OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-252-956-003

ISSUES

- Did Claimant prove she suffered a compensable injury on July 10, 2023?

- If Claimant proved a compensable injury, did she prove treatment recommended by Concentra in October 2023, including physical therapy, is reasonably needed and causally related to the injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a Registered Behavioral Technician. The job entails working with autistic children individually or in small group settings.

2. On July 10, 2023, Claimant reported to work at 7:00 AM for a monthly staff meeting. Claimant sat on the floor during the meeting, which lasted approximately one hour. Toward the end of the meeting, Claimant felt discomfort and tingling in her lower back. The symptoms resolved when she got up and started doing other tasks.

3. At approximately 10:00 AM, Claimant started "Circle Time" with two children. Circle Time generally consists of interactive activities and prompting with things like calendars, shapes, colors, or books. The children sit in low chairs while the RBT stands and bends down to allow the child to point at items. For instance, the RBT may ask the child to "touch the ball," "touch red," "touch July," and so forth.

4. After performing Circle Time for approximately 15 minutes, Claimant bent forward and felt severe pain in her back and legs. She had difficulty walking and asked another RBT to take over Circle Time. Claimant's supervisor brought her a chair so she could sit down. Claimant could not finish her shift and requested treatment. Employer gave Claimant a list of designated providers, from which she chose Concentra.

5. Claimant was evaluated by Emily Woods, PA-C at Concentra. Claimant reported having temporary discomfort in her low back and right hip while sitting during a staff meeting that morning. Approximately two hours later, she developed severe back and right posterior hip, which she attributed to "repetitive" bending while performing Circle Time. Ms. Wood observed Claimant walked with a limp favoring the right leg. Physical examination showed tenderness and muscle spasms in the right buttocks, right SI joint, and right lower paraspinal muscles. Lower extremity sensation and strength were normal, and bilateral straight leg raise testing was negative. Lumbar and hip x-rays showed bilateral SI joint arthritis but no acute pathology. Ms. Wood diagnosed a lumbar strain, and opined the symptoms were consistent with a work-related injury. Claimant was given a right SI joint injection, a Toradol injection, and muscle relaxers, and referred to physical therapy.

6. Claimant attended a single PT session that same day. She did not keep her scheduled follow-up appointments at Concentra and sought no additional treatment for approximately three months.

7. Claimant testified she did not return to Concentra because she was dissatisfied with the quality of care, including a lengthy wait before seeing Ms. Wood. She testified that Ms. Wood seemed inexperienced and asked other medical providers for advice on what to tell Claimant. She also thought Ms. Wood appeared unsteady while performing the injection. Claimant assumed she would improve by performing home exercises as instructed by the physical therapist.

8. Claimant testified that she did not improve, but instead experienced progressively worsening back and leg pain during the next three months.

9. Claimant's allegation of continued back and leg symptoms is inconsistent with her post-injury behavior. She did not mention ongoing back problems to Employer and performed her regular job with no apparent difficulty. Claimant worked her regular schedule, which sometimes included 11-hour days, with no accommodations or limitations. Employer's HR director, [Redacted, hereinafter CC], observed Claimant during this time and noticed no outward signs of pain, discomfort, or distress.

10. As additional explanation for why she did not seek additional treatment, Claimant testified she did not want to lose time from work because she needed the money, she did not want to lose her job, and she didn't understand how the workers' compensation system worked. However, CC[Redacted] credibly testified Claimant would not have been required to take sick leave, vacation leave, or leave without pay for attending medical appointments for a work injury and that she would have been in no jeopardy of losing her employment if she pursued treatment. She further explained that Claimant received in-depth training about Employer's work injury procedures when she was hired in May 2023. CC[Redacted] testimony is corroborated by the fact that Employer immediately advocated for Claimant to return to Concentra once it learned she claimed to have ongoing issues related to the July 2023 incident.

11. Claimant suffered an unrelated ankle injury at work on September 3, 2023, while participating in a game of "Duck, Duck, Goose." Claimant tripped while running around the circle after having been tagged as the "Goose." Claimant was given a designated provider list for the ankle injury, and she elected to return to the same Concentra clinic where she went previously.

12. Claimant saw Daniel Czarniawski, PA-C, at Concentra on September 5, 2023, and was diagnosed with an ankle sprain. There is no reference to any low back issues.

13. Claimant contacted CC[Redacted] on October 2, 2023, to inquire whether her July 2023 claim was still open and whether she could return to Concentra for treatment. Prior to that time, CC[Redacted] was unaware that Claimant was alleging any

ongoing issues related to her back. Nevertheless, she contacted Insurer and received authorization for Claimant to receive additional treatment.

14. Claimant returned to Concentra on October 9, 2023. She told Mr. Czarniawski that she had difficulty picking up weight, bending, sitting, and could not walk for more than five minutes. The physical examination portion of the report is cloned from the July 10, 2023 visit, so it cannot reliably be determined if there were any significant clinical findings. Mr. Czarniawski maintained the diagnosis of lumbar strain and referred Claimant to physical therapy. He also ordered a lumbar MRI.

15. The MRI was completed on October 17, 2023. It showed a left-sided disc bulge at L4-5 slightly displacing the left L5 nerve root. The right L5 nerve root was unaffected.

16. Dr. Albert Hattem performed a record review for Respondents on October 24, 2023. Dr. Hattem noted a significant history of pre-injury hip and back issues, including, scoliosis, two surgeries for hip dysplasia, and chiropractic treatment for low back pain since 2020. Dr. Hattem opined Claimant's attribution of low back pain to "repetitive" bending was not supported by the DOWC Low Back Pain MTGs. He further noted Claimant failed to pursue follow-up care for three months, which he was inconsistent with the allegation of significant symptoms during that interval of time. Ultimately, Dr. Hattem concluded Claimant's low back symptoms are unrelated to her work.

17. Insurer filed a Notice of Contest based on Dr. Hattem's report and denied authorization for additional treatment, including the PT recommended by Concentra.

18. Claimant saw Dr. Jack Rook on February 21, 2024, for an IME at her counsel's request. Examination showed soft-tissue tenderness throughout the lumbar area, but no neurological deficits. Dr. Rook concluded that Claimant sustained an acute injury involving her low back at work. In support of this opinion, he noted Claimant descried the acute onset of low back pain while bending forward to present a teaching card during "Circle Time." Claimant denied any pre-injury history of low back pain. She was under no physical restrictions at the time of injury, and had no traumatic events outside of work around that time. Dr. Rook was unimpressed by the pre-injury chiropractic records because they frequently described Claimant's symptoms as "well controlled." Dr. Rook opined that bending forward increases intradiscal pressure, and Claimant "likely sustained an acute disc herniation at the L4-5 level" when she bent forward on July 10, 2023.

19. Dr. John Burris performed an IME for Respondents on April 16, 2024. Claimant reported 8/10 low back pain and numbness in the back of her legs. Despite those complaints, the physical examination was benign with normal active ROM, no sensory or motor deficits, and no evidence of radiculopathy with provocative maneuvers. Dr. Burris diagnosed nonspecific low back pain, which he concluded was not related to Claimant's work.

20. Dr. Burris testified at hearing for Respondents. He noted that Claimant's mechanism of injury of simply bending forward was relatively innocuous and involved no lifting or any traumatic event. Dr. Burris agreed with Dr. Hattem that the 3-month delay in returning to Concentra was inconsistent with Claimant's allegation of significant ongoing symptoms. Even if she was dissatisfied with Concentra, he would have expected her to pursue treatment elsewhere if she were having the level of ongoing issues she described. Dr. Burris opined the MRI findings did not explain Claimant's symptoms because the L4-5 disc bulged to the left, but Claimant's primary symptoms were on the right side. Additionally, Claimant's reported leg symptoms did not match the L5 dermatome. Dr. Burris further opined that the disc bulge was probably pre-existing and not caused by bending forward. He therefore disagreed with Dr. Rook's conclusion that Claimant suffered an acute disc herniation at work or that her symptoms are work-related.

21. Claimant proved she suffered a compensable injury to her low back on July 10, 2023, specifically, a minor soft-tissue strain. Claimant had no back pain or issues immediately before arriving at work that day. She experienced the acute onset of low back pain while bending forward to perform a work-related function. Although the activity was relatively innocuous, it was sufficient to trigger pain in Claimant's back and prompt her to request medical attention. Claimant's muscles were probably already irritated from sitting on the floor during the staff meeting. The initial examination at Concentra showed right-sided muscle spasms, an objective finding consistent with a soft-tissue injury. Concentra reasonably took x-rays, administered injections to alleviate the pain, and referred Claimant to PT. These facts are sufficient to establish a compensable injury.

22. Claimant failed to prove the treatment recommended by Concentra for her low back on and after October 9, 2023 is causally related to the minor strain she suffered in July 2023. As an initial matter, merely bending forward without appreciable weight or associated trauma would not typically be expected to cause a long-term injury. Furthermore, Claimant's allegation of ongoing severe pain is inconsistent with her failure to pursue treatment for almost three months thereafter. Even if she were unwilling to return to Concentra, she could have asked to see one of Employer's other designated providers. Nor did she persuasively explain why she voluntarily chose to return to Concentra for the ankle sprain in September 2023. After the July 2023 injury, Claimant resumed her regular work without limitation or apparent difficulty. Dr. Rook's opinion that the act of bending forward caused an acute disc "herniation" is unpersuasive. As Dr. Burris persuasively explained, the activity Claimant described would not likely cause disc pathology, and, in any event, the left-sided disc "bulge" shown on the MRI would not account for Claimant's predominantly right-sided complaints.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Even a “minor strain” can be a sufficient basis for a compensable claim if it was caused by a claimant’s work activities and caused her to seek medical treatment. The ICAO’s decision in *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2004) is instructive regarding the minimal extent of an injury that can satisfy the basic threshold requirement of compensability. In *Garcia*, the claimant felt pain in her abdomen and hip while lifting a piece of glass at work. The employer referred the claimant to Dr. Caughfield, who diagnosed a lumbar strain, but opined she had already reached MMI. The ALJ found that the claimant suffered a “minor back sprain,” but also found the sprain had “resolved” within five days of the incident. The ALJ denied the claim on the grounds that the claimant failed to prove she suffered a compensable “injury.” The ICAO reversed, and held that the claimant had established a compensable injury as a matter of law:

> Where pain triggers the claimant’s need for medical treatment, the claimant has established a compensable injury if the industrial injury is the cause of the pain. The term medical treatment includes diagnostic procedures required to ascertain the extent of the industrial injury.
>
> Here, the ALJ found there was an industrial accident which caused a minor lumbar strain. Further, the ALJ determined that when the injury was reported to the employer, the employer offered the claimant medical services from Dr. Caughfield, which the claimant accepted. Although Dr. Caughfield placed the claimant at MMI based upon his [ ] examination, the ALJ found with record support that Dr. Caughfield diagnosed a lumbar strain. Thus, the ALJ’s findings compel the conclusion the claimant established a compensable injury which entitled her to an award of medical benefits. (Citations omitted).

Conry v. City of Aurora, W.C. No. 4-195-130 (ICAO, April 17, 1996) involved a similarly minor episode that was found to establish a compensable claim as a matter of law. In *Conry*, the claimant suffered from pre-existing asthma. One day she walked into work and encountered a “strong smell of ammonia.” As a result, she “began wheezing and became short of breath.” The claimant’s supervisor advised that she go to the doctor. There is no indication in the decision that the claimant required any treatment other than the one physician visit. The ALJ denied the claim because the ammonia exposure merely caused a “temporary exacerbation” of the claimant’s pre-existing asthma. She had no ongoing sequela or require any additional treatment other than the one-time visit. Therefore, the ALJ determined the claimant failed to prove that she suffered a compensable “injury.”

