as endorsed on Claimant's Application for Hearing: reasonably necessary medical benefits, temporary total disability ("TTD") benefits, overcoming the Division Independent Medical Examination ("DIME"), permanent partial disability ("PPD") whole person conversion, and average weekly wage ("AWW"). Later in the hearing Claimant withdrew the issue of overcoming the DIME and reserved the issue of medical benefits. Claimant proceeded on the issues of AWW and conversion to whole person impairment.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that his scheduled permanent impairment rating should be converted to a whole person impairment rating.

II. Determination of Claimant's AWW and any effect it may have on TTD benefits previously paid.

III. Whether Respondents are entitled to an offset against prior benefits paid and determination of overpayment based upon Claimant's receipt of unemployment insurance ("UI") benefits, as well as an overpayment relating to any adjustment of AWW.

FINDINGS OF FACT

1. Claimant is a 60-year-old right hand dominant male. Claimant worked for Employer as a roofer.

2. Claimant sustained an admitted industrial injury to his left shoulder and biceps on June 16, 2021 when attempting to lift a large roll of roofing material.

3. On June 24, 2021, Claimant presented to Patrick Antonio, D.O. at authorized treating physician ("ATP") Concentra. Claimant reported feeling pain and a pop in his left shoulder and elbow. Claimant had bruising in his biceps with limitations in movement in his left elbow and shoulder secondary to pain. Dr. Antonio assessed Claimant with a tear of the left biceps muscle and a left shoulder strain. He referred Claimant for MRIs of the left shoulder and left elbow and an evaluation by an orthopedic specialist.

4. Claimant underwent a left shoulder MRI on June 25, 2021 that revealed full-thickness tears of the supraspinatus, subscapularis, and long head biceps tendons;

moderate infraspinatus tendinosis; moderate acromioclavicular osteoarthritis; and moderate glenohumeral joint effusion.

5. On June 28, 2021, Claimant presented to orthopedic surgeon Craig Davis, M.D. Dr. Davis noted Claimant reported pain primarily around the left shoulder when he tried to lift his arm. Dr. Davis noted that there was not much external tenderness around the shoulder but a little tenderness in the trapezius area. His impression was a large rotator cuff tear and proximal biceps rupture of the left shoulder.

6. Dr. Davis recommended that Claimant undergo left shoulder surgery, which he performed on July 21, 2021. Claimant underwent a left shoulder arthroscopy with extensive labral debridement and debridement of the biceps stump along with a partial synovectomy, manipulation under anesthesia, and arthroscopic repairs of the supraspinatus, infraspinatus, and subscapularis tendons.

7. Claimant attended physical therapy post-operatively, reporting left shoulder and elbow pain and restricted shoulder range of motion, along with some swelling in his left hand and fingers.

8. As of August 30, 2021, Dr. Davis noted reported improvement in Claimant's left shoulder, but continued stiffness in the left elbow and left hand, along with diminished sensation. He referred Claimant for occupational therapy.

9. Physical therapy records dated September 23 and September 28, 2021 note some reported soreness in the left deltoid, as well as soreness over the pectoral muscle and posterior rotator cuff.

10. On September 29, 2021, Dr. Davis noted that Claimant was progressing well regarding his shoulder, but that his hand problems were worsening with numbness, swelling and reduced finger range of motion. Dr. Davis remarked that Claimant's left hand had the clinical appearance of complex regional pain syndrome ("CRPS") with fairly significant carpal tunnel syndrome. Dr. Davis administered a carpal tunnel injection and referred Claimant for an EMG and to Haley Burke, M.D. for evaluation of CRPS.

11. Claimant saw Lisa Grimaldi, PA-C at Concentra on October 5, 2021, who noted on examination tenderness in the left trapezius muscle and shoulder. There was full shoulder range of motion with pain. Assessment now included, *inter alia,* acute cervical myofascial strain and acute thoracic myofascial strain. PA-C Grimaldi referred Claimant for acupuncture, chiropractic treatment and massage therapy.

12. Claimant first presented to Dr. Burke on October 7, 2021. Claimant reported diffuse pain in the left shoulder, elbow and hand, as well as numbness and swelling of the left hand. Dr. Burke recommended a stellate ganglion block to treat what she believed were CRPS type 1 symptoms.

13. October 8 and October 22, 2021 physical therapy records note reported increased soreness and pain in the left shoulder and mid-deltoid region.

14. David L. Reinhard, M.D. performed an EMG of Claimant's left upper extremity on October 11, 2021, which was positive for mild left carpal tunnel syndrome.

15. On October 12, 2021, Claimant reported to Don Aspegren, DC achiness in the neck and left shoulder region.

16. On October 15, 2021, Claimant reported improvement in his shoulder though continued numbness and decreased strength in the forearm. On examination, Dr. Antonio noted reported tenderness in the left trapezius, and anterior, lateral, superior and posterior left shoulder with full range of motion.

17. Massage therapy records dated October 16, October 22, November 5 and November 12, 2021 document reported pain in the left neck, shoulder, arm, fingers and back.

18. Dr. Burke administered two rounds of left stellate ganglion blocks on November 16, 2021 and December 7, 2021.

19. On December 17, 2021, Claimant saw Dana Chretien, PA at Concentra, with complaints of constant stabbing pain in anterior left shoulder, constant left elbow pain, and numbness, tingling and weakness of the left hand and fingers. On examination, PA Chretien noted tenderness of the left trapezius and left shoulder with painful but full range of motion.

20. On December 27, 2021, Claimant reported to Dr. Burke experiencing full relief of his left arm pain for one week after the block before the return of his pain, worse from his bicep to his fingers. Dr. Burke recommended another EMG before proceeding with another block.

21. On January 14, 2022, Claimant saw Brittany Lain, NP at Concentra. Claimant reported 7-8/10 pain located in the left lateral shoulder radiating down to the biceps and fingers. Claimant reported that the pain was exacerbated by the use of his left arm and attempting range of motion above shoulder height. On examination NP Lain noted reduced left shoulder range of motion and significant hypertonicity along the biceps and anterior shoulder.

22. Claimant saw Rosalie Bondi, D.O. for acupuncture treatment. On January 27, 2022, Dr. Bondi noted reported discomfort along cervical paraspinals, with most of the pain along the upper trapezius and upper/middle thoracic region, left more so than right. Claimant also reported discomfort on the left shoulder joint, especially along the subacromial and AC joint.

23. On February 7, 2022, Dr. Burke noted that the EMG did not suggest cervical radiculopathy. Claimant endorsed pain affecting the entirety of his left upper extremity and minimal pain affecting the trapezius muscles of his left upper extremity. He denied having substantial neck pain.

24. On February 14, 2022, Claimant reported to Dr. Bondi experiencing improvement of his left shoulder pain and range of motion and less cervical and thoracic paraspinal pain and muscle spasms.

25. On February 15, 2022, Dr. Davis noted Claimant's shoulder was doing "quite well with minimal pain and good strength in the rotator cuff" with good and functional range of motion. R. Ex. J, pp. 387-389. He noted Claimant had degenerative arthritis of the left elbow which he remarked was unrelated to the work injury.

26. Claimant underwent an MRI of the left hand on March 19, 2022, revealing chronic-appearing volar subluxation and partial thickness tearing of the extensor carpi ulnaris tendon, and osteoarthritis.

27. On March 30, 2022, Dr. Bondi noted minimal to mild cervical and thoracic paraspinal pain with overall less hypertonia, as well as less hypertonia and trigger points bilaterally in the upper trapezius region. Mild left subacromial and AC joint pain remained.

28. On April 14, 2022, Claimant reported to Dr. Burke pain worse in the left anterior shoulder with concerns of a new tear in the anterior shoulder. Dr. Burke noted that previous attention was paid mostly to Claimant's mid-distal upper extremity but Claimant clarified at this appointment his chief concern "by far" was his anterior shoulder. Dr. Burke referred Claimant for an updated shoulder MRI. Id. at, pp. 430-433.

29. On April 19, 2022, Claimant reported to Dr. Davis experiencing achy pain over his lateral shoulder worse with overhead reaching. Dr. Davis noted Claimant had improved overall with now a little diffuse pain in the arm. Dr. Davis administered a shoulder injection.

30. On April 26, 2022, Claimant presented to physiatrist Samuel Chan, M.D. at Concentra. Claimant complained of pain encompassing his left upper extremity. On examination, Dr. Chan noted that cervical spine range of motion was within functional limits with no tenderness with extension or rotation of the cervical spine bilaterally. Active range of motions of the left shoulder were somewhat limited.