The ICAO reversed and found that the claimant had proven compensability as a matter of law. The ICAO stated “the claimant’s industrial exposure to ammonia caused her to experience respiratory symptoms for which she needed and received medical treatment. . . . [T]hese findings compel a conclusion that the claimant suffered a compensable aggravation of her pre-existing condition [asthma]. Therefore, we reverse the ALJ’s determination that the claimant did not suffer a compensable injury.”

As found, Claimant proved she suffered a compensable injury on July 10, 2023, specifically a low back strain. Claimant experienced the sudden onset of pain while bending forward to perform a work-related function. Although the forces involved were relatively minor, they were sufficient to evoke symptoms in Claimant's back and prompted her to request medical attention. Claimant's muscles were probably already irritated from sitting on the floor during the staff meeting. The examination at Concentra showed right-sided muscle spasms, an objective finding consistent with a soft-tissue injury. Concentra reasonably took x-rays, administered injections to alleviate the pain, and referred Claimant to PT. Claimant subsequently attended a single PT session at which she was given instruction on home exercises. These facts are sufficient to establish a compensable injury.

B. Medical treatment commencing October 2023

The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The mere occurrence of a compensable injury does not compel a finding that all subsequently requested treatment is causally related to the injury. *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, July 2, 2010). The claimant must prove entitlement to disputed treatment by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, Claimant failed to prove treatment recommended by Concentra for her low back on and after October 9, 2023, is causally related to the minor strain she suffered in July 2023. As an initial matter, merely bending forward without appreciable weight or trauma would not typically be expected to cause a long-term injury. In any event, Claimant's allegation of ongoing severe pain is inconsistent with her failure to pursue treatment for almost three months thereafter. Even if she did not want to return to Concentra, she could have asked to see one of Employer's other designated providers. Nor did she persuasively explain why she voluntarily chose to return to Concentra for the ankle sprain in September 2023. Moreover, Claimant resumed her regular work after July 10, 2023 without limitation or apparent difficulty. Dr. Rook's opinion that the act of bending forward caused an acute disc "herniation" is unpersuasive. As Dr. Burris persuasively explained, the activity Claimant described would not likely cause disc pathology, and in any event, the left-sided disc "bulge" shown on the MRI would not account for Claimant's predominantly right-sided complaints.

ORDER

It is therefore ordered that:

1. Claimant's claim related to a lumbar strain occurring on July 10, 2023 is compensable.

2. Claimant's request for medical treatment for her low back recommended by Concentra in October 2023, including physical therapy, is denied and dismissed.

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

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

DATED: November 1, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-268-111-001

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that she suffered an injury or occupational disease arising out of and in the course and scope of her employment with Employer?

If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment she has received for her right upper extremity (including MRI and EMG testing) constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

FINDINGS OF FACT

1. Claimant has worked for Employer as a sonographer since November 2019. Claimant's job duties include performing ultrasound on a wide variety of patients. Claimant testified that while performing an ultrasound on October 16, 2023, she felt sharp and aching pain in her right elbow. Claimant took anti-inflammatories to address these symptoms. Two days later, Claimant contracted COVID-19. As a result, Claimant was off from work until October 30, 2023.

2. Claimant testified that on November 14, 2023, she felt excruciating pain in her right elbow while performing an ultrasound. Due to these continued pain symptoms, Claimant sought treatment at Pagosa Springs Medical Center, and was seen by Dr. William Webb.

3. In the November 14, 2023 medical record, Dr. Webb recorded that Claimant had been experiencing pain in the lateral aspect of her right elbow for three weeks. Claimant reported to Dr. Webb that she had a prior "episode" during prior employment that had resolved with physical therapy and chiropractic treatment. Dr. Webb diagnosed lateral epicondylitis of the right elbow and recommended and administered a steroid injection. In addition, Dr. Webb prescribed meloxicam and recommended the use of a tennis elbow brace.

4. Claimant testified that the November 14, 2023 injection provided her with between six and eight weeks of relief.

5. Following her November 14, 2023 appointment with Dr. Webb, Claimant reported her right elbow condition to Employer. Thereafter, this workers' compensation claim was initiated. Subsequently, Claimant began treatment with Dr. David Eisenhauer.

6. On December 7, 2023, Sara Nowotny, Vocational Case Manager, performed a job demand analysis (JOA) of Claimant's position with Employer. In connection with the JOA Ms. Nowotny reviewed Claimant's job tasks, observed Claimant in the performance of those tasks, and reviewed whether any risk factors (as determined by the Colorado Workers' Compensation Medical Treatment Guidelines (MTG)) were present. In her December 15, 2023 report, Ms. Nowotny stated that no primary or secondary risk factors for Claimant's diagnoses were present in Claimant's performance of her work tasks.

7. Ms. Nowotny's testimony was consistent with her written report. Ms. Nowotny reiterated that Claimant's job duties do not meet either the MTG primary or secondary risk factors for cumulative trauma. Ms. Nowotny explained how she performs a JOA and calculates risk factor exposure. In this case, Ms. Nowotny calculated Claimant's potential risk factor exposure based upon both an eight hour workday and the total number of ultrasound examinations performed by Claimant in a day. Ms. Nowotny also testified that even on a day in which Claimant worked ten hours, the performance of her job duties did not rise to the level of being primary or secondary risk factors. Ms. Nowotny testified that during her observations, she did not see much supination or pronation of the hand/wrist. In addition, Ms. Nowotny did not observe pinch force, lifting, and use of handheld tools of two pounds or more. Ms. Nowotny also testified that elbow flexion was the only risk factor that came close to meeting a secondary cumulative trauma risk factor. However, even on Claimant's busiest day, that movement would fall well below the threshold as a secondary risk factor.

8. Claimant presented her own calculations regarding time spent performing ultrasounds in a given day. Specifically, Claimant's calculations show that she works 36.5 hours per week, with varied hours each day. Additionally, Claimant calculated that on her busiest days she is actively performing ultrasounds a total of five hours and 37 minutes. On her lightest day, Claimant calculated that she actively performs ultrasounds for two hours and 56 minutes.

9. Ms. Nowotny testified that she reviewed Claimant's calculations regarding her work duties. Ms. Nowotny further testified that these calculations did not change her opinions regarding Claimant's exposure to risk factors. Ms. Nowotny testified that if anything, Claimant's calculations supported Ms. Nowothy's own data extrapolation.

10. On April 4, 2024, Claimant began treatment at San Juan Hand Therapy with Lani Beattie. At that time, Claimant reported pain and numbness in her right forearm and hand. Ms. Beattie recommended hand therapy one time per week for 10 to 12 weeks.

11. On June 171 2024, Claimant returned to Dr. Eisenhauer. At that time, Claimant reported that occupational therapy was beneficial for several weeks. However, her pain symptoms had "returned to baseline". Claimant also reported hand pain and numbness on the medial side, sporadic palm and finger numbness, and deep pain in her elbow. Claimant further reported that these symptoms worsened when performing

her job duties. Dr. Eisenhauer recommended work restrictions of no more than five ultrasound scans per day. In addition, he ordered electromyography (EMG) and nerve conduction studies of the right upper extremity and magnetic resonance imaging (MRI) of the right elbow.

12. On July 2, 2024, Claimant underwent a right elbow MRI. The MRI showed focal edema at the medial epicondyle of the distal humerus. In the MRI report, Dr. Robert Stone noted that this was indicative of a low grade stress injury or contusion. Dr. Stone also noted no acute injury to ligaments or tendons.

13. On July 11, 2024, Dr. William Bentley administered the recommended EMG and nerve conduction studies on Claimant's right upper extremity. Dr. Bentley noted that the results showed evidence of right carpal tunnel syndrome. Dr. Bently further noted that the ulnar and radial studies were normal.

14. On August 25, 2024, Claimant attended an independent medical examination (IME) with Dr. Mark Paz. In connection with the IME, Dr. Paz obtained a history from Claimant, performed a physical examination, and reviewed Claimant's medical records. In his IME report, Dr. Paz identified Claimant's diagnoses as right lateral epicondylitis and right carpal tunnel syndrome. It is Dr. Paz's opinion that these diagnoses are not work related. In support of this opinion, Dr. Paz referred to the MTG regarding cumulative trauma conditions; (specifically, Rule 17, Exhibit 5) and the JDA performed by Ms. Nowtony.

15. On September 4, 2024, Claimant was seen by Dr. Eisenhauer. At that time, Dr. Eisenhower identified Claimant's issues as chronic and repetitive in nature. In addition, Dr. Eisenhauer opined that Claimant's right upper extremity symptoms could be "related back to the repetitive and sometimes awkward nature of her job as an ultrasound tech". Dr. Eisenhauer further opined that Claimant did not need to undergo surgical intervention. Rather he recommended rest and activity modification, additional injections, and continued occupational therapy.

16. Dr. Paz's deposition testimony was consistent with his IME report. Dr. Paz testified that Claimant's diagnoses were not caused by her job duties. Dr. Paz further testified that Claimant's job duties do not meet the MTG criteria for cumulative trauma. Dr. Paz testified that although Claimant may experience symptoms while at work, that does not mean that the activities caused her diagnoses of right lateral epicondylitis and right carpal tunnel syndrome. Nor do Claimant's job duties result in an aggravation of those conditions, under the MTG.

17. The ALJ credits the medical records, the MTG, the opinions of Ms. Nowotny, and the opinions of Dr. Paz over the contrary opinions of Dr. Eisenhauer. The ALJ is persuaded that Claimant has pain in her right elbow. The ALJ is likewise persuaded that Claimant suffers from right lateral epicondylitis and right carpal tunnel syndrome. However, the ALJ also finds that these conditions do not meet the criteria for cumulative trauma under the Colorado Medical Treatment Guidelines. Therefore, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that she

suffered an occupational disease arising out of and in the course and scope of her employment with Employer. The ALJ further credits the opinions of Dr. Paz and the MTG, and finds that Claimant's job duties did not result in an aggravation of her diagnoses of right lateral epicondylitis and right carpal tunnel syndrome.

CONCLUSIONS OF LAW

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

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

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

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a 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.*

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

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

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff,* 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *Gotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.,* W.C. No. 4-445-608 (ICAP, April 10, 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. *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 {ICAP, October 27, 2008).

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

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

10. Rule 17, Exhibit 5 of the MTG provides instructions for determining causation of cumulative trauma conditions, including a "Risk Factors Definitions Table". That table provides primary and secondary risk factors related to a claimant's job duties.

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

12. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that she suffered an injury or occupational disease arising out of and in the course and scope of her employment with Employer. As found, Claimant's job duties do not present primary or secondary risk factors set forth in the MTG. Therefore, Claimant's diagnoses of right lateral epicondylitis and right carpal tunnel syndrome are not work related. Additionally, Claimant's job duties did not result in an aggravation of her diagnoses of right lateral epicondylitis and right carpal tunnel syndrome. As found, the medical records, the MTG, and the opinions of Ms. Nowotny and Dr. Paz are credible and persuasive.

ORDER

It is therefore ordered that Claimant's claim regarding an occupational disease is denied and dismissed.

Dated November 4, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts,** 1525 Sherman St., 4th Floor,

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-168-955-004

ISSUES

As in the Summary Order, the issue addressed in this decision involves Claimant's entitlement to medical benefits. The question answered is:

I. Whether Claimant established, by a preponderance of the evidence, that her need for a total knee arthroplasty ("TKA") is reasonable, necessary and related to her admitted August 24, 2020 work injury.

FINDINGS OF FACT

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

1. This claim has been the subject of a prior order issued by ALJ Patrick Spencer on January 11, 2023. (CHE 7, pp. 190-196). Although the issue addressed in the January 11, 2023 order differs from the question currently before the court, ALJ Spencer made detailed findings of fact that the undersigned ALJ finds relevant to the issue of whether Claimant's need for a TKA is reasonable, necessary and related to her admitted August 24, 2020 work injury. Accordingly, the undersigned ALJ adopts the following findings of fact from ALJ Spencer's January 11, 2023 order:

- Claimant worked for Employer as a Production Planner. She suffered an admitted injury to her right knee on August 24, 2020 when she stood up from her desk while using her right leg to push, twist, and turn. She felt a sharp pop and severe pain in her right knee.

- Claimant was taken by ambulance to the Parkview Medical Center emergency department. She was "extremely uncomfortable" and reluctant to have her knee examined because of the pain. Claimant was given IV fentanyl, which reduced her pain. The ER physician recommended a knee immobilizer brace, but Claimant could not use the brace because she could not fully straighten her leg. Instead, she was given a posterior splint and crutches.

- Employer referred Claimant to CCOM for authorized treatment, where she saw PA-C Buddy Leckie at the initial appointment on August 25, 2020. Claimant was still having pain and could not bend the knee or bear weight on her right leg. Examination showed swelling and bruising along the medial joint line. Mr. Leckie diagnosed an unspecified collateral ligament injury. He prescribed tramadol and recommended Claimant continue using the knee brace and crutches.

- A right knee MRI on September 10, 2020 showed advanced patellar chondromalacia, an intra-articular loose body, and a presumed low-grade chondroid lesion at the medial aspect of the distal femoral metaphysis.

- Claimant followed up with Dr. Centi at CCOM on September 21 to review the MRI results. Her knee was improving, although it was still painful to direct pressure. Claimant was doing home exercises because her work schedule and the remote location of her residence made it too difficult to attend PT regularly. She was advised to wean off the crutches as tolerated.

- Claimant saw Dr. David Walden, an orthopedic surgeon, on October 8, 2020. Claimant ambulated with a limp and had significant range of motion deficits. Dr. Walden personally reviewed the MRI images. Dr. Walden diagnosed traumatic subluxation of the right patellofemoral joint, right knee osteoarthritis, and right knee arthrofibrosis. He thought the loose body was probably an incidental finding and probably not causing Claimant's knee pain. Dr. Walden opined Claimant "likely sustained some significant injury which may very well have involved a patellofemoral subluxation. With the underlying osteoarthritis, it set up a significant reaction in the knee and severe pain. She has not yet been involved in physical therapy and has developed arthrofibrosis around the knee with a flexion contracture. This is now a significant problem since she walks with a limp, unable to bend her knee." He gave Claimant a steroid injection "to calm the knee down" and had her see a therapist in his office to demonstrate home exercises in lieu of formal PT.

- Claimant returned to Dr. Walden on December 3, 2020. She reported benefit from the injection and increased tolerance for weight bearing. Dr. Walden recommended a second steroid injection followed by viscosupplementation. His diagnostic impressions included, "acute irritation of underlying osteoarthritis," and "traumatic subluxation of the patellofemoral joint irritating underlying osteoarthritis."

- Claimant underwent a hyaluronic acid injection on December 28, 2020.

- Dr. Centi put Claimant at MMI on January 11, 2021. The injections were "minimally" helpful and Dr. Centi thought no additional treatment would provide significant benefit. Examination showed tenderness to palpation, mild swelling, and reduced range of motion. Dr. Centi assigned a 17% lower extremity rating based on range of motion and degenerative joint disease.

- Dr. Centi opined in his records that Claimant's condition was "related to work activities."

- Claimant's condition worsened after MMI. She returned to Dr. Walden on April 15, 2021 and reported a recent severe flare while visiting her elderly father in Florida. Her knee "locked" for more than eight hours. She described significant ongoing pain beneath her kneecap. Dr. Walden opined the episode of locking was probably caused by the loose body engaging with the tibiofemoral articulation. Dr. Walden recommended arthroscopic surgery to remove the loose body.[1]

- Insurer approved the surgery and it was performed on May 5, 2021.

- On August 5, 2021, Claimant told Dr. Walden her knee pain was better but she still "struggled" with range of motion. She was not interested in additional surgery so Dr. Walden recommended she be put at MMI with permanent restrictions. He scheduled no specific follow-up but indicated he "would be happy to see her back for maintenance care."

- Claimant completed a functional capacity evaluation (FCE) on August 23, 2021. The FCE was valid based on internal consistency measures. Claimant demonstrated the ability to work at the light physical demand level with no kneeling, crouching, or crawling. The examiner documented significant knee range of motion deficits.

- Claimant was again put at MMI by Dr. J. Douglas Bradley on September 27, 2021. Examination showed minimal pain but an altered gait primarily because of limited range of motion. Dr. Bradley assigned a 35% lower extremity rating after "normalization" with the contralateral knee. Dr. Bradley's rating was primarily based on range of motion deficits, but also included 5% for arthritis under Table 40. Dr. Bradley indicated the objective findings were consistent with a work-related mechanism of injury.

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[1] Review of the April 15, 2021, medical report authored by Dr. Walden referencing Claimant's symptoms while vacationing in Florida reveals the following:

> [Claimant] reports that approximately 2 weeks ago she was on vacation in Florida when she developed significant pain in this [right] knee. [Claimant] reports there was no injury, incident, or change in activity that she can equate this pain to.

(CHE 6, p. 136). In addition to her increased pain, Claimant experienced an extended episode of right knee locking presumably while on vacation in Florida. *Id.* Dr. Walden noted this locking was likely related to a loose body "engaging within the tibiofemoral articulation", which "could have been generated from the episode at work", i.e. Claimant's patellofemoral subluxation. *Id*. As noted, Insurer authorized surgery and the loose body was removed. Although Claimant continued to struggle with right knee range of motion loss post-surgery, which this ALJ finds was most probably related to her persistent arthrofibrosis, she expressed no interest in additional surgery. Accordingly, Dr. Walden recommended that she be put at MMI during a follow-up visit on August 5, 2021. (CHE 6, p. 186). Dr. Walden scheduled no specific follow-up but indicated he "would be happy to see her back for maintenance care." *Id.*; See also FOF ¶ 1.

- Claimant was also evaluated by Dr. Nicolas Kurz on September 27, 2021 for an assessment of MMI and impairment.[2] Dr. Kurz determined Claimant was at MMI with no impairment. He opined her symptoms were related to "long standing" degenerative arthritis and were neither caused nor aggravated by her work. He felt Insurer had been "generous" in covering the surgery because he saw no work-related injury. He recommended Claimant pursue further treatment through her personal providers outside of the workers' compensation system.

2. Claimant underwent a Division Independent Medical Examination (DIME) with Dr. William Watson on July 12, 2022. (RHE C). Examination showed limited flexion and extension and an antalgic gait, i.e. a limp with a quick component on the right side, which Claimant reported was affecting her ability to complete her activities of daily living. *Id*. at p. 26. After taking a history, completing a records review and performing a physical examination, Dr. Watson determined Claimant was not at MMI. *Id.* He noted that Claimant's initial MRI "revealed full thickness cartilage loss throughout the median patellar ridge and lateral patella facet with extensive subarticular bone marrow edema" along with "[m]oderate cartilage loss throughout the distal femoral intercondylar notch". *Id*. He reached the following clinical diagnoses:

> 1. Status post twisting injury to the knee with possible subluxation of the patella at that time. She also has significant evidence of patellofemoral osteoarthritis. It should be noted that the MRI did show edematous changes within the subarticular bone marrow. This was on the lateral patella facet.
>
> 2. Evidence of arthrofibrosis.

Id.

3. Dr. Watson was "concerned" about Claimant's arthrofibrosis as she was ambulating with a severely antalgic gait and was unable to fully extend her knee. He recommended a repeat MRI and re-evaluation by Dr. Walden for possible intervention. He noted that Claimant's condition regarding her arthrofibrosis might warrant additional arthroscopy with lysis of adhesions. He was also concerned about Claimant's "ongoing" osteoarthritis noting that it could also require intervention, including a total knee replacement". (RHE C, p. 27).

4. Respondents elected to challenge the MMI determination of Dr. Watson and as noted above, the parties submitted the question to ALJ Spencer through position statements on December 19, 2022. In preparation of their defense, Respondents sought a records review opinion from Dr. John Burris. According to ALJ Spencer's January 11, 2023 Order, Dr. Burris opined that Dr. Watson erred by attributing any of Claimant's ongoing symptoms or functional deficits to the "very minor" incident at work. He opined, "The only possible diagnosis that can be causally related to the reported

[2] It is unclear why Claimant was contemporaneously evaluated by both Dr. Bradley and Dr. Kurz.

workplace event is a minor soft tissue strain . . . [and Claimant] is certainly at MMI for any possible minor work-related condition." (CHE 7, pp. 192-194).

5. ALJ Spencer concluded that Respondent's had failed to overcome Dr. Watson's opinion concerning MMI, concluding instead that the "need for additional diagnostic testing or workup can be a sufficient basis for a determination [that] a claimant is not at MMI". (CHE 7, p. 195). Accordingly, the request to set aside Dr. Watson's determination regarding MMI was denied and dismissed. Respondents did not appeal ALJ Spencer's January 11, 2023 order and the same became final pursuant to § 8-43-301(2) and OACRP, Rule 26 on February 1, 2023. *Id.*

6. Per the DIME opinion of Dr. Watson, Claimant returned to Dr. Walden in follow-up on April 25, 2023. Dr. Walden noted that Claimant's last office visit was August 5, 2021, wherein she was released from care at her request without further treatment recommendations. (CHE 1, p. 10). Dr. Walden reviewed Claimant's "legal ruling", i.e. ALJ Spencer's January 11, 2023 order that "asked for repeat evaluation of the knee and a new MRI scan". (CHE 1, p. 11). While he was not sure that a repeat MRI scan would be very valuable, Dr. Walden requested the same to determine the existence of "new pathology" and make further recommendations. *Id*.

7. The repeat MRI was completed on December 7, 2023 at Colorado Springs Imaging. (CHE 1, pp.7-8). Pertinent to the issue presented, the MRI demonstrated "[p]atellar chondromalacia with full thickness chondral loss over the lateral patellar facet.

8. As noted above, Claimant then returned to Dr. Walden's office on December 19, 2023 to discuss the results of her repeat MRI. (CHE 1, p. 4). Dr. Walden reviewed the December 7, 2023 MRI results after which he reached the following assessment, "post-traumatic osteoarthritis of the right knee". *Id*. at p. 5. In connection with the case, Dr. Walden asked for a consult from Dr. Michael Schuck, a fellowship trained joint replacement expert. *Id*.