31. Claimant underwent an updated left shoulder MRI on May 7, 2022, that revealed non-visualization of the biceps tendon, and a full thickness defect at the supraspinatus and infraspinatus tendon junctions, among other findings including confirmation of post-surgical repairs.

32. On May 27, 2022, Claimant presented to George Schakaraschwili, M.D. for evaluation of CRPS. Claimant described pain in his left upper extremity from his fingertips to the shoulder. Dr. Schakaraschwili noted functional shoulder range of motion.

33. On June 7, 2022, Dr. Davis reviewed Claimant's MRI films and reports. Claimant continued to complain of aching pain around the left shoulder. Dr. Davis noted that the repeat shoulder MRI demonstrated a small partial retear with longitudinal separation

between the fibers of the infraspinatus and supraspinatus, which he remarked was likely of limited mechanical significance. Dr. Davis opined that further surgery was not likely to be helpful.

34. On July 27, 2022, Claimant saw physiatrist Yusuke Wakeshima, M.D. Claimant reported pain in his left neck, left upper back, and left shoulder down to his elbow. On examination, Dr. Wakeshima noted tenderness of the left cervical paraspinal musculature, left upper trapezius and left levator scapulae. There was pain with flexion and extension and right lateral cervical bend with pain reported to left neck and upper back region. Dr. Wakeshima further noted tenderness in the shoulder and left biceps.

35. On July 28, 2022, Dr. Schakaraschwili performed a testing battery for evaluation of CRPS. He concluded there was a low probability for the presence of CRPS, noting Claimant tested negative in three of four lab tests for CRPS and his clinical findings were not strongly suggestive of the disorder.

36. On August 2, 2022, Autumn Schwed, D.O. at Concentra noted Claimant was likely at maximum medical improvement "(MMI") and referred Claimant back to Dr. Chan for an impairment rating.

37. On August 5, 2022, Claimant reported to Dr. Wakeshima having pain about the left shoulder, left arm, left hand and difficulty flexing certain digits of the left hand. On exam, Dr. Wakeshima noted tenderness of the cervical paraspinal musculature, left upper trapezius, left levator scapula, left shoulder and left biceps.

38. Claimant returned to Dr. Chan on August 16, 2022. Dr. Chan remarked that Claimant had non-focal subjective pain complaints diffusively without any objective findings. He agreed Claimant was at MMI and assigned 10% scheduled impairment rating of the left upper extremity for deficits in shoulder range of motion. Dr. Chan recommended permanent restrictions of no lifting of more than 10 lbs. with his left upper extremity, and no overhead activity with the left upper extremity.

39. On August 25, 2022, Claimant saw Dr. Burke, reporting 8/10 pain affecting the entirety of his left upper extremity. Examination revealed near full range of motion of the left shoulder, with tenderness to palpation overlying the left shoulder. Dr. Burke noted there was no notable pain overlying the trapezius, posterior shoulder or acromioclavicular joint and made no mention of any neck complaints or findings. Dr. Burke administered a suprascapular nerve block.

40. Dr. Schwed confirmed MMI as of August 30, 2022. She also assigned permanent restrictions of no lifting of more than 10 lbs. with the left upper extremity, no overhead activity with the left upper extremity, and no climbing.

41. Respondents filed a Final Admission of Liability ("FAL") admitting to a 10% scheduled impairment rating. Claimant timely objected to the FAL and requested a DIME.

42. Matthew Broadie, M.D. performed the initial DIME on February 22, 2023. In addition to left upper extremity complaints, Claimant reported stiffness on left side of his neck with movement without radiation. On examination, Dr. Broadie noted obvious atrophy of the left forearm. He did not document atrophy of the left shoulder. Light touch of the left trapezius evoked significant pain response and withdrawal. Dr. Broadie noted Claimant displayed pain during certain maneuvers on examination, but did not display such pain mannerisms with spontaneous motion of the left upper extremity when observed during the interview component of the exam. Dr. Broadie's clinical diagnoses included, in part, regional pain of the cervical spine and left upper shoulder/trapezius region of unclear etiology. He concluded Claimant was not at MMI. He noted that there was insufficient medical evidence of a cervical spine disorder or injury, but there could be a potential inter-relationship between Claimant's left upper extremity symptoms and findings and a potential cervical spine disorder. Accordingly, he recommended Claimant undergo a repeat EMG, repeat forearm MRI, a cervical spine MRI, a psychological evaluation, and repeat stellate ganglion block.

43. Claimant returned to Dr. Chan on March 28, 2023. On exam, Dr. Chan noted cervical spine range of motion was within functional limits. There was tenderness in the left AC joint and subacromial space as well as diffuse tenderness to palpation of left trapezius, levator scapulae, deltoid and biceps. Dr. Chan remarked that Claimant had diffuse and non-focal pain of the left upper extremity of unclear etiology without any significant objective findings. He opined that Claimant remained at MMI with no other diagnostic or therapeutic intervention necessary other than resuming anti-inflammatory medications as needed.

44. On August 29, 2023, Claimant saw Autumn Armstrong, D.O. at Concentra with complaints of constant left shoulder pain worsened with movement of the shoulder. Dr. Armstrong noted Claimant had subjective complaints without objective findings. At a follow-up evaluation with Dr. Armstrong on September 27, 2023, Claimant reported generalized, diffuse tenderness to the left upper extremity, including the posterior shoulder with limited range of motion and reproducible pain with range of motion of the left upper extremity. Dr. Armstrong ordered additional tests.

45. John Aschberger, M.D. performed an EMG of Claimant's left upper extremity on October 5, 2023 that revealed no abnormalities.

46. Claimant underwent a cervical spine MRI on October 7, 2023 that demonstrated moderate degenerative changes including moderate C6-7 and mild C7-T1 central canal stenosis and severe left and moderate right C6-7 neural foraminal narrowing.

47. Claimant subsequently underwent a psychological assessment, as well as MRIs of the left elbow and left wrist.

48. On October 24, 2023, Claimant returned to Dr. Chan reporting diffuse and non-focal pain over the entire left upper extremity from the shoulder down. On exam, Dr. Chan noted cervical range of motion was within functional limits, subjective tenderness to palpation over the cervical spine area bilaterally, and guarded movement of the left shoulder with significant active limitation of left shoulder range of motion. Dr. Chan

again remarked that there were subjective pain complaints without significant objective findings. He wrote,

> Of concern is the fact that the patient has rather incongruent examination findings when he is being observed and when he is not observed. Examination findings are not completely credible. The concern would be if the patient's findings are consistent with an underlying dysautonomia that might account for the patient's ongoing pain symptoms.

R. Ex. I, pp. 294-296.

49. On October 26, 2023, Dr. Antonio noted generalized, diffuse tenderness to the left upper extremity, including posterior shoulder with limited range of motion. The assessment on this visit included acute cervical myofascial strain.

50. Dr. Burke administered another stellate ganglion block on December 12, 2023. On January 3, 2024, Claimant reported to Dr. Burke experiencing no benefit from the block. He reported pain worse in his shoulder and anterior biceps and medial proximal arm. Dr. Burke noted that Claimant's cervical findings at C6-7 could predispose him to a cervical radiculopathy. She recommended cervical epidural injections.

51. On January 5, 2024, Kathy McCranie, M.D. reviewed the request for authorization for cervical epidural injection and recommended denial of the injections. She noted that the EMGs performed showed no evidence for radiculopathy, clinical exams for the cervical spine had been normal with no findings consistent with radiculopathy, and she pointed to initial findings in the claim in which Claimant had entirely normal cervical examinations. Dr. McCranie opined that Claimant's MRI findings were entirely degenerative and that any treatment to the neck was not reasonably causally related to the work injury.

52. Dr. Brodie performed a follow-up DIME on April 17, 2024. Claimant reported persistent pain in the left upper left upper extremity in the regions of the shoulder joint, upper arm biceps, elbow, forearm, wrist, hand and digits. Claimant further reported difficulty with reaching forward secondary to left shoulder and left biceps discomfort. Dr. Brodie placed Claimant at MMI as of August 30, 2022 and assigned a 17% left upper extremity impairment for shoulder range of motion deficits (10% whole person). Dr. Brodie opined that there was insufficient medical evidence of a cervical spine injury. He noted that diagnostic tests of the cervical spine, left elbow, left wrist and hand appeared to primarily document pre-existing, chronic degenerative conditions and that such conditions were not causally related to the work injury. Dr. Broadie recommended permanent restrictions of avoiding repetitive shoulder motion, avoiding lifting greater than 10 pounds with the left upper extremity, and infrequent reaching or lifting above chest level. He noted that the work restrictions applied to the left shoulder, relative to the rotator cuff and biceps tendon surgical repair.

53. Respondents' payment ledger reflects Claimant was paid TTD for periods beginning July 21, 2021 through September 16, 2022. Dr. Schwed's placement of Claimant at MMI on August 30, 2022 resulted in the termination of TTD payments.

Respondents then reinstated TTD payments after Dr. Brodie rescinded MMI in February 2023. Respondents issued a payment of $22,868.47 to Claimant on March 27, 2023 for TTD payments backdated from the date of the last cessation of payments through that time. Claimant then received continuous TTD for periods through May 3, 2024, after Dr. Brodie found Claimant to be at MMI. Claimant was therefore paid TTD benefits for the consecutive periods of July 21, 2021 through May 3, 2024.

54. Respondents filed a FAL on May 1, 2024, admitting for Dr. Brodie's 17% scheduled impairment rating and claiming an overpayment of $65,876.79 of TTD paid to Claimant due to Dr. Brodie's backdating of MMI to August 30, 2022.

55. On September 17, 2024, Brian Mathwich, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Claimant reported pain in the entire left shoulder, arm and hand, with the most severe pain in the posterior left shoulder, specifically in the trapezius area. On exam, Dr. Mathwich noted deep palpation of the left trapezius caused significant discomfort and Claimant reported diffuse pain throughout the posterior, lateral and anterior shoulder. Dr. Mathwich noted that there was no atrophy of the shoulder girdle muscles which would indicate chronic disuse of the left shoulder. He further noted that Claimant's current subjective complaints of shoulder pain were out of proportion with what would be expected three years after injury, but not inconsistent with the injury and subsequent surgery. Dr. Mathwich's work-related diagnosis was a left shoulder injury to include tears of supraspinatus, infraspinatus and long head of the biceps. He opined that Claimant's cervical, left elbow, left wrist, and left arm nerve conditions were unrelated. He agreed with Dr. Broadie that Claimant reached MMI on August 30, 2022 with 17% scheduled impairment of the left upper extremity. Dr. Mathwich opined that Claimant's current subjective complaints of cervical pain are not related to the shoulder injury or surgical repair, but instead are the expected outcome of Claimant's significant pre-existing cervical degenerative disease. Dr. Mathwich recommended permanent restrictions of no frequent or repetitive extended reach or work above shoulder height and no lifting with left upper extremity of greater than 10 pounds.

56. Claimant underwent a repeat left shoulder MRI on September 24, 2024. Dr. Mathwich reviewed the September 24, 2024 MRI, as well as additional records, and issued an addendum to his IME report on October 16, 2024. Dr. Mathwich noted that the September 24, 2024 MRI showed minor changes from the May 2022 MRI, but that such changes occurred after the August 30, 2022 MMI date and thus had no effect on the MMI date. Dr. Mathwich maintained the opinions he expressed in his initial IME report.

57. Claimant testified at hearing. Claimant testified he felt pain in his left shoulder and a little bit into his neck and the top of shoulder area and left upper extremity when the work injury occurred. Claimant testified he continues to have neck and shoulder pain. He testified that, since the work injury, he has needed help getting dressed, but no assistance bathing. Claimant testified he can only wash his hair and drive with his right arm. He testified he cannot lift a gallon of milk with his left arm. Claimant testified he cannot lift heavy objects and can only lift approximately three pounds to waist level. Claimant testified he can no longer ascend ladders nor lift his arm above shoulder-level.

Claimant testified he does not perform any overhead movements due to his left shoulder. Claimant testified he can no longer perform any of his regular work duties due to his left arm. Claimant testified he has difficulty moving anything with his left arm, as well as difficulty moving some of the fingers on his left hand.

58. Claimant further testified that, prior to the work injury, he did not have any neck pain, issue with his hands, injuries to his left upper extremity. Claimant testified he was able to perform overhead duties prior to the work injury and now he cannot lift his left arm at all.

59. Dr. Mathwich testified at hearing on behalf of Respondents as Level II accredited an expert in family medicine and occupational medicine. Dr Mathwich testified consistent with his IME reports. Dr. Mathwich testified Claimant did not report to him at the time of the IME any neck pain, or that he had been having any neck pain prior to his surgery. Dr. Mathwich testified Claimant did not have any atrophy in his arm and shoulder musculature apparent on his exam. He testified that this did not correlate with Claimant's report of being essentially unable to use his left arm, which would result in atrophy of the musculature. Dr. Mathwich testified Claimant's subjective complaints and reported limitations, including an alleged inability to lift no more than a cup of coffee, did not correlate to the objective findings. He further testified that Claimant's testimony regarding his functional limitations relating to below the shoulder such as ability to grip would not be related to the work injury but related to non-work related diagnoses.

60. Dr. Mathwich testified he did not recall any record of any limitations in function or range of motion in Claimant's cervical spine in the first year after the injury, and complaints which developed thereafter would be unrelated to the workers' compensation claim. He testified that Claimant's post-surgical left shoulder MRI would not explain Claimant's reported symptoms and limitations. Regarding Claimant's reports of trapezius pain, Dr. Mathwich testified that soreness in the trapezius can manifest after a shoulder injury, but any delayed onset would not likely be related to the work injury.

61. Dr. Mathwich further testified that Claimant's shoulder injury did not lead to any symptoms past the shoulder joint. He testified that Claimant did not lose any function, motion, strength, or sensation to any part of his body past the shoulder joint and into the trunk of the body. He testified that Claimant requires no permanent restrictions other than those affecting the left arm.

62. Claimant's admitted AWW is $1,160.00. Respondents have paid Claimant's TTD benefits at the corresponding TTD rate of $773.33.

63. Claimant earns $29 per hour plus time-and-half for overtime. Employer pay records for pay periods ending June 20, 2020 – June 12, 2021 demonstrate Claimant was paid on a weekly basis, the number of hours Claimant worked each week varied, and his Claimant's weekly gross earnings ranged from $1,392.00 to $471.25. The ALJ totaled Claimant's earnings during different periods to analyze any significant differences and determine the AWW. For reference, Claimant earned the following earnings during the following periods:

Pay Period Endings	Total Gross Earnings
6/20/2020 - 6/12/2021	$53,153.87
1/16/2021 - 6/12/2021	$24,240.88
3/13/2021- 6/12/2021	$15,617.00
5/15/2021- 6/12/2021	$5,905.62

64. It is undisputed Claimant received Employer-paid health insurance through his employment, which was cancelled as of November 1, 2022. The monthly health insurance premium amount was $720.82.

65. Claimant testified that he received UI benefits for a period of time. Claimant received net UI benefits for the week-end dates of November 26, 2022 through April 1, 2023, in the total amount of $9,124 when his individual listed payments, as noted in submitted records, are itemized.

Ultimate Findings

66. The ALJ finds the testimony of Dr. Mathwich, as supported by the medical records and the opinions of Claimant's ATPs and the opinions of Dr. Broadie and Dr. McCranie, more credible and persuasive than Claimant's testimony.

67. Claimant failed to prove by a preponderance of the evidence he sustained functional impairment beyond the arm at the shoulder and thus failed to prove he is entitled to conversion of his scheduled impairment to whole person impairment.

68. The ALJ finds that an AWW of $1,160.00, to which Respondents have repeatedly admitted and paid benefits pursuant to, remains a fair approximation of Claimant's wage loss and diminished earning capacity. Thus, between the date of injury and October 31, 2022, Claimant's AWW is $1,160.00. Upon cancellation of his health insurance on November 1, 2022, Claimant's AWW's should include the cost of the health insurance. The associated weekly cost of the insurance is $166.34. ($720.82 x 12 months / 52 weeks). Therefore, Claimant's AWW from November 1, 2022 forward is $1,326.34 ($1,160+ $166.34).

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).

Conversion

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. When an injury results in a permanent medical impairment not on the schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S. The schedule includes the loss of the "arm at the shoulder." but the "shoulder" is not listed on the schedule of impairments. *See* §8-42-107(2)(a), C.R.S.

The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. 4-573-459 (ICAO, Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. 4-868-996-01 (ICAO, Feb. 1, 2016). Under the functional impairment test, neither the situs of the injury nor the anatomical distinctions found in the AMA Guides controls the issue. Rather, the ALJ must consider all relevant evidence and determine what parts of the body have been functionally impaired. Even if the claimant proves tissue damage and pain in structures beyond the schedule, the ALJ may still find a scheduled injury. *See Barry v. Dep't of Human Services*, W.C. 5-150-172 (ICAO, Feb. 13, 2023); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996); *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996).