9. Dr. Schuck noted that Claimant's right knee symptoms have progressively worsened over the last two years with severe anterior and medial knee pain. According to Dr. Schuck, Claimant's MRI revealed "[s]ignificant patellofemoral osteoarthritis making her a candidate for a knee replacement surgery. (CHE 1, p. 6). Claimant wanted time to consider this course of care. *Id.*

10. On February 8, 2024, Respondents' acknowledged receipt of a request from Dr. Walden for authorization to proceed with a right TKA, which correspondence outlined their intention to seek an independent medical examination (IME) with Orthopedic Surgeon, Dr. Qing-Min Chen on March 14, 2024.[3]

11. Dr. Chen completed his evaluation on March 14, 2024. (RHE E, p. 35). Following a physical examination and records review, Dr. Chen opined that Claimant's current right knee symptoms were not related to her August 24, 2020 work injury. To

[3] Respondents' February letter erroneously identified the requested surgical procedure as a right ankle replacement rather than a total knee arthroplasty.

the contrary, Dr. Chen opined that prior to her August 24, 2020 injury, Claimant had pre-existing osteoarthritic changes that were likely present for "years if not decades". *Id.* at p. 41. According to Dr. Chen, there is no evidence that the mechanism of injury, i.e. pushing off with the right leg aggravated Claimant's severe pre-existing osteoarthritis. *Id*. at p. 42. Indeed, Dr. Chen found no indications of an osteochondral lesion or other evidence of acute injury to the right knee. *Id.* Instead, Dr. Chen explained that the progressive nature of the osteoarthritis present in Claimant's right knee causes loss of the articular cartilage covering the joint surfaces and that this loss of cartilage results in pock marked sections over the joint surface that catch on themselves causing further tearing and grinding until bare bone is exposed. *Id*. Dr. Chen opined that while the proposed TKA is reasonable and necessary, the need for this procedure is not related to Claimant's August 24, 2020 work injury. *Id*. Indeed, Dr. Chen explained that due to the nature of Claimant's progressing osteoarthritis her need for a TKA was a "foregone conclusion" and that this (Claimant's need for a TKA) would have "happened regardless of whether or not she pushed herself off with her right leg . . ." *Id.* He also noted that Claimant experienced "severe" symptoms in the right knee while visiting her father in Florida, which supported his conclusion that Claimant's osteoarthritis was a "progressive problem and not something unique to her work environment. *Id.*

12. Respondent's denied the requested right TKA based upon Dr. Chen's IME. (RHE E, pp. 33-34). Claimant then applied for hearing.

CONCLUSIONS OF LAW

Generally

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

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-42-101. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. C.R.S. § 8-43-201.

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

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

Medical Benefits

C. Claimant's request for a right total knee arthroplasty is denied and dismissed as the ALJ is persuaded that the need for this surgery, while reasonable and necessary, is not causally related to Claimant's August 24, 2020 workers' compensation injury. Once a claimant has established the compensable nature of his/her work injury, as in this case, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, an injured worker is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *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 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*.

D. This case is complicated by the fact that Claimant suffered an acute work-related injury to her right knee in the form of a probable patellar subluxation with subsequent loose body development, which was superimposed on chronic progressive degenerative osteoarthritis. The question here is whether Claimant's need for a total knee replacement four years after her right patellar subluxation is due to the effects of her work injury or the natural progression of her pre-existing degenerative osteoarthritis.

E. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ

to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Thus, a claimant is entitled to medical benefits for treatment of pain, only if the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1949)*; Abeyta v. Wal-Mart Stores,* W.C. No. 4-669-654 (January 28, 2008).

F. In this case, the totality of the evidence presented persuades the ALJ that Claimant's current symptoms and need for a total knee arthroplasty (TKA) is causally related to the natural progression of her underlying degenerative osteoarthritis. Here, Dr. Watson, in his 2022-DIME report, recognized there are two issues surrounding the condition of Claimant's right knee. First, the work-related issues involving the development of arthrofibrosis and a loose body with subsequent removal related to Claimant's patellar subluxation and second, her "ongoing" osteoarthritis, which Dr. Watson noted may require a total knee replacement to address definitively.

G. Careful review of Dr. Watson's DIME report persuades this ALJ that he did not render a causation opinion regarding the relatedness of Claimant's need for a TKA to her August 24, 2020 work injury as part of his July 12, 2022 examination. Indeed, at the time of the July 11, 2022 DIME, no opinions had been issued regarding the relatedness of Claimant's need for a TKA to her August 24, 2020 work injury. In fact, Claimant was not deemed a candidate for a TKA until December 19, 2023, some 17 months after Claimant's July 12, 2022 DIME with Dr. Watson. Here, the ALJ is convinced that when Dr. Watson wrote: "Indeed, [Claimant] had preexisting osteoarthritis, however, the proximate cause of her disability and requirement for surgical intervention was a twisting injury at her desk" and "I therefore believe further treatment should be under the guise of Workman Compensation", he was probably referring to the effects of Claimant's arthrofibrosis and the potential for additional arthroscopy with lysis of adhesions. The opinion of Dr. Watson regarding Claimant's need for a TKA and its relatedness to her August 24, 2020 work injury are simply unknown because Claimant does not appear to have returned for a follow-up DIME after her repeat MRI and Dr. Watson was not called to testify. Furthermore, the ALJ is not persuaded based upon the evidence presented, that Dr. Watson was suggesting that Claimant's patellar subluxation aggravated her pre-existing osteoarthritis to cause her need for treatment. Instead, Dr. Watson was exceedingly precise when he wrote: "Indeed, [Claimant] had preexisting osteoarthritis, however, the proximate cause of her disability and requirement for surgical intervention was a twisting injury at her desk". Accordingly, the ALJ is convinced that Claimant's acute patellar subluxation gave rise to her need for treatment, including her loose body removal surgery, rather than an aggravation of her underlying pre-existing osteoarthritis.

H. Based upon the evidence presented, the ALJ is persuaded that the first condition addressed by Dr. Watson, is clearly related to Claimant's original work injury and that any treatment, including an arthroscopy with lysis of adhesions associated with arthrofibrosis would appropriately be Respondents' liability. However, the total knee replacement is not being requested to deal with Claimant's arthrofibrosis or her patellar subluxation. Instead, the total knee replacement is being sought to conclusively treat Claimant's progressive osteoarthritis, which has become increasingly symptomatic and disabling in the four years since Claimant's patellar subluxation.

I. While the December 19, 2023 report of Drs. Walden and Schuck can reasonably be read to indicate that Claimant's need for a right TKA is related to her August 24, 2020 work, injury, the ALJ credits the unrebutted causation opinion of Dr. Chen who opined:

> There is no evidence that pushing herself off with her right leg somehow permanently aggravated what was already a severe condition in her right knee of tricompartmental osteoarthritis. I'm looking specifically for some sort of osteochondral lesion, some sort of fracture that goes through the joint space, something showing an acute injury to the cartilage. Unfortunately, arthritis is a progressive disorder. Healthy joints move like a smooth ball bearing. When you lose cartilage and you have osteoarthritis, the ball bearing becomes pock-marked. This has a negative feedback loop where the pock marked sections of the joint catch on themselves and tear themselves further damaging the cartilage and grinding themselves down to bare bone. This is the process that is occurring here and there is no evidence that pushing herself off with her right leg permanently aggravated was an ongoing progressive disorder.

(RHE A, p. 9).

J. As presented, the evidence, including Dr. Chen's unrebutted opinions persuade this ALJ that Claimant's need for a TKA is related to a longstanding progressive disease process in the right knee. The ALJ is not convinced that the mechanism of injury in this case aggravated, accelerated, or "combined with" Claimant's pre-existing infirmity or disease "to produce the disability and/or her need for treatment, i.e. the requested TKA. *H & H Warehouse v. Vicory*, supra. Because the evidence demonstrates that Claimant's need for a right total knee replacement procedure is, more probably than not, related to the natural progression of her longstanding degenerative right knee osteoarthritis, Claimant's request for medical benefits in the form of a TKA must be denied and dismissed.

ORDER

It is therefore ORDERED that:

1. Claimant has failed to establish, by a preponderance of the evidence, that the requested total knee arthroplasty is related to her admitted August 24, 2020 work injury. Accordingly, the request for authorization to proceed with the right TKA under this workers' compensation claim is hereby denied and dismissed.

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

DATED: November 4, 2024

/s/ Richard M. Lamphere

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

NOTE: If you are dissatisfied with 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.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-216-612-001

ISSUES

The parties proceeded to hearing on the sole issue of who is a qualifying dependent for purposes of any death benefits in this claim. All remaining endorsed issues have been reserved.

FINDINGS OF FACT

Based upon the evidence and testimony presented at the hearing, the ALJ makes the following findings of fact:

1. The decedent was employed full time with Employer as an Asset Protection Manager.

2. This fatality claim arises from the death of the decedent which occurred on August 30, 2022.

3. The decedent and TA were married in a ceremonial marriage on May 20, 1989. From the date of their marriage until the decedent's death, they remained married.

4. TA has not remarried.

5. The decedent and TA have three adult children. At the time of the decedent's death, the children's ages were 29 years, 26 years, and 20 years.

6. None of the children are disabled.

7. Their youngest child was not attending school at the time of the decedent's death and was not financially dependent upon the decedent.

8. The decedent has no other children.

9. During their 33 years of marriage, TA was dependent upon the decedent for financial support leading up to and at the time of his passing.

10. The ALJ finds that at the time of the decedent's death, his only dependent was his surviving spouse, TA.

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 5-216- 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. The Colorado Workers Compensation Act provides specific parameters in determining who is entitled to death benefits as a dependent of a deceased claimant. Section 8-41-501(1)(a), C.R.S., provides that a surviving spouse is presumed to be a dependent of the deceased.

5. Section 8-41-501(1)(c), C.R.S. also addresses that children over the age of 18 may be considered a dependent if certain criteria are met. Specifically, that section provides, in pertinent part, "Minor children of the deceased who are eighteen years or over and under the age of twenty-one years if it is shown that: (I) At the time of the decedent's death they were actually dependent upon the deceased for support; and (II) Either at the time of the decedent's death or at the time they attained the age of eighteen years they were engaged in courses of study as full-time students at any accredited school."

6. In the present case, the decedent was survived by his spouse of 33 years, TA. The couple's three children were all over the age of 18 at the time of the decedent's death. Their youngest child was 20 years old at that time and was not a full time student. Therefore, the ALJ concludes that the decedent's only dependent at the time of his death was his surviving spouse, TA. Therefore, TA is the sole individual entitled to any potential death benefits available in this claim.

ORDER

It is therefore ordered, the decedent's surviving spouse, [Redacted, hereinafter TA], is the sole individual entitled to any potential death benefits available In this claim. All matters not determined here are reserved for future determination.

Dated November 6, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-259-981-001

ISSUES

- Did Claimant suffer a compensable injury on October 21, 2023?
- Average weekly wage.
- Temporary total disability benefits commencing December 16, 2023.
- Unemployment offset.
- Medical benefits.
- Claimant withdrew his penalty claims with prejudice.

FINDINGS OF FACT

1. Claimant worked for Employer as a gravel truck driver.

2. On October 21, 2023, Claimant injured his left shoulder while washing his work truck. He was climbing out of his truck and his foot slipped. Claimant was holding on to the grab bar with his left arm and wrenched his left shoulder.

3. Claimant began receiving treatment at Concentra on November 7, 2023. He described progressive left shoulder pain since the accident. He was diagnosed with left shoulder bursitis and tendinosis.

4. Claimant was treated by Dr. Marcie Wilde at subsequent visits to Concentra. The parties stipulated that Dr. Wilde is the ATP.

5. Claimant was given work restrictions that precluded him from performing his preinjury job. The parties stipulated that Claimant is entitled to TTD benefits commencing December 16, 2023.

6. The parties stipulated to an average weekly wage of $1,000, with a corresponding TTD rate of $666.67.

7. Claimant received unemployment benefits in the amount of $678 per week, from February 17, 2024 through June 1, 2024 (15 weeks). The parties stipulated that Respondent is entitled to an offset for unemployment benefits, which "zeros out" Claimant's TTD benefits for the corresponding 15-week period.

8. Employer was not insured for workers' compensation liability on the date of Claimant's injury.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Claimant proved he suffered a compensable injury to his left shoulder while working for Employer on October 21, 2023.

B. Medical benefits and authorized provider

The employer is liable for medical treatment from authorized providers reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. Having established a compensable injury, Claimant is entitled to a general award of medical benefits. The parties stipulated that Dr. Marcie Wilde at Concentra is the ATP. Claimant did not request payment of specific medical bills.

C. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The parties stipulated to an average weekly wage (AWW) of $1,000, with a corresponding TTD rate of $666.67.

D. Temporary total disability benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The parties stipulated that Claimant is entitled to TTD benefits commencing December 16, 2023.

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3). There is no persuasive evidence that Claimant has been released to regular duty, returned to work, or been put at MMI by an authorized treating physician. Accordingly, Claimant is entitled to TTD benefits commencing December 16, 2023, and continuing until terminated by law.

E. Unemployment offset

The employer is entitled to a dollar-for-dollar offset against liability for TTD benefits for unemployment received by a claimant. Section 8-42-103(1)(f). Claimant received unemployment benefits in the amount of $678 for 15 weeks, commencing February 17, 2024. The parties stipulated that the statutory offset for unemployment benefits reduced Claimant's TTD benefit to $0 for that corresponding 15-week period.

F. Total TTD and statutory interest owed

Employers or their insurers must pay statutory interest of 8% per annum on all benefits not paid when due. Section 8-43-410(2). Based on the TTD rate of $666.67 per week, Employer owes $6,000.03 in TTD benefits and $391.08 in statutory interest for the period of December 16, 2023 through February 16, 2024. Additionally, Employer owes $15,047.69 in TTD benefits and $239.73 in statutory interest from June 2, 2024 through November 5, 2024 (the date of this decision). Interest will continue to accrue at the rate of $4.75 per day until the past-due TTD is paid ($1.40 + $3.35 = $4.75). The accrued interest and ongoing daily interest were calculated using the Division of Workers' Compensation Benefits Calculator, which is available on the Division's website at https://dowc.cdle.state.co.us/Benefits/tab/interest.aspx

Photo of benefits calculator (claimant's name enetered) [Redacted, hereinafter BC]

G. Payment to the Colorado Uninsured Employer Fund

Section 8-43-408(5) provides that:

> 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 . . . 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.

Although Claimant waived his penalty claims, the penalty provided by § 8-43-408(5) is mandatory, self-executing, and cannot be waived without the consent of the uninsured employer fund.

The penalty for failure to insure only applies to indemnity benefits; it does not apply to medical benefits. *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc.*, W.C. No. 4-155-231 (February 13, 1998). Additionally, although the ALJ is not aware of a case directly on point, statutory interest is not properly considered "compensation or benefits" within the meaning of 8-43-408(5). 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).

Employer has been ordered to pay $21,047.72 in TTD benefits. Twenty-five percent (25%) of the compensation awarded is $5,261.93.

H. Payment to Division trustee or a bond to secure payment of benefits

Employer was uninsured for workers' compensation liability at the time of Claimant's injury. Pursuant to § 8-43-408(2), Employer must pay 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. The total compensation, interest, and penalties Ordered herein is $26,940.46. Although this Order awards ongoing TTD benefits, the end date is unknown, so the present value of ongoing TTD cannot be calculated. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by some surety company authorized to do business in Colorado. Employer may contact the Division of Workers' Compensation at 303-318-8700 or cdle_wccustomer_service@state.co.us for assistance with their obligations in this regard.

ORDER

It is therefore ordered that:

1. Claimant's claim for an injury on October 21, 2023 is compensable.

2. Employer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's injury.

3. Dr. Marcie Wilde at Concentra is Claimant's ATP.

4. Employer shall pay Claimant $6,000.03 in TTD benefits from December 16, 2023 through February 16, 2024.

5. Employer shall pay Claimant $391.08 in statutory interest on unpaid TTD from December 16, 2023 through February 16, 2024. Interest will continue to accrue at the rate of $1.40 per day until the past-due TTD is paid.

6. Employer shall pay Claimant $15,047.69 in TTD benefits from June 2, 2024 through November 6, 2024.

7. Employer shall pay Claimant $239.73 in statutory interest on unpaid TTD from June 2, 2024 through November 6, 2024. Interest will continue to accrue at the rate of $3.35 per day until the past-due TTD is paid.

8. Employer shall pay Claimant $666.67 per week in TTD benefits commencing November 7, 2024 and continuing until terminated by law.

9. Employer shall pay $5,261.93 to the Colorado Uninsured Employer Fund.

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

a. Deposit $26,940.46 with the Division of Workers' Compensation, as trustee, to secure payment of all unpaid compensation and benefits awarded, or

b. File a surety bond in the amount of $26,940.46 with the Division of Workers' Compensation within ten (10) days 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, penalties, and benefits awarded.

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

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

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

DATED: November 6, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-262-798-001 & WC 5-262-798-002

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on November 6, 2023.

2. Whether Claimant established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits, including an emergency room visit and follow-up care.

FINDINGS OF FACT

1. Claimant works for Employer performing as-needed maintenance work on properties Employer owns in Georgetown, Colorado. Claimant's job duties include repairs and other maintenance work, and being available to respond to maintenance calls on an as-needed basis.

2. Employer initially hired Claimant and his wife to work as property managers. In August 2022, Claimant, his wife, and Employer, executed a written agreement through which Claimant and his wife agreed to serve as "Apartment Managers" with responsibilities that included collecting and depositing rent, marketing, showing units and signing leases with to prospective and new tenants, and handling maintenance requests "as needed." In exchange, Employer agreed to compensate Claimant and his wife with a combined monthly salary of $1000, plus housing and utilities. Maintenance work would be paid at the rate of $30 per hour. It was understood that Claimant and his wife would manage and maintain all of Employer's properties in and around Georgetown.

3. On July 17, 2023, Claimant took a new job with the [Redacted, hereinafter CT]. After that, Employer no longer paid Claimant as a property manager and paid his wife the full $1000 per month salary. As part of his employment with CT[Redacted], Claimant works 40 hours per week, and is on-call during off-hours one to two weeks per month. During the time he works or is on call for CT[Redacted],, Claimant is not available to perform work for Employer. After starting with CT[Redacted],, Claimant's work for Employer has been limited to providing maintenance for Employer's properties on an as-needed basis. (Ex. FF, p. 445). In September and October 2023, Claimant performed a total of 5 hours doing maintenance work for Employer. No credible evidence was admitted indicating that Claimant performed the job duties of a property manager after beginning working for CT[Redacted],.

4. The housing Employer provided for the Claimant and his wife was a free-standing, single family home located at [Redacted, hereinafter SF]. The property is situated next to Clear Creek, and adjacent to a small bridge over the creek. The house is several blocks away from Employer's other properties including apartments located at [Redacted,

hereinafter FS], [Redacted, hereinafter NO], [Redacted, hereinafter SI], [Redacted, hereinafter EO], all in Georgetown. (See FF, and JJ). The house at SF[Redacted] is not part of an apartment building or apartment complex. Claimant and his wife lived in the house at SF[Redacted] as their primary residence until November 6, 2023.

5. No credible evidence was admitted indicating that Employer required Claimant to live at SF[Redacted] as a condition of his employment, either as an as-needed maintenance provider, or earlier as a property manager.

November 6, 2023 Incident

6. On the evening of November 6, 2023, Claimant and his wife were eating dinner in their home when they heard a loud noise coming from outside. Claimant exited the home to investigate and saw that a semi-truck had collided with the bridge adjacent to their home, and dislodged the bridge's guardrail from its posts. The truck dragged the guardrail through the street, causing it to collied with and penetrate the house, causing severe damage. At the time, Claimant's wife was inside the house. Claimant called 911, and then entered the damaged home to attempt to rescue his wife. Claimant was outside when the house was damaged, and did not sustain any injuries as a direct result of the incident.

7. While on the call with 911, Claimant became worried for his wife's safety, and went into the house to attempt to get her out. He testified that in the course of locating and helping his wife, he fell several time inside the house . Claimant testified that he was coughing due to the dust and insulation that was dislodged by the incident. He indicated that as time went on, he began to feel sore, and approximately one week after the incident he was experiencing pain in his back, foot, neck, and ankle.

Claimant's Residence after November 6, 2023

8. The damage caused by the November 6, 2023 incident rendered the house at SF[Redacted] uninhabitable. Employer then offered Claimant and his wife housing at SI[Redacted] in Georgetown. However, Claimant and his wife declined the offer and moved in with family members outside Georgetown. During this time, Claimant continued to work for CT[Redacted], and perform maintenance work as-needed for Employer. In January 2024, Claimant and his wife moved back to Georgetown and into an apartment at [Redacted, hereinafter SS]. Employer did not own the apartment and paid Claimant's wife additional compensation to represent the "housing and utilities" element of her compensation, including $1,200 for December 2023, and $1,600 for housing expenses beginning January 2024, during the times they did not live in an Employer-owned property. (Ex. FF, p. 458, 459 and 497). In April 2024, Claimant and his wife moved into one of Employer's properties located at EO[Redacted], in Georgetown.

9. Claimant and his wife did not live in Employer-provided housing from November 6, 2023 until April 2024. During this time, Claimant continued to perform some maintenance work for Employer. For example, in February 2024, Claimant performed 22 hours of maintenance work. No credible evidence was admitted that Claimant's ability perform his

job duties for Employer during the time he lived with family outside Georgetown, or while living at SS[Redacted] was negatively affected.

Claimant's Injuries and Medical Treatment

10. An ambulance arrived at the Claimant's home at approximately 6:57 p.m. on November 6, 2023, in response to Claimant's 911 call. Claimant initially reported to the responding EMT that he had no medical complaint and did not wished to be assessed, but ultimately agreed to be evaluated. Claimant's only complaint at the scene was coughing, indicating that he had inhaled dust and debris during the incident. EMTs conducted an on-site assessment and found no other abnormalities. The ambulance transported Claimant and his wife to the St. Anthony Hospital emergency department, with Claimant sitting in a seat in the patient compartment of the ambulance. (Ex. S).

11. At approximately 8:10 p.m., Claimant was evaluated at the St. Anthony Hospital emergency department, reporting that he had childhood asthma and felt that his symptoms were mildly exacerbated by the dust and debris. He reported no other trauma or injury and had no other complaints. Claimant's pulmonary examination was negative. He was provided with an albuterol nebulizer and discharged. (Ex. R).

12. On November 8, 2023, a nurse contacted Claimant to follow-up on the ER visit. Claimant reported feeling better, and declined a follow-up appointment. (Ex. T).

13. On November 15, 2023, Claimant saw chiropractor Paul Fontana, D.C., at S & P Healing Arts in Evergreen, Colorado. Claimant reported discomfort in his cervical, thoracic, lumbar, and sacroiliac spine, trapezius, left calf, left ankle, and left foot plantar region, and indicated the pain had become worse since November 6, 2023. (Ex. J4).

14. Claimant continued to receive chiropractic care at S & P Healing Arts until April 3, 2024, attending twenty-four visits. Over the course of these visits, Claimant reported the same issues. By March 2024, Claimant's reported pain levels had decreased from an initial report of 7/10 to 3/10, and he reported the complaints were occurring with less frequency. (Ex. J4).

15. On December 12, 2023, Employer filed a first report of injury, indicating Claimant had sustained injuries to multiple body parts. (Ex. J1).

16. On January 30, 2024, Claimant filed a Worker's Claim for Compensation, indicating that Claimant had sustained injuries to his back, neck, ankles, lungs, and minor scratches on his feet, legs, and waist. (Ex. AA).

17. On February 16, 2024, Employer filed a Notice of Contest. (Ex. J1).

18. On May 29, 2024, Claimant attended an independent medical examination (IME) with Allison Fall, M.D., at Respondents' request. Dr. Fall concluded that Claimant had not sustained any musculoskeletal injuries as result of the incident.

19. [Redacted, hereinafter BY], Employer's president testified at hearing that he hired Claimant and his wife in May 2022 to serve as managers of the properties owned by Employer. He testified that the written agreement between the parties was to pay Claimant and her husband each $500 per month to be property managers. When Claimant began working for CT[Redacted], his job responsibilities were limited to performing as needed maintenance. BY[Redacted] testified that Claimant's job duties did not include acting as an emergency responder, and that he would not expect that Claimant would go into unsafe situations as a part of his employment. BY[Redacted] testified that Employer also has two other part-time maintenance providers who work 24 to 30 hours per week, performing the same type of work as Claimant.