In the case of a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Goreck v. Smyrna Ready Mix Concrete*, W.C. No. 5-243-574 (ICAO, Mar. 13, 2025); *Langton v. Rocky Mountain Health Care Corp*., *supra*; *Strauch v. PSL Swedish Healthcare System*, *supra*,

Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson–Wood*, WC 4-536-198 (ICAO, June 20, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, W.C. 4-657-285 (Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant argues that he is entitled to a whole person impairment rating based on symptoms affecting his cervical spine, grip strength, fine motor control and functional limitations affecting his activities of daily living and employment. As found, the totality of the credible and persuasive evidence fails to demonstrate it is more likely than not Claimant sustained functional impairment beyond the arm at the shoulder.

While the record documents reported pain and limitations regarding Claimant's neck, elbow, wrist and hand, DIME physician Dr. Broadie ultimately concluded that Claimant did not sustain any causally related work injuries to his cervical spine, left elbow, left wrist and hand. Dr. Broadie's opinion is consistent with the opinions of Claimant's ATPs Chan and Schwed, as well as the opinions of Drs. Mathwich and McCranie. Importantly, at hearing, Claimant withdrew the issue of overcoming the DIME. To the extent Claimant relies on symptoms and limitations involving the neck, elbow, wrist and hand as a basis for converting his upper extremity impairment rating, there is insufficient credible and persuasive evidence establishing such symptoms and limitations are the result of his work-related shoulder injury.

Dr. Mathwich credibly testified that Claimant's work-related shoulder injury and resulting functional limitations and restrictions do not extend beyond the arm at the shoulder joint. While the ALJ may consider lay evidence on the issue of conversion, Claimant's reports and testimony regarding the extent of his symptoms and lack of function are questionable. ATPs Chan and Armstrong noted that Claimant had

subjective diffuse pain complaints without objective findings. Dr. Chan specifically remarked that Claimant's exam findings were incongruent and not completely credible, noting a difference in Claimant's presentation when Claimant was aware he was being observed versus when he was not aware of being observed. DIME physician Dr. Broadie also noted that Claimant displayed pain during maneuvers on his physical examination but was capable of spontaneous motion without display of pain mannerisms at other times during the interview component. Dr. Mathwich credibly testified that Claimant's current subjective complaints are out of proportion to what would be expected of the work injury three years later.

The credible and persuasive evidence demonstrates Claimant experiences limitations with respect to the use of his left arm, including issues lifting the arm above a certain height, carrying items, and performing certain activities of daily living. To the extent there are reports of pain in the neck, trapezius and other areas beyond the arm at the shoulder, there is insufficient credible and persuasive evidence establishing that such pain and limitations are the result of Claimant's work-related injury. Additionally, reported pain in such areas does not require a finding that the pain represents functional impairment beyond the arm at the shoulder. The preponderant evidence establishes that the situs of Claimant's functional impairment as related to the work injury does not extend beyond the arm at the shoulder. Accordingly, Claimant is not entitled to conversion of his scheduled upper extremity impairment to whole person impairment.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82.

Pursuant to Section 8-40-201 (19)(b), C.R.S., the term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan. If, after the injury, the employer continues to pay the cost of health insurance coverage or the cost of the conversion of health insurance coverage, the advantage or benefit shall not be included in the determination of the employee's wages if the employer continues to make payment.

Respondents argue that Claimant's AWW from the date of injury through October 31, 2022 should be $1,039.29, as wage records reflect a lower pre-injury AWW than the admitted AWW. Respondents contend they admitted to an AWW based on their assumption Claimant worked a 40-hour work week, despite Respondents presumably

having access to Claimant's pay records and having paid benefits consistent with such AWW over the course of multiple years. Respondents agree that Claimant's AWW for benefits to be paid after November 1, 2022 should then be increased by $166.34 due to the loss of his health insurance benefit.

The pay records demonstrate that Claimant's hours per week varied. While the pay records reflect a lower AWW when calculated over an almost year-long period prior to the work injury, calculations based on other periods of time leading up to the work injury reflect an AWW close to, or more than, the admitted AWW of $1,160.00. Based on the totality of the evidence, an AWW of $1,160.00 is a fair approximation of Claimant's wage loss and diminished earning capacity prior to the termination of his health insurance.

As of November 1, 2022, Employer terminated Claimant's health insurance and ceased paying the cost of Claimant's health insurance coverage. Accordingly, Claimant's AWW from November 1, 2022 forward is $1,326.34.

Offsets and Overpayments

Respondents argue they are entitled to an offset for Claimant's receipt of UI benefits during a period of entitlement to TTD, separate from the $65,876 overpayment resulting from the backdating of MMI and already claimed in the May 1, 2024 FAL.

Claimant contends Respondents are not entitled to an offset for UI benefits because Claimant did not actually receive payment of such benefits concurrently with the payment of the TTD benefits. Claimant cites no authority, nor is the ALJ aware of any authority, in support this argument.

Section 8-43-103(1)(f), C.R.S., provides, in pertinent part:

> In cases where it is determined that unemployment insurance benefits are payable to an employee, compensation for temporary disability shall be reduced, but not below zero, by the amount of unemployment insurance benefits received, unless the unemployment insurance amount has already been reduced by the temporary disability benefit amount and except that the temporary total disability shall not be reduced by unemployment insurance benefits received pursuant to section 8-73-112.

The ALJ is not persuaded by Claimant's argument that no offset applies because Claimant did not receive actual payment of the UI benefits at the same time as he received actual payment of the TTD benefits. The offset provision in §8-43-103(1)(f) applies to UI benefits and TTD benefits awarded for the same period of time. *See Pace Membership Warehouse v. Axelson*, 938 P.2d 504 (Colo. 1997). Nothing in the provision provides that the offset is inapplicable if the actual payment of TTD benefits awarded for the same time period was issued at a different time, as was the case here. Respondents ceased paying TTD benefits pursuant to the initial MMI finding, but upon Dr. Brodie's reversal of MMI, issued a lump sum award of prior owed TTD benefits

covering a period of time during which Claimant also received UI benefits. As noted by the court in *Pace Membership Warehouse v. Axelson*, *supra*, the purpose of §8-43-103(1)(f) is to prevent double recovery of wage loss benefits. To interpret §8-43-103(1)(f) to require receipt of the payment of TTD benefits at the same time the claimant received UI benefits, as opposed to for the same time period, is incongruent with the language and purpose of the statute.

Nonetheless, the ALJ concludes that Respondents are not entitled to an offset under § 8-43-103(1)(f) for a different reason. As noted above, the purpose of the offset provision in §8-43-103(1)(f) is to prevent the double recovery of wage loss benefits. Here, Claimant received UI benefits during a period of time in which Respondents were initially liable to pay Claimant TTD benefits based on Dr. Broadie's reversal of MMI. Dr. Broadie subsequently backdated MMI to August 30, 2022, terminating Claimant's entitlement to TTD benefits after such date, pursuant to §8-42-105(3)(a), C.R.S.

The applicable definition of "overpayment" in §8-40-201(15.5), C.R.S., in effect at the time of Claimant work injury and thus applicable here, is as follows:[1]

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

Based on the version of the statute in effect at the time of Claimant's work injury, Claimant's receipt of TTD benefits for the period after his MMI date of August 30, 2022 constitutes an overpayment. This overpayment of $65,876.79 has already been claimed by Respondents in the May 1, 2024 FAL.

Respondents now request to offset UI benefits from TTD benefits to which Claimant was not ultimately entitled and for which Respondents have claimed an overpayment. The entirety of the time period Claimant received UI benefits (the week ending November 26, 2022 through the week ending April 1, 2023) occurred after the date of MMI, when Claimant was not entitled to TTD benefits. As discussed, the purpose of the offset provision for UI benefits is to prevent a claimant's double recovery of wage loss benefits. While the statutory definition of an "overpayment" was significantly amended by HB 21-1207 effective January 1, 2022, excluding from the definition of "overpayment" TTD benefits paid after the date of MMI, the same language regarding duplicate benefits due to offsets reducing disability benefits remains in both versions. To the extent Claimant received double wage loss benefits or duplicate benefits for the

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[1] In "workers' compensation cases, the substantive rights and liabilities of the parties are determined by the statute in effect at the time of a claimant's injury, while procedural changes in the statute become effective during the pendency of a claim." *Berthold v. Industrial Claim Appeals Office*, 410 P.3d 810, 814 (Colo.App. 2017)(quoting *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 977 (Colo.App. 2004)); *see also Rosa v. Industrial Claim Appeals Office*, 885 P.2d at 334 ("[T]he general rule [is] that the rights and liabilities of the parties are determined by the statute in effect at the time of injury, except that procedural changes may be immediately applied to ongoing claims for benefits.").

applicable time period, the resulting overpayment is encompassed in its entirety in the $65,876.79 overpayment of TTD benefits resulting from the backdating of MMI. Offsetting the UI benefits against TTD benefits in these circumstances would effectively result in a double recovery of an overpayment by Respondents. Accordingly, the ALJ concludes Respondents are not entitled to an offset of the UI benefits for the applicable time period.