20. BY[Redacted] indicated that after the SF[Redacted] property was damaged, he offered the Claimant and his wife a residence at SI[Redacted] but did not require them to move into that location. Claimant and his declined to stay at the SI[Redacted] property, and instead elected to move in with family outside Georgetown. Once they returned to Georgetown, Claimant and his wife moved into an apartment that was not owned by Employer, and paid rent. BY[Redacted] testified that Employer reimbursed Claimant for the rental expenses. Employer reimbursed Claimant for rental expenses including $1,200 for December, 2023, and $1,600 per month beginning January 2024. (Ex. FF, p. 497, 458, 459).

CONCLUSIONS OF LAW

Generally

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

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

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

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

Compensability

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

"Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co.*, 812 P.2d at 641; *Hubbard v. City Market*, W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). Whether the claimant has sustained her burden to prove the requisite nexus between the injury and the employment is one of fact for resolution by the ALJ. *Triad Painting Co., supra.*

For the reasons set forth below, the ALJ concludes that any injuries Claimant sustained did not arise out of the course of his employment with Employer and are therefore not compensable.

Claimant's injury did not occur "in the course of " his employment because it did not occur within the time and place limits of his employment, or during an activity that had a connection with his work-related functions. On November 6, 2023, Claimant's job for Employer was to respond to maintenance requests when he was available. No credible evidence was admitted demonstrating that Employer placed any specific requirements on Claimant to respond to after-hours maintenance requests. Claimant testified that he had

no specific time obligations to respond to requests, and or duties other than to "take care of the property." Employer also utilized two other maintenance providers in addition to Claimant who did the same work as Claimant. Because Claimant worked full-time for CT[Redacted], and was on call 1-2 weeks per month, he was not available to work for Employer during those times. As a result, he was not on call "24/7" for Employer as Claimant contends. The ALJ concludes that the conditions of Claimant's job cannot be reasonably interpreted to indicate that he was "on duty" for Employer at the time of the November 6, 2023 incident.

The ALJ further concludes that Claimant's injuries did not occur within the place limits of his employment. Claimant contends that Colorado law – specifically § 12-61-101 (2)(b)(XII), C.R.S.[1] – required him to live "on site" to perform the duties of an "apartment manager." The current version of the statute – § 12-10-202, C.R.S. – provides that a person working in the capacity of a real estate broker must be licensed by the Colorado Real Estate Commission. As relevant to Claimant, the practice of a real estate broker includes, among other things, renting or leasing real estate as an employee or on behalf of the owner of real estate – tasks Claimant's wife (but not Claimant) performed as part of her job duties for Employer. §12-10-201 (6)(a)(I) and (VIII), C.R.S. A statutory exemption to the real estate broker licensing requirement exists for a "[a] regularly salaried employee of an owner of an apartment building or complex who acts as an on-site manager of such apartment building or complex." § 12-10-201 (6)(b)(XII), C.R.S.

The unlicensed on-site manager provision of § 12-10-201 (6)(b)(XII), C.R.S., is not applicable to Claimant. Although Claimant initially had the job title of "apartment manager," as of July 17, 2023, Claimant no longer served in that role, and his wife performed those duties. The real estate licensing statute has no application to a maintenance provider, and contains no requirements related to the location that a maintenance provider must live. Moreover, even if the statute were applicable to maintenance providers, it requires that an unlicensed apartment manager be on-site in an apartment building or complex. Because the home in which Claimant lived was not a part of any apartment building or complex, Claimant was not "on-site," and the statute is therefore inapplicable.

The ALJ also concludes that Claimant was not required to live at SF[Redacted] as a condition of his employment. No credible evidence was admitted indicating that Claimant's position as a maintenance provider required him to live at any specific location. Claimant was able to perform his job duties between November 6, 2023 and April 2024 while living outside of Georgetown and while living at a different location not owned by Employer. Thus, the ALJ concludes that any injuries Claimant sustained did not occur in the course of his employment.

Claimant's injuries also did not "arise out of" his employment. Any injuries Claimant sustained were the result of his efforts to extract his wife from the house after it was damaged. Claimant's job duties for Employer did not include emergency response, and

[1] Section 12-61-101, C.R.S. was repealed, reenacted, and relocated within the Colorado Revised Statutes in 2019. The ALJ will refer to the current version of the statute.

BY[Redacted] testified Claimant was not expected to go into unsafe situations. While Claimant's decision to enter the building to find and save his wife was certainly reasonable, it was not within the scope of his employment duties. Because Claimant has not established that his injuries arose out of the course of his employment, they are not compensable.

Positional Risk Doctrine

Claimant contention that his alleged injuries are compensable under the positional risk doctrine is also without merit. The positional risk applies when the duties of the claimant's employment place him at a time and location where he is injured by a "neutral force." *Ismael v. Nextel Comms., Inc.*, WC No. 4-616-895 (ICAO Jul. 3, 2007). "A neutral force is one which is neither peculiar to the employment nor personal to the claimant." *Shirzadian v. Univ. of Colorado/Denver*, WC No. 4-619-435 (ICAO Feb. 13, 2006).

The positional risk doctrine is not applicable to Claimant's claim. First, Claimant was not injured by a neutral force. The "neutral force" in this case is the guardrail penetrating and damaging the home. Claimant was standing outside the home when the incident occurred, and was not injured by the guardrail penetrating the walls. Any injuries Claimant sustained, occurred when he entered the home to locate and remove his wife from the damaged home. Thus, any injuries were incurred as a result of Claimant's rescue attempt, rather than directly from a neutral force. Next, as discussed above, Claimant was not at SF[Redacted] as a condition of his employment, nor was Claimant on duty at the time of the incident. Because Claimant's employment did not place him at the time and location where he was injured, and his injuries were not caused by a neutral force, the positional risk doctrine is inapplicable.

Medical Benefits

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

Because Claimant has failed to establish that he sustained a compensable injury, Claimant has failed to establish an entitlement to medical benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained compensable work-related injury on November 6, 2023.

2. Claimant's claim for workers' compensation benefits related to the November 6, 2023 incident are denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 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: November 7, 2024

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

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?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received from Family Health West and Community Hospital Emergency Room was reasonable and necessary to cure and relieve Claimant from the industrial injury?

FINDINGS OF FACT

1. Claimant was employed with Employer as the Rocky Mountain Regional Manager. Claimant testified at hearing that as the Rocky Mountain Regional Manager his job duties included covering his market area that included all of New Mexico and all of Utah.

2. Claimant testified that he was scheduled to travel from his home in Fruita, Colorado to New Mexico on March 25, 2024 for his work to cover his region. Claimant testified that on March 22, 2024, in preparation for his trip to New Mexico he was placing sandbags in the back of the company owned pickup truck due to the fact that in order to travel from Fruita, Colorado to New Mexico, his route would take him over three mountain passes, including Red Mountain Pass.

3. Claimant testified that while putting the sandbags in the back of his pickup truck, he felt a pop across his abdomen. Claimant testified that he went to his personal physician at Family Health West who diagnosed Claimant with a hernia. Claimant testified he was referred to the emergency room ("ER") to be examined to ensure that the hernia was not strangulated. Claimant's testimony regarding the medical treatment he received as a result of the pop across his abdomen was not particularly questioned by Respondents and is found to be credible.

4. Claimant put into evidence photographs from his doorbell camera showing Claimant loading the sandbags into the back of his pickup truck on Friday, March 22, 2024 at approximately 3:45 p.m.

5. Claimant testified that the purpose of putting sandbags in the back of his pickup truck was to put weight over the tires of the pickup truck to help with traction in snowy weather. Claimant testified that he was aware that a storm was predicted to come in over the weekend and he wanted to have the benefit of the weight in the back of the truck to protect the company assets, including the pickup truck that is owned by Employer.

6. Claimant testified he contacted [Redacted, hereinafter WD] with Employer to report his injury. Claimant testified that when he reported the injury to WD[Redacted] and explained the reason for putting the sandbags in the back of his pickup truck, WD[Redacted] acknowledged that putting weight in the back of the truck made sense.

7. WD[Redacted] testified at hearing that he is Claimant's direct supervisor. WD[Redacted] testified that he was notified of the injury from someone in human resources. WD[Redacted] testified that in the company policies, there is not a provision that discussed putting weight into the back of the company trucks. WD[Redacted] agreed in his testimony that employees must do an analysis of potential risks before getting into a company vehicle. WD[Redacted] testified he did not recall stating to Claimant that putting weight in the back of the pickup truck was a good idea. WD[Redacted] further testified that he had never heard of putting weight in the back of a pickup truck to improve traction.

8. The ALJ finds Claimant's testimony that he felt a pop in his abdomen while putting sandbags in the back of his pickup truck on March 22, 2024 as credible. The ALJ further finds Claimant's testimony that he was putting the sandbags into the back of his pickup truck in anticipation of needing additional traction while traveling over the mountain passes for his trip to New Mexico on March 25, 2024.

9. The ALJ notes that testimony was presented regarding whether the weather for Claimant's trip would necessitate sandbags in the back of his pickup truck. The ALJ credits Claimant's testimony and finds that the purpose for putting the sandbags in the back of the pickup truck was in preparation for the trip to New Mexico. Specifically, the ALJ finds that it is reasonable to anticipate potential snowy or icy conditions when traveling over mountain passes in March. Therefore, the ALJ finds Claimant's actions in this case in putting sandbags in his truck to be a reasonable act in preparation for mountain travel in March.

10. The question then becomes whether Claimant's injury, arising out of loading the sandbags into the back of his pickup truck is compensable under the Colorado Workers' Compensation Act.

11. Notably, the ALJ finds, based on Claimant's testimony at hearing, that the injury that required Claimant to seek medical treatment arose out of an activity that was inherent to Claimant's employment. Specifically, the trip Claimant was preparing for was a work-related trip. Additionally, the vehicle Claimant was preparing when the injury occurred is owned by Employer and provided to Claimant for purposes of his employment.

12. The ALJ further credits Claimant's testimony at hearing and finds the actions of putting sandbags in the back of a pickup truck to assist with traction when Claimant was planning on driving over mountain passes in the Springtime to be a reasonable action considering the inherent dangers involved with traveling over mountain passes during that time of year. The ALJ further finds that the fact that the

truck was owned by Employer and provided to Claimant for the purpose of traveling for work represents additional evidence that an injury arising out of preparing a vehicle in anticipation of work related travel represents an injury arising out of and in the course of Claimant's employment with Employer.

13. While it is true that weighing down the back of a company vehicle is not specifically mandated by the Employer's Driver and Safety Policy, the ALJ finds that the act of placing sandbags in the back of the company truck is a reasonable action by Claimant to assist with traction when driving on snowy or icy roads.

14. Based on the finding that the injury occurred while Claimant was preparing the work owned pickup truck for work-related travel, the ALJ determines that the injury in this case arises out of and in the course and scope of his employment.

15. The ALJ further credits the testimony of Claimant at hearing and finds that Claimant has established that it is more probable than not that the medical treatment he received from Family Health West and the referral to the ER was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury.

CONCLUSIONS OF LAW

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

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

3. As a preliminary matter, Respondents argue in their position statement that Claimant failed to enter any medical records into evidence at hearing, and therefore, Claimant has failed in establishing his burden of proof that he sustained an

injury arising out of and in the course of his employment with Employer. The ALJ is not persuaded that Claimant's failure to enter medical records into evidence is fatal to his claim for workers' compensation benefits in this case.

4. In support of this decision the ALJ notes that the Colorado Workers' Compensation Act establishes special requirements for establishing an injury when the injury involves a mental claim, which do not apply to a physical injury. Section 8-41-301(2)(a) provides in pertinent part:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed psychiatrist or psychologist….