ORDER

It is therefore ordered that:

1. Claimant's request to convert the 17% scheduled impairment for loss of use of the left arm below the shoulder to a whole person impairment rating is denied and dismissed.

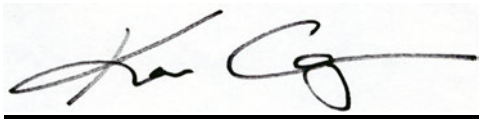
2. Claimant's AWW from the date of injury through October 31, 2022 is $1,160.00. Claimant's AWW as of November 1, 2022 is $1,326.34.

3. Respondents request for an offset of UI 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 23, 2025



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-291-313-001

ISSUES

> Compensability of the Claimant's Injury that occurred on March 21, 2024.

> Claimant's entitlement to TTD/TPD benefits.

> Medical Benefits.

> Average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant suffered an injury on March 21, 2024 to his left knee and lower back while he was working for the employer unloading a delivery truck.

2. Claimant went to the hospital because of the injury on March 23, 2024.

3. Claimant reported the injury to the Division of workers compensation as well as the Respondents. Respondent insurer issued a Notice of Contest on December 27, 2024, denying the claim.

4. Claimant underwent a course of care and treatment with his personal doctors that resulted in a surgery to the Claimant's left knee. *Exhibit 4.*

5. Claimant worked 65.23 hours in the pay period between February 26, 2024 and March 10, 2024. The Claimant was earning $14.42/hour. In addition, the Claimant was earning tips, for the same pay period the claimant earned $197.91 in tips. Taking both of those amounts the Claimant's AWW is $569.27. (($14.42 * 5.23)+197.91=$1,136.53/2=$569.27). *Exhibit 3.*

6. As a result of the injury the Claimant was unable to return to work until April 16, 2024.

7. Once the Claimant returned to work on April 16, 2024 he was restricted to twenty-five hours of work a week as a result of the injuries that he sustained.

8. The Claimant was entitled to TPD after April 16, 2024. As a result of the Claimant's reduced work hours he was only earning $410.50 a week. (($14.42*25)+ 50 in tips=$410.50).

9. The Claimant was forced to resign his employment with the employer as the result of a domestic violence incident with his brother and moved from Pueblo to Colorado Springs. The Court finds that this resignation was not the fault of the Claimant. Therefore, as of August 3, 2024 the Claimant was once again entitled to TTD benefits.

10. The Claimant returned to fulltime work on January 7, 2025.

CONCLUSIONS OF LAW

1. To establish a compensable injury, the claimant has the burden to prove by a preponderance of the credible evidence that his condition arose out of and in the course of his employment. *See* §8-41-301(1)(c), C.R.S. *Madden v. Mountain West Fabricator's*, 977 P.2d 861 (Colo. 1999)

2. The question of whether the claimant met his burden of proof is one of fact for determination by the ALJ. *See Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988)

3. 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. See *Page v. Clark*, 593 P. 2d 792 (Colo. 1979).

4. The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of an injured worker or the rights of the employer. *See* §8-43-201, C.R.S. (2010).

5. After considering all of the evidence, the ALJ concludes that the claimant has met his burden of proof. It is concluded the claimant's testimony is credible concerning his injury occurring on July 26, 2014, while at work for the employer.

6. The ALJ concludes that the claimant has established by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with the employer.

7. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. 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). As found, claimant has proven by a

preponderance of the evidence that his low back and left leg conditions are related to the work injury the claimant sustained on March 21, 2024.

8. A workers' compensation claimant is eligible for temporary total disability (TTD) benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *Anderson v. Longmont Toyota, Inc.*, 2004, 102 P.3d 323. Under these facts the Claimant suffered an injury that resulted in disability as of March 21, 2024 and continuing to April 15, 2024. In addition, the Claimant is entitled to TTD benefits from August 3, 2024 to January 7, 2025, when he returned to full duty work. The ALJ concludes that the Claimant's resignation was not "volitional conduct" which rendered him "responsible" for the loss of the employment within the meaning of §8-42-105(4).

9. An injured worker in Colorado is entitled to temporary partial disability (TPD) benefits when they experience a partial wage loss due to a work-related injury but are still able to work in some capacity. C.R.S. § 8-42-106. As found, the Claimant is entitled to TPD benefits from April 16, 2024, to August 2, 2024.

10. The ALJ must determine an employee's AWW by calculating the monetary 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 R2d 539 (Colo. App. 1995).

11. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that Claimant's AWW is properly calculated to be $569.27. The payroll records admitted into evidence are credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant has suffered a compensable injury to his low back and left knee.

2. Respondents shall be responsible for any and all reasonable and necessary medical treatment as a result of the Claimant's injury.

3. Claimant's average weekly wage is $569.27.

4. The Claimant is entitled to TTD benefits from March 22, 2024 to April 16, 2024 and from August 3, 2024 to January 7, 2025.

5. Claimant is entitled to TPD benefits from April 17, 2024 to August 2, 2024.

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

DATED: May 27, 2025

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-277-954-006

ISSUES

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

2. Determination of Claimant's authorized treating physician (ATP).

3. Determination of Claimant's average weekly wage.

4. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability benefits beginning August 28, 2023.

FINDINGS OF FACT

1. Claimant worked for Employer as an asbestos removal supervisor beginning in April 2021, under the supervision of Gilbert Lucero.

2. On April 7, 2023, Claimant sustained an injury to his left knee while moving bags of asbestos into a trailer for Employer. Claimant testified that he slipped on a piece of plastic, causing his left knee to twist and pop. Claimant testified that he reported his injury to Mr. Lucero, on the day of the injury. Although Claimant reported the injury to Mr. Lucero, Employer did not provide Claimant medical care and did not refer him to any medical provider.

3. Claimant has a prior history of left knee issues, including two prior anterior cruciate ligament (ACL) surgeries, and meniscectomy. (Ex. 2).

4. Claimant first sought medical care on his own with Alex Romero, M.D., at Meridian Neighborhood Health Center on April 12, 2023. (Ex. 2). Claimant reported to Dr. Romero that he had injured his knee while throwing bags into a trailer, and that he felt a pull and pain in the medial side of his knee. Claimant reported that he had continued to work using a knee brace. Dr. Romero noted that Claimant had a prior ACL injury, and was concerned about further damage. Thus, he ordered an MRI which was performed on April 15, 2023. The MRI demonstrated a complete tear of Claimant's ACL graft from his prior surgery, and a tear of the posterior horn of his medial meniscus. (Ex. 2).

5. On April 26, 2023, Dr. Romero recommended that Claimant consult with an arthroplasty surgeon regarding a knee replacement, and referred him to Daniel Kaplan, D.O. Claimant saw Dr. Kaplan on May 2, 2023. Based on his evaluation and review of Claimant's history, Dr. Kaplan recommended a total knee arthroplasty. (Ex. 2).

6. On August 28, 2023, Dr. Kaplan performed a left knee total arthroplasty. (Ex. 2).

7. Claimant experienced complications following the August 28, 2023 surgery, which required a second surgery on December 6, 2023. At that time, Dr. Kaplan performed a left total knee revision, hardware removal, and patellar resurfacing. (Ex. 2, p. 390).

8. Claimant experienced more complications following the December 2023 surgery, necessitating another surgery on January 25, 2024. At that time, Dr. Kaplan performed an open repair of the left knee extensor mechanism with mesh augmentation and debridement of tissue and muscle. (Ex. 2, p. 338).

9. Following the January 2024 surgery, Claimant developed an infection, leading Dr. Kaplan to recommend a two-stage revision. Dr. Kaplan performed this surgery – Claimant's fourth – on March 14, 2024, including removal of the left knee arthroplasty and placement of an antibiotic drug delivery device. (Ex. 2, p. 263).

10. On June 27, 2024, Claimant underwent a fifth surgery with Dr. Kaplan. This time to revise the knee arthroplasty again, and remove temporary implants placed during the March 14, 2024 surgery.

11. Claimant testified that he continues to experience decreased range of motion and swelling in his knee. He indicated that he cannot bend his leg, climb ladders, or lift significant weight, which has prevented him from performing his job duties.

12. Following his injury, Claimant continued to work in a light or modified duty capacity until August 27, 2023, the day before his August 28, 2023 surgery. Claimant testified, credibly, that he has not worked since the August 28, 2023 surgery, and that he has been unable to work due to his left knee injury, the five surgeries he has undergone, and the prolonged recovery.

13. Claimant testified that before his injury, Employer paid him $1,280.00 per 40-hour work week for his services. Claimant's bank records from June and July 2023 show periodic payments from Mr. Lucero. For the month of June 2023, Claimant received $5,315 in payments from Mr. Lucero, representing approximately $1,325.00 per week in wages. In July 2023, Claimant's bank records reflect payments from Mr. Lucero totaling $410.00. (Ex. 3). Claimant's tax records show Claimant received $36,450 in gross payments from Employer during 2023 (presumably for the 34-week period of January 1, 2023 through August 28, 2023). This corresponds to $1072.00 per week in wages. (Ex. 3).

14. Exhibit 4 is the Division file regarding Claimant's claim. The Division file demonstrates that Gilbert Lucero responded to correspondence from the Division on behalf of Employer. Employer provided several different addresses, including two email addresses for Mr. Lucero. The Notice of Hearing for this hearing was sent to Mr. Lucero at one of the email addresses provided to the Division.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S. (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). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO Aug. 25, 2014).

Claimant has established by a preponderance of the evidence that he sustained an injury to his left knee arising out of course and scope of his employment with Employer. Claimant credibly testified that he sustained the knee injury while moving bags of asbestos into a trailer for Employer. Claimant's testimony is consistent with his contemporaneous reports to his medical providers. Although Claimant had prior knee conditions, he sustained a new injury to his left knee which required multiple surgeries. Claimant's left knee injury is compensable.

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. Rule 8-2 (A)(2) clarifies that, "[a] copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury." The term "business days" refers to any day other than a Saturday, Sunday, or legal holiday. W.C.R.P. 1-2 (C).

An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). If upon notice of the injury the employer does not timely designate an ATP, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987), *see also* W.C.R.P. 8-2 (E) ("If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing.")

Claimant has established that Employer did not provide Claimant with a designated provider list as required by the Act. As a result, the right of selection of an ATP passed to Claimant. Once the right of selection passed to Claimant, through his actions, he selected Dr. Romero as his ATP. *See e.g., In re Claim of Murphy-Tafoya*, W.C. No. 5-153-600-001 (ICAO Sept. 1, 2021). By virtue of Dr. Romero's referral, Dr. Kaplan was also an ATP, within the chain of referrals.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate a claimant's average weekly wage (AWW) based on a claimant's monthly, weekly, daily, hourly, or other earnings. This section establishes the default method for calculating AWW. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S., establishes the so-called "discretionary exception," which affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., *supra*; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007).

Based on the evidence presented, the ALJ concludes that the most reliable evidence of Claimant's average weekly wages at the time of his injury is Claimant's tax record, which shows gross receipts from Employer of $36,450. As found, Claimant worked for Employer through August 28, 2023, and did not return after that date. Thus, Claimant's gross income for 2023 of $36,450 is for a period of 34 weeks (from January 1, 2023 to August 27, 2023), and represents an average weekly wage of $1,072.00. Claimant's average weekly wage at the time of injury was $1,072.00 per week.

Temporary Disability Benefits.

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

Claimant has established by a preponderance of the evidence that he sustained a work injury resulting in medical incapacity and impairment of wage-earning capacity. Specifically, Claimant was unable to work and experienced an actual wage loss beginning on August 28, 2023, the date of his first knee surgery. No credible evidence was admitted demonstrating that any of the events for termination of TTD under §8-42-105(3)(a)-(d), C.R.S., have occurred. Accordingly, Claimant is entitled to TTD benefits, until terminated pursuant to the Colorado Workers' Compensation Act.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his left knee on April 7, 2023.

2. Claimant's average weekly wage at the time of injury was $1,072.00 per week.

3. Claimant is entitled to temporary total disability benefits beginning August 28, 2023, until terminated pursuant to the Act.

4. Claimant's authorized treating physician for his work injury is Alex Romero, M.D. Daniel Kaplan, D.O., is an authorized treating physician based on Dr. Romero's referral.

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

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

DATED: May 27, 2025

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

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. 5-246-442-001

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that on May 27, 2023, he suffered an injury arising out of and in the course and scope of his employment with Employer?

FINDINGS OF FACT

1. Claimant worked for Employer as a tractor operator. Claimant's job duties involved loading and moving materials around a job site for other employees to use. Claimant would begin each day by moving materials to designated areas. Throughout the day, he would move material as needed for the project. In May 2023, Claimant was working for Employer at a job site at Coors Brewery in Golden, Colorado. The project involved building tanks.

2. Claimant testified that he suffered an injury at work on May 27, 2023[1], at the Coors job site. That day was the Friday before the long Memorial Day weekend. Claimant explained that at the Coors job it was necessary for him to go under the tanks to place material. Claimant further testified that while under the tanks in this way, he was lifting heavy wooden material, and slipped on some rocks and fell, striking the middle of his back on a metal beam. Claimant testified that his coworker Lupe was present when he fell and Lupe assisted him out from under the tank.

[1] The ALJ takes administrative notice that May 27, 2023 was a Saturday. Based upon the information available in the record, the ALJ is persuaded that the alleged incident Claimant described in his testimony may have occurred on Friday, May 26, 2023.

3. Claimant testified that he reported his injury to Luis Ovando, who in turn spoke with Juan Lopez with the safety department. Claimant testified that Mr. Ovando informed him that Mr. Lopez felt the issue was not serious and Claimant was instructed to return to work.

4. Claimant's co-worker, Juan Teran testified at the hearing. Mr. Teran testified that he was aware that Claimant had an issue with his back while working with him. Mr. Teran testified that he was not sure of the date, but on the day that Claimant injured his back Mr. Teran was working in the same area as Claimant. Specifically, Mr. Teran was working outside of the tanks, and Claimant was working inside the tanks. Mr. Teran further testified that he recalls Claimant coming out of the tanks with back pain. Mr. Teran testified that Claimant informed him that he injured his back while carrying heavy material.

5. Claimant also testified that when he returned to work[2] after the long weekend, he was in a great deal of pain and could not move. Claimant further testified that on that date, he was informed by Mr. Lopez that he should see a chiropractor.

6. On May 30, 2023, a witness statement form was completed by Mr. Orvando. In that document, Mr. Orvando noted that on May 30, 2024, Claimant informed Mr. Orvando that "he woke up with back pain and didn't feel good." Mr. Orvando noted in this document that he took Claimant to speak with a safety representative.

7. On May 30, 2023, Claimant was seen at Aim High Health by a chiropractic provider, Elizabeth Northway, DC. At that time, Claimant reported that on May 30, 2023 he experienced acute and severe back pain "when he was bending over to pick up some light scaffolding". During Dr. Northway's examination, Claimant reported that his pain was 9 out of 10. Dr. Northway ordered x-rays of all levels of Claimant's spine; (cervical, thoracic, and lumbar). Dr. Northway listed Claimant's diagnoses as: segmental

[2] The ALJ takes administrative notice that Tuesday, May 30, 2023, was the Tuesday following the Memorial Day holiday.

and somatic dysfunction of the cervical region; cervicalgia; segmental and somatic dysfunction of the thoracic region; muscle spasm; abnormal posture; pain in the thoracic spine, postural kyphosis (thoracic), segmental and somatic dysfunction of the lumbar region; and segmental and somatic dysfunction of the pelvic region. Dr. Northway noted that due to "suspicious x-rays" she was referring Claimant to see his primary care physician.

8. On May 31, 2023, Claimant was seen by Dr. Carlos Rodriguez at Columbine Ridge Family Medicine. At that time, Claimant reported upper thoracic back pain. Dr. Rodriguez ordered x-rays of Claimant's spine and made a referral for an orthopedic consultation and recommended an exercise program. The cause and start date of Claimant's symptoms were not noted in Dr. Rodriguez's May 31, 2023 report.