5. In *Colorado Department of Labor and Employment v. Esser*, 30 P.3d 189 (Colo. 2001), the Colorado Supreme Court held that the requirement that a claim for mental impairment be proven by evidence supported by "testimony" does not require oral testimony and could be met by submitting a medical report. Therefore, the ALJ determines that while a claim for mental impairment requires oral or written "testimony" from a licensed provider establishing the injury, this requirement does not apply to a claim for physical injuries.

6. Therefore, the ALJ determines that Claimant's failure to present the medical records from his treatment with Family Health West Physicians and Community Hospital ER is not fatal to his claim for benefits.

7. 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.

8. As found, Claimant's injury in this case arose out of his loading sandbags into the back of his pickup truck. As found, Claimant's testimony that the purpose for loading the sandbags in the back of his pickup truck was in anticipation of needing extra weight to assist with traction while traveling mountain passes is found to be credible and a reasonable action by Claimant considering the nature of the trip.

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

10. As found, Claimant has proven by a preponderance of the evidence that the medical treatment he received for the hernia from Family Health West and the ER represents reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury. As found, Claimant's testimony regarding the nature of his medical treatment with Family Health West and the ER are found to be credible with regard to this issue.

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 March 22, 2024 industrial 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, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 12, 2024

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. 5-209-220-002

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable injury?

II. If compensable, has Claimant shown, by a preponderance of the evidence, that he is entitled to medical benefits to treat his injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed as a firefighter/medic with the City of Pueblo. He was hired on May 15, 1995. Claimant was eventually promoted to Captain of a station and then in 2016 he became a training officer. He is now the Airport Station Captain since 2022.

2. In 2015, Claimant noticed that he had difficulty hearing when going out on calls. A hearing test was done and did not show any physical problems with his hearing. He was told it was a processing problem. He discussed his symptoms with his primary care physician, Dr. John Thomas. He was upset and cried because he did not know what was going on. Dr. Thomas took him off work for two months.

3. Claimant started counseling with Greg Sims. They discussed his struggles with some of his work experiences including a three-person car accident where a passenger was ejected, hit a tree and died. Another incident that was distressing was where a young man was brought out of a building and placed in the ambulance. He was screaming and chewing on his fingers to the point of bleeding. A third incident was with a female who had cut her wrists and blood was spraying everywhere. These incidents occurred in 2014 and 2015. Claimant also testified that he answered a call where a 2 year old was shot in the face. This happened in 1997. Mr. Sims and Dr. Thomas diagnosed him with Post-traumatic Stress Disorder (PTSD). He was referred to nurse Diana Smith for medication. He did not report his treatment as work related.

4. In 2016, a training position opened and he was selected for that position. He no longer went on calls and worked in administration and not in a fire station. His quality of life improved and his symptoms improved but not entirely.

5. In August 2021, [Redacted, hereinafter BR] was the safety officer responsible for safety. During the Albany fire, he got into a shouting match with another captain. He perceived that the other captain was putting himself in "harm's way" without utilizing protective gear. Following this incident, he became upset that the other firefighters started not

listening to him, despite his position as the safety officer. Claimant did agree that this incident did not involve a traumatic event. It was just disrespect from his co-workers.

6. On March 28, 2022, Claimant was working as a safety officer for the [Redacted, hereinafter PP]. He received a text that a coworker that he had trained attempted suicide by hanging. Claimant did not witness the incident. Claimant decided to go to the hospital to support the co-worker and his family. When he arrived, the co-worker was unconscious and on a ventilator. He stayed with the co-worker until the co-worker's wife arrived later that evening. Claimant testified that it was very upsetting to him that the co-worker attempted suicide. After that event, Claimant went to Peer Team Counseling. They referred him to [Redacted, hereinafter LS] at [Redacted, hereinafter IT].

7. On April 25, 2022, Claimant reported to Dr. Thomas that he was struggling with a new shift at work with symptoms starting in February 2022. He was upset to the point that he considered retirement.

8. On May 10, 2022, Claimant filled out a written notice of accident. In that report Claimant indicated that he suffered an accident on March 28, 2022 at around 9:00 p.m. when he was exposed to a co-worker with a life-threatening injury. He alleged that this caused a significant increase in depression.

9. Following the report of injury, Claimant started treating with Dr. Centi on May 18, 2022. Dr. Centi reported that the Claimant had a traumatic event dealing with an injured and tragically ill employee. Dr. Centi diagnosed Claimant with work-related PTSD. Dr. Centi referred the Claimant to a psychiatrist, Dr. Moe. Claimant first saw Dr. Moe on June 7, 2022. Dr. Moe did not document any independent causation analysis and relied on Dr. Centi's diagnosis of PTSD,

10. In 2023, following an administrative oversight in overbooking the training calendar, Claimant felt dismissed and invalidated by his superiors. Specifically, his supervisor corrected the problem without allowing the Claimant to correct the problem. He testified that he was then suicidal and went to see Dr. Centi who took him off work. This apparently happened on January 17, 2023 according to the history provided to Dr. Kleinman. However, in reviewing Dr.Centi's notes from that he was returned to work at the visit on January 17, 2023 noting that he was able to return to full duty on January 18, 2023. The next entry of January 19, 2023, he states "denies suicidal or homicidal ideations". Nevertheless, he takes him off work from that date until February 16, 2023.

Dr. Kleinman's IME

11. Dr. Robert Kleinman, a psychiatrist, conducted an IME at Respondent's request and authored a report dated January 15, 2024. After review of the medical records and interviewing the Claimant Dr. Kleinman was of the opinion that Claimant did not have PTSD or met the medical criteria for a compensable mental condition under §8-41-301 C.R.S.

12. Utilizing the DSM V, Dr. Kleinman listed the diagnostic criteria for PTSD. They include exposure to actual and threatened death, serious injury by directly experiencing the

traumatic event; witnessing the event as it occurred to others; learning that the traumatic event occurred to a close family member or a close friend; experienced repeated/extreme exposure to aversive details of traumatic events such as first responders and police officers repeatedly exposed to details of such things as childhood abuse. He states, "The events between 2021 and 2023 would not qualify for a diagnosis of PTSD".

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43--201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

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

Appeals Office, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002

D. The 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). In this instance, the ALJ is persuaded by the opinions of Dr. Kleinman that the Claimant does not have PTSD from the event he describes that occurred on March 28, 2022 or the Albany fire incident.

E. Prior to July 1, 2018, a compensable mental impairment was limited to a psychologically traumatic event that arose out of and in the course of employment when the accidental injury "consists of a psychologically traumatic event that is generally *outside* of a worker's usual experience ...." *See* §8-41-301(2)(a) C.R.S. Effective July 1, 2018, the section of the statute dealing with claims of mental impairment, §8-41-301, C.R.S., was amended by House Bill 17-1229. The amendments effective on that date broadened the category of compensable mental impairment injuries to include, at least potentially, PTSD arising from events "*within* a worker's usual experience". However, since the Claimant does not have PTSD related to the events between 2021 and 2023, the new criteria do not apply to the Claimant.

F. Section 8-41-301(2)(a) and (b) now provides, as pertinent to this claim:

> (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*. …
>
> …
>
> (b)(II) "Psychologically traumatic event" also includes an event that is within a worker's usual experience only when the worker is diagnosed with post-traumatic stress disorder by a licensed psychiatrist or psychologist after the worker experienced exposure to *one or more* of the following events:
>
> …
>
> (C) The worker *repeatedly* and either visually or audibly, or both visually and audibly, *witnesses* the serious bodily injury, or *the immediate aftermath of the serious bodily injury,* of one or more people as the result of the intentional act of another person *or* an accident. (Emphasis added).

G. In order for this new section to apply, Claimant must have the diagnosis of PTSD from the event. In this case, the event is the Claimant's encounter at the hospital with the co-worker who tried to commit suicide. Since Dr. Kleinman credibly determined that the Claimant does not have PTSD from that event, the test remains is whether the event is within a worker's usual experience.

H. Claimant testified that the incidents he experienced and recounted for his providers in his hearing testimony were not outside of his usual work experience and to respond to calls of this nature and was the norm. I conclude that Claimant has failed to sustain his burden of proof that he sustained a compensable mental impairment claim.

ORDER

It is therefore Ordered that:

1. The claim for compensation based on a mental impairment is denied and dismissed.

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.

DATED: November 13, 2024

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-211-192-001 & 5-091-665-001

ISSUES

- Did Claimant prove he suffered a compensable injury to one or both shoulders on May 10, 2022?

- If Claimant proved a compensable injury, did he prove that bilateral total shoulder arthroplasties performed by Dr. David Weinstein were proximately caused by the injury?

- In the alternative, did Claimant prove WC 5-091-665 should be reopened because of a change in condition?

FINDINGS OF FACT

1. Claimant works for Employer as a facilities maintenance technician. The job is physically demanding and requires frequent heavy lifting. He also performs overhead work to maintain items such as light fixtures, ceiling tiles, and HVAC systems. Claimant has been in his current position since 2017. Before that, he worked for approximately 12 years in Employer's wastewater construction department.

2. Claimant suffered a work-related shoulder injury to his left shoulder on May 29, 2018. An MRI showed advanced AC joint osteoarthritis and a posterior labral tear. The glenohumeral joint was normal with no osteoarthritis or joint effusion. Dr. Michael Simpson performed an arthroscopic subacromial decompression, distal clavicle resection, and posterior labral repair, on November 1, 2018.

3. Claimant was put at MMI on April 23, 2019, with a 15% upper extremity impairment. He was released to full duty with no restrictions and no recommendations for maintenance care. The claim was closed by an uncontested Final Admission of Liability ("FAL").

4. Claimant had no additional treatment for his left shoulder until May 2022.

5. Claimant alleges he injured both shoulders on May 10, 2022, while he and a co-worker, [Redacted, hereinafter PG], were loading a large piece of sheet metal roofing material into a roll-off dumpster. Claimant estimated the sheet metal was approximately 20 feet long and weighed approximately 50-80 pounds. The dumpster was taller than Claimant, so he had to lift the material over his head.It was windy at the time, which made the sheet metal awkward to lift and maneuver into the dumpster.

6. Claimant felt a "pop" and immediate pain in his right shoulder while pushing the piece of sheet metal over the edge of the dumpster.

7. PG[Redacted] corroborated that he and Claimant disposed of the large piece of sheet metal on May 10. However, PG[Redacted] was unaware of any potential injury to Claimant at the time. Claimant said nothing about shoulder pain, and PG[Redacted] did not observe any indicators of pain or limitations.

8. Claimant kept working after the incident with the sheet metal despite pain in his shoulder. Near the end of his shift Claimant reported the incident to his supervisor, and completed an incident report. The report states Claimant injured his right shoulder "throwing trash into a dumpster . . . when he felt pop and pain." Claimant did not seek medical attention and decided to wait and see if the pain would subside on its own.

9. Claimant's right shoulder was still painful the next day. He also noticed pain in his left shoulder, although it was less severe than the right.

10. Claimant saw Dr. Nicholas Kurz at Employer's occupational medicine clinic on May 11, 2022. Claimant reported he was throwing a large piece of sheet metal into a dumpster, and "when pushing it over the top of the dumpster, felt pop in R shoulder, now pain and reduced ROM." Claimant also stated his left shoulder was sore but was not painful until that morning. Shoulder range of motion was limited on the right, but normal on the left. Dr. Kurz diagnosed bilateral shoulder strains, and recommended shoulder MRIs "to rule out any new/acute injury vs. OA/DJD."