9. On June 1, 2023, Claimant was seen at Panorama Orthopedics and Spine Center by Aaron Norris, PA-C. At that time, PA Norris noted Claimant's report of one week of interscapular thoracic pain. Claimant described the pain as constant, aching, and burning. PA Norris reviewed the recent spinal x-rays and noted cervicothoracic scoliosis with a "Cobb angle measuring 28 degrees with winging left scapula and elevation". PA Norris also noted acceptable cervical lordosis and age appropriate disc height. PA Norris listed Claimant's diagnoses as: cervicothoracic scoliosis; cervicothoracic scoliosis degenerative disc disease; and mild lumbar spondylosis. PA Norris opined that surgery was not indicated and recommended physical therapy and medications. Claimant declined both treatment modalities "due to cost". PA Norris assigned work restrictions one to two weeks of no bending, lifting, or twisting over 20 pounds. The cause of Claimant's symptoms was not noted in PA Norris's report.

10. On June 8, 2023, Claimant was seen for chiropractic treatment at The Joint Chiropractic. On that date, Claimant reported to Dr. Rebecca Horton complaints of mid back stiffness, neck and upper back pain, and low back stiffness.

11. At some time thereafter, Claimant filed a Worker's Claim for Compensation with the Colorado Division of Workers' Compensation (DOWC). That document was marked as received by the DOWC on August 2, 2023.

12. Claimant continued to undergo chiropractic treatment with The Joint Chiropractic. On January 27, 2024, Claimant was seen at that practice by Dr. Phillip Oller. At that time, Dr. Oller noted that Claimant's neck and upper back pain, mid back stiffness, and low back stiffness had resolved.

13. On January 31, 2025, Claimant attended an independent medical examination (IME) with Dr. Lloyd Thurston. In connection with the IME Dr. Thurston reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his February 2, 2025 IME report, Dr. Thurston listed Claimant's diagnoses as "unexplained" and persistent mid-thoracic myofascial pain and left lower extremity "meralgia paresthetica/lateral femoral cutaneous nerve syndrome". Dr. Thurston opined that these diagnoses are not work related. Dr. Thurston also stated that Claimant's findings on examination and his subjective complaints are not related to work related lifting injury. Dr. Thurston further opined that although the chiropractic treatment Claimant received was reasonable, it was not medically necessary. Finally, Dr. Thurston noted that Claimant's condition was a maximum medical improvement (MMI) as of January 27, 2024, as that was the date of the chiropractic record that noted that Claimant's symptoms had resolved.

14. The ALJ does not find Claimant's testimony regarding the nature and onset of his symptoms to be credible or persuasive. The ALJ credits the medical records and the opinions of Dr. Thurston. The ALJ specifically credits the May 30, 2023 medical record in which Claimant described his mechanism of injury as bending over to pick up light scaffolding. Although Claimant testified that he fell at work on May 27, 2023, the ALJ is more persuaded by the contemporaneous medical record than Claimant's testimony almost two years after the alleged incident. The ALJ also specifically credit's Dr. Thurston's opinion that Claimant did not suffer a work related

lifting injury. Therefore, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that on May 27, 2023, he suffered an injury arising out of and in the course and scope of his employment with Employer.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that on May 27, 2023, he suffered an injury arising out of and in the course and scope of his employment with Employer. As found, the medical records and the opinions of Dr. Thurston are credible and persuasive.

ORDER

It is therefore ordered that Claimant's claim regarding an alleged May 27, 2023 work injury is denied and dismissed.

Dated May 29, 2025.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

ALJ's order will be final. Section 8-43-301 (2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries during the course and scope of employment on November 2, 2023.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his November 2, 2023 industrial injuries.

3. Whether Employer is subject to penalties pursuant to §8-43-408(1), C.R.S. for failing to carry Workers' Compensation insurance on November 2, 2023.

NOTICE OF PROCEEDINGS

1. Respondents failed to attend the May 27, 2025 in-person hearing in this matter. Therefore, prior to entering an order, the ALJ must consider whether Respondents had adequate notice of the proceedings.

2. Office of Administrative Courts Rules of Procedure for Workers' Compensation Hearings (OACRP) Rule 24 governs the entry of orders against non-appearing parties at hearings. Rule 24 provides, in relevant part:

> If a party fails to appear at a hearing after the OAC has sent notice of the hearing to that party, prior to entering any orders against the non-appearing party as a result of that hearing, the judge will consider:
>
> A. The addresses to which the notice of hearing was sent are the most recent addresses provided by the non-appearing party to either the OAC or the Division of Workers' Compensation; or
>
> C. A copy of a record or other written statement from the OAC or the Division of Workers' Compensation containing the most recent address provided by the non-appearing party to either of those agencies shall be sufficient to create a rebuttable presumption that the non-appearing party received notice of the hearing.

3. On April 2, 2025 the Office of Administrative Courts (OAC) sent a Notice of Hearing (NOH) to Respondents at the following address: Pristine Restaurant Equipment LLC, 4880 Ironton St. Unit D, Denver CO 80239. The Notice specified that the hearing would be conducted on May 27, 2025 at 8:30 a.m. at the OAC, 1525 Sherman Street, 4th Floor, Denver, Colorado 80203.

4. The record includes an Unopposed Motion for Extension of Time filed by Claimant's former counsel on May 24, 2024. The Motion sought an extension for a

scheduled April 9, 2024 hearing. The Motion was mailed to Daniel Perez at the address listed on the NOH in this matter: Pristine Restaurant Equipment LLC, 4880 Ironton St. Unit D, Denver CO 80239.

5. The record also includes a check from Employer payable to Claimant dated February 3, 2024. The check was from Pristine Restaurant Equipment LLC, 4880 Ironton St. Unit D, Denver CO 80239. The address on the check matches the address on the NOH in this matter.

6. Respondents did not file a Case Information Sheet (CIS) prior to the hearing in this matter. They also did not submit any Exhibits.

7. Despite the preceding notice of the May 27, 2025 hearing, Respondents failed to appear. At the outset of the hearing, the ALJ reviewed the record to determine whether Respondents had received adequate and proper notice of the 8:30 a.m. hearing. Based on a review of the file, the ALJ was satisfied Respondents had proper and adequate notice of the matter. Because the case involved Claimant's Application for Hearing, the ALJ proceeded with the hearing.

8. The preceding chronology reflects that Respondents had adequate notice of the May 27, 2025 hearing in this matter. The OAC sent a NOH to Respondents at the address on file. Moreover, previous pleadings, as well as a check stub in the file, listed the same address for Employer. The record thus demonstrates sufficient evidence to create a rebuttable presumption that Respondents received notice of the hearing. Respondents have failed to rebut the presumption. Because Respondents had adequate notice of the May 27, 2025 hearing but chose not to appear, entry of an Order in this matter is appropriate.

FINDINGS OF FACT

1. Employer is in the business of selling and repairing restaurant equipment. Claimant's job duties for Employer involved repairing refrigerators, coolers and electrical components.

2. Claimant explained that on November 1, 2023 Employer directed him to drive to a bakery on the following day to repair a mixer. Guillermina Bello worked for the bakery and testified that she had called Employer because the mixer was defective. On November 2, 2023 Claimant arrived at the bakery shortly before 7:00 a.m. He attempted to haul the mixer out of the bakery in a wheelbarrow or dolly to return to Employer's facility and make the necessary repairs.

3. As Claimant tried to load the mixer into the wheelbarrow, the mixer began to slide. The handle of the wheelbarrow struck Claimant in the chin area and caused bleeding. Ms. Bello noted that she did not directly witness the event but heard a loud sound from Claimant as he was moving the mixer. She noticed that he was unstable and bleeding from the chin area. Ms. Bello gave Claimant a towel to reduce the bleeding and

helped him into a chair. Claimant refused an ambulance but left the bakery after a few minutes and loaded the mixer onto his work vehicle.

4. Claimant returned to Employer's facility. Based on Claimant's injuries, an assistant at the office took him to an emergency room. Claimant's wife Mary Segura testified that she received a call from Claimant at around 9:00 a.m. stating that he had been injured. He was then transported to urgent care for treatment.

5. Ms. Segura explained that initial x-rays of Claimant's jaw at the urgent care facility revealed a mandibular fracture. The record reveals a CT scan of Claimant's face without contrast. Saad Naseer, M.D. commented that the imaging reflected a right mandibular fracture with significant dental disease. The CT scan specifically revealed a "[t]ransversely oriented and mildly displaced fracture through the right mandibular ramus. Obliquely oriented, mildly comminuted and mildly displaced fracture through the right mandibular symphysis which courses between the right mandibular cuspid and the right mandibular first bicuspid."

6. On November 2, 2023 Claimant was transported from urgent care to UCHealth for treatment. Although providers considered surgical repair of Claimant's jaw area, swelling prevented immediate additional treatment. He was discharged from the hospital later in the day.

7. On November 10, 2023 Claimant underwent surgical repair. Ms. Bello explained that physicians placed a platinum post in Claimant's jaw and immobilized or wired his jaw closed. A record from Ryan J. Lau, M.D. and Geoffrey R. Ferril, M.D. reveals that the surgery involved four locking screws and plates to achieve adequate reduction and fixation of Claimant's jaw fractures.

8. Ms. Segura remarked that after about four weeks providers replaced the wires in Claimant's jaw with rubber bands to further promote healing. As a result of the procedures, Claimant was unable to eat solid foods for approximately two months.

9. The record reveals that Claimant has incurred significant medical expenses because of his injuries. Initially, on the date of injury of November 2, 2023 Claimant spent $60.00 on medical supplies at Salud Medical. On the date of surgery of November 10, 2023 Claimant incurred total charges of $26,268.22 from UCHealth. He also had total costs of $3292.28 from UC Health-Anschutz Medical Campus for visits on December 15, 2023, January 5, 2024 and January 9, 2024. Claimant further has a payment due to Boulder Valley Anesthesiology in the amount of $1,400. Finally, Claimant produced an estimated bill of $681.36 from UC Health-Anschutz Outpatient Pavillion from January 2, 2025. Combining the preceding amounts yields total medical expenses of $31,701.86. All of the preceding medical treatment was reasonable, necessary and causally related to Claimant's November 2, 2023 industrial injuries. Moreover, Claimant has not reached Maximum Medical Improvement (MMI) and may require additional medical treatment. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of his work-related jaw injuries.

10. Claimant has established it is more probably true than not that he suffered compensable injuries during the course and scope of employment on November 2, 2023. Initially, Claimant visited a bakery to retrieve a mixer that required repairs. However, as Claimant tried to load the mixer into a wheelbarrow, the mixer began to slide. The handle of the wheelbarrow struck Claimant in the chin area and caused bleeding. Ms. Bello noted that she did not directly witness the event but heard a loud sound from Claimant as he was moving the mixer. She noticed that he was unstable and bleeding from the chin area.

11. The record reveals that Claimant immediately sought medical treatment from an urgent care facility where x-rays of his jaw revealed a mandibular fracture. The record reveals a CT scan of Claimant's face without contrast. Dr. Naseer commented that the imaging reflected a right mandibular fracture with significant dental disease. Based on the credible testimony of Claimant and other lay witnesses, as well as a review of the medical records, Claimant suffered injuries to the jaw area that were proximately caused by his work duties during the course and scope of his employment. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered compensable industrial injuries while working for Employer on November 2, 2023.

12. Claimant has demonstrated it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his November 2, 2023 industrial injuries. On November 10, 2023 Claimant underwent surgery for his mandibular fractures. The surgery involved four locking screws and plates to achieve adequate reduction and fixation of Claimant's jaw fractures. He also obtained follow-up care and treatment for his industrial injuries. The record reveals that Claimant incurred significant medical bills totaling $31,701.86. All of the preceding care was designed to treat his industrial injuries. Claimant has thus proven that all of his medical care was authorized, reasonable, necessary and causally related to his November 2, 2023 work accident. Respondents are thus financially responsible for Claimant's past and future reasonable, necessary and related medical treatment for his November 2, 2023 industrial injuries.

13. Employer did not have an active Workers' Compensation insurance policy with any insurer effective on or prior to Claimant's November 2, 2023 date of injury. Based on the preceding sections of the present Order, Claimant has demonstrated that he has incurred medical expenses of $31,701.86 that were reasonable, necessary and causally related to his industrial injuries. However, Claimant did not seek and has not produced evidence establishing that he is entitled to indemnity benefits. Therefore, a 25% penalty payable to the Colorado Uninsured Employer Fund for Employer's failure to carry Workers' Compensation insurance is inappropriate.

14. This Order awards medical benefits to Claimant totaling $31,701.86. Claimant may also incur additional expenses for continuing care and treatment of his November 2, 2023 industrial injuries. Employers are thus required to pay the trustee of the Division a total amount of $34,000. In the alternative, Employers 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. Employers 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 Employers calculate medical payments owed under the fee schedule.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d

999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

7. As found, Claimant has established by a preponderance of the evidence that he suffered compensable injuries during the course and scope of employment on November 2, 2023. Initially, Claimant visited a bakery to retrieve a mixer that required repairs. However, as Claimant tried to load the mixer into a wheelbarrow, the mixer began to slide. The handle of the wheelbarrow struck Claimant in the chin area and caused bleeding. Ms. Bello noted that she did not directly witness the event but heard a loud sound from Claimant as he was moving the mixer. She noticed that he was unstable and bleeding from the chin area.

8. As found, the record reveals that Claimant immediately sought medical treatment from an urgent care facility where x-rays of his jaw revealed a mandibular fracture. The record reveals a CT scan of Claimant's face without contrast. Dr. Naseer commented that the imaging reflected a right mandibular fracture with significant dental disease. Based on the credible testimony of Claimant and other lay witnesses, as well as a review of the medical records, Claimant suffered injuries to the jaw area that were proximately caused by his work duties during the course and scope of his employment. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered compensable industrial injuries while working for Employer on November 2, 2023.

Medical Benefits

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

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

10. 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).

11. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his November 2, 2023 industrial injuries. On November 10, 2023 Claimant underwent surgery for his mandibular fractures. The surgery involved four locking screws and plates to achieve adequate reduction and fixation of Claimant's jaw fractures. He also obtained follow-up care and treatment for his industrial injuries. The record reveals that Claimant incurred significant medical bills totaling $31,701.86. All of the preceding care was designed to treat his industrial injuries. Claimant has thus proven that all of his medical care was authorized, reasonable, necessary and causally related to his November 2, 2023 work accident. Respondents are thus financially responsible for Claimant's past and future reasonable, necessary and related medical treatment for his November 2, 2023 industrial injuries.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

12. Prior to July 1, 2017 §8-43-408(1), C.R.S., provided that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits payable to the claimant were to be increased by fifty percent. However, effective July 1, 2017 §8-43-408, C.R.S. was amended and the language regarding a fifty percent increase in benefits was removed. The version of §8-43-408(5), C.R.S. in effect at the time of Claimant's November 2, 2023 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.

13. The penalty for failure to insure only applies to indemnity benefits and does not encompass medical benefits. *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford*

v. Support, Inc., W.C. No. 4-155-231 (ICAO, Feb. 13, 1998). Statutory interest also is not properly considered "compensation or benefits" within the meaning of §8-43-408(5), C.R.S. Interest is a statutory right intended to secure claimants the present value of benefits to which they are entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991).

14. As found, Employer did not have an active Workers' Compensation insurance policy with any insurer effective on or prior to Claimant's November 2, 2023 date of injury. Based on the preceding sections of the present Order, Claimant has demonstrated that he has incurred medical expenses of $31,701.86 that were reasonable, necessary and causally related to his industrial injuries. However, Claimant did not seek and has not produced evidence establishing that he is entitled to indemnity benefits. Therefore, a 25% penalty payable to the Colorado Uninsured Employer Fund for Employer's failure to carry Workers' Compensation insurance is inappropriate.

Payment to Trustee or Posting of Bond

15. Under §8-43-408(2), C.R.S. an 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."

16. As found, this Order awards medical benefits to Claimant totaling $31,701.86. Claimant may also incur additional expenses for continuing care and treatment of his November 2, 2023 industrial injuries. Employers are thus required to pay the trustee of the Division a total amount of $34,000. In the alternative, Employers 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. Employers 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 Employers calculate medical payments owed under the fee schedule.

ORDER

1. Claimant suffered compensable injuries on November 2, 2023 during the course and scope of his employment.

2. Respondents are financially responsible for Claimant's past and future reasonable, necessary and related medical treatment for his November 2, 2023 industrial injuries.

3. Employer is not subject to penalties payable to the Colorado Uninsured Employer Fund based upon the failure to carry Workers' Compensation insurance.

4. In lieu of payment of the above compensation and benefits to Claimant, Employers shall:

a. Deposit the sum of $34,000 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 $34,000 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.

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

6. 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.

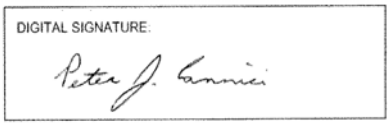
7. Pursuant to §8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injuries.

8. 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 29, 2025.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
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Denver, CO 80203