11. The MRIs were completed on May 15, 2022. The right shoulder MRI showed advanced osteoarthritis with joint space narrowing, bone spurs, chondral fissuring and delamination, supraspinatus tendinosis with a partial-thickness tear, and fraying of the labrum. The previous surgical repairs were intact. The findings were similar in the left shoulder, with rotator cuff tendinosis, advanced osteoarthritis, and degenerative labral tears. The radiologist gave no indication that any pathology in either shoulder was acute.

12. Claimant followed up with Dr. Kurz on May 18, 2022. Based on the MRI findings, Dr. Kurz opined Claimant had suffered no new injury and his symptoms were related to severe pre-existing osteoarthritis. He advised Claimant to follow-up with his personal physicians for treatment of his nonwork-related shoulder pain. Dr. Kurz put Claimant at MMI with no impairment and released him to work with no restrictions.

13. Thereafter, Claimant saw his PCP and was referred to Dr. David Weinstein, an orthopedic surgeon. Dr. Weinstein recommended bilateral total shoulder arthroplasties. The right shoulder was done on September 13, 2022, and the left shoulder was done on September 1, 2023.

14. Dr. Mark Failinger performed an IME for Respondent on May 16, 2023. He authored two IME reports and testified twice via deposition. Dr. Failinger agreed the total shoulder arthroplasties were reasonably needed to treat the advanced osteoarthritis in Claimant's shoulders. But he opined the procedures were not causally related to Claimant's work.

15. Dr. Failinger cited multiple factors in support of his conclusions. First, he opined the mechanism of injury described by Claimant was insufficient to accelerate or aggravate Claimant's pre-existing arthritis. He also noted that the May 2022 MRIs showed only pre-existing, severe, degenerative changes, and no acute injury. As a result, the "pop" Claimant experienced in his right shoulder was of no clinical significance and not correlated with any structural damage. Dr. Failinger conceded that Claimant developed shoulder symptoms in May 2022, and opined, "it's reasonable to state there is a strain . . . to the capsule or the rotator cuff tendons." The left shoulder MRI showed evidence of a mild deltoid strain, which Dr. Failinger testified "could be consistent with trying to move an object." However, a strain would resolve quickly and would "certainly not" be treated with a shoulder replacement. Dr. Failinger testified that Claimant's ongoing symptoms are "almost to a medical certainty" entirely related to his long-standing, pre-existing osteoarthritis.

16. Although Dr. Failinger has consistently maintained that Claimant's persistent symptoms and need for bilateral shoulder arthroplasties are unrelated to his work activity in May 2022, he offered conflicting opinions regarding the role played by Claimant's 2018 injury. In his first deposition, Dr. Failinger pointed to the relatively rapid onset of severe osteoarthritis in the left shoulder compared to prior findings in 2018. He opined that "the number one thing by far [from a causation standpoint] is genetics." But he also indicated that Claimant's prior labral repair may have accelerated the degenerative process. He testified that he had stopped performing labral repairs several years ago because he had seen many patients develop arthritis relatively quickly at a young age following labral surgery.

17. Claimant petitioned to reopen the 2018 left shoulder claim based on Dr. Failinger's deposition testimony.

18. Dr. Failinger revisited this issue in an addendum report and his September 16, 2024 deposition. Dr. Failinger explained that he conducted a literature review but found no evidence that labral repairs lead to the rapid progression of osteoarthritis. Based on his research, he amended his opinion and concluded "the development of arthritis [after a labral repair] is . . . a possibility, but it's quite low." Therefore, the only medically "probable" causative factor in this case is Claimant's genetics.

19. Dr. Anjmun Sharma performed an IME on June 15, 2023 at the request of Claimant's counsel. Dr. Sharma opined that "both shoulders are work-related and are both related to the fact that the patient has been working for the same employer for the past 18 years." He further opined, "while the patient did have an acute exacerbating injury [ ] on May 10, 2022, . . . the arthritis in his shoulders would not have occurred as a result of lifting a piece of tin but rather [is a] chronic progression . . . as a result of working for the same employer for the last 18 years."

20. Dr. Sharma issued an addendum report on August 29, 2024. He opined that the May 10, 2022 incident "aggravated, accelerated, and/or exacerbated" both shoulders. He opined that Claimant injured the right shoulder on May 10, 2022, and subsequently injured the left shoulder because "he was using his left shoulder more and . . . his left

shoulder did experience overuse and worsening, acceleration, and exacerbation of the underlying arthritic change." With respect to reopening the 2018 left shoulder claim, Dr. Sharma opined the shoulder worsened because "multiple surgeries on the shoulder can result in arthritic changes."

21. Claimant proved he suffered compensable injury May 10, 2022, consisting of bilateral shoulder "strains."

22. Claimant was put at MMI by Dr. Kurz on May 18, 2022, and no DIME has been completed. As a result, I have no jurisdiction to award or deny treatment after that date in W.C. No. 5-211-192.

23. Claimant failed to prove his 2018 claim should be reopened. Dr. Failinger's opinions regarding causation of the left total shoulder arthroplasty are credible and persuasive. There is no doubt, Claimant's left shoulder has worsened since he was put at MMI in 2019. But he failed to prove the change of condition reflects the natural progression of the injury-related condition. Rather, the worsening is the manifestation of Claimant's underlying genetic predisposition. As Dr. Failinger explained, although it is "possible" that the 2018 surgery accelerated the progression arthritis in Claimant's left shoulder, a causal nexus is not "probable." Dr. Sharma opined that "multiple" surgeries can accelerate arthritic change, but Claimant had only one prior surgery to the left shoulder.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Even a "minor strain" can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused them to seek medical treatment. The ICAO's decision in *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2004) is instructive regarding the minimal extent of an injury that can satisfy the basic threshold requirement of compensability. In *Garcia*, the claimant felt pain in her abdomen and hip while lifting a piece of glass at work. The employer referred the claimant to Dr. Caughfield, who diagnosed a lumbar strain, but opined she had already reached MMI. The ALJ found that the claimant suffered a "minor back sprain," but also found the sprain had "resolved" within five days of the incident. The ALJ denied the claim on the grounds that the claimant failed to prove she suffered a compensable "injury." The ICAO reversed, and held that the claimant had established a compensable injury as a matter of law:

> Where pain triggers the claimant's need for medical treatment, the claimant has established a compensable injury if the industrial injury is the cause of the pain. The term medical treatment includes diagnostic procedures required to ascertain the extent of the industrial injury.

> Here, the ALJ found there was an industrial accident which caused a minor lumbar strain. Further, the ALJ determined that when the injury was reported to the employer, the employer offered the claimant medical services from Dr. Caughfield, which the claimant accepted. Although Dr. Caughfield placed the claimant at MMI based upon his [ ] examination, the ALJ found with record support that Dr. Caughfield diagnosed a lumbar strain. Thus, the ALJ's findings compel the conclusion the claimant established a compensable injury which entitled her to an award of medical benefits. (Citations omitted).

Conry v. City of Aurora, W.C. No. 4-195-130 (ICAO, April 17, 1996) involved a similarly minor episode that was found to establish a compensable claim as a matter of law. In *Conry*, the claimant suffered from pre-existing asthma. One day she walked into work and encountered a "strong smell of ammonia." As a result, she "began wheezing and became short of breath." The claimant's supervisor advised that she go to the doctor. There is no indication in the decision that the claimant required any treatment other than the one physician visit. The ALJ denied the claim because the ammonia exposure merely caused a "temporary exacerbation" of the claimant's pre-existing asthma. She had no ongoing sequela and required no additional treatment other than the one-time visit. Therefore, the ALJ determined the claimant failed to prove that she suffered a compensable "injury."

The ICAO reversed and found that the claimant had proven compensability as a matter of law. The ICAO stated "the claimant's industrial exposure to ammonia caused her to experience respiratory symptoms for which she needed and received medical treatment. . . . [T]hese findings compel a conclusion that the claimant suffered a compensable aggravation of her pre-existing condition [asthma]. Therefore, we reverse the ALJ's determination that the claimant did not suffer a compensable injury."

As found, Claimant proved he suffered a compensable injury on May 10, 2022. Claimant's testimony regarding the events that day is credible. Claimant experienced the onset of right shoulder pain while lifting a heavy piece of sheet metal over his head during strong wind, which Dr. Failinger agreed was a reasonable mechanism of injury for a soft-tissue strain. Although Claimant did not notice left shoulder pain immediately, the shoulder was sore when he awoke the next morning. Claimant reasonably requested treatment and Employer obliged. Dr. Kurz initially diagnosed bilateral shoulder strains and ordered MRIs.

Diagnostic testing intended to investigate the nature and extent of a work injury is a compensable medical benefit. *E.g., Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). *Bustamante v. City of Pueblo*, W.C. No. 5-256-187 (ICAO, October 28, 2024). This is true even if the testing shows the injury was only partially responsible for the claimant's symptoms. *E.g., Briggs v. Safeway, Inc*., W.C. No. 4-950-808-01 (ICAO, July 8, 2015); *Vangenberg v. Ames Construction*, W.C. No. 4-388-883 (ICAO, December 5, 2007). Here, the persuasive evidence shows Claimant experienced pain triggered by a work-related activity, which resulted in medical treatment, including diagnostic testing. These facts are sufficient to establish a compensable injury.

B. Jurisdiction to adjudicate Claimant's request for additional medical benefits

Sections 8-42-107(8)(b)(I)-(III) provide that

> An authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement . . . . If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected . . . . A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division.

Taken together, these provisions establish that once an ATP places a claimant at MMI, a DIME is a "mandatory, jurisdictional prerequisite" to a hearing regarding additional medical treatment. *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003). The ICAO has repeatedly held that "after MMI [is] declared, the ALJ lack[s] jurisdiction to award or deny medical benefits to cure and relieve the claimant's condition." *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (January 27, 2006); *see also Eby v. Wal-Mart Stores Inc.*, W.C. No. 4-350-176 (February 14, 2001); *Anderson-Capranelli v. Republic Industries, Inc.*, W.C. No. 4-416-649 (November 25, 2002); *Cass v. Mesa County Valley School District*, W.C. No. 4-69-69 (August 26, 2005).

Subject matter jurisdiction cannot be conferred by consent or waiver. *Hasbrouck v. Industrial Commission*, 685 P.2d 780 (Colo. App. 1984); *Industrial Commission v. Plains Utility Co.*, 259 P.2d 282 (Colo. 1953). Although neither party raised an issue regarding jurisdiction at the hearing, if a court determines it lacks subject matter jurisdiction, it should address the issue *sua sponte*, regardless of whether the parties have raised it. *E.g.*, *People in the Interest of J.C.S.*, 169 P.3d 240, 245 (Colo. App. 2007); *Shelter Mutual Ins. Co. v. Mid-Century Ins. Co.*, 214 P.3d 489 (Colo. App. 2008).

McCormick v. Exempla, *supra*, illustrates the futility of rendering a decision at this juncture. In *McCormick*, neither party raised the issue of jurisdiction at the hearing. After receiving an adverse decision from the ALJ, the claimant asserted the ALJ's lack of subject matter jurisdiction for the first time on appeal. The ICAO rejected the respondents' argument that the claimant had waived the issue, noting that a party can assert lack of jurisdiction "at any point in the proceedings." Ultimately, the ICAO agreed with the claimant's argument and vacated the ALJ's decision.

Claimant's request for medical benefits after May 18, 2022, including bilateral total shoulder arthroplasties, must be dismissed for lack of jurisdiction.

C. Reopening in W.C. 5-091-665

Section 8-43-303 authorizes an ALJ to reopen an award on the grounds of error, mistake, or a change in condition. A "change in condition" refers either to a change in the condition of the original compensable injury, or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,*

714 P.2d 1328 (Colo. App. 1985). If a claimant's condition has changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from a separate cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. When a claimant seeks reopening based on a change of condition after MMI, a prior DIME determination is entitled to no special weight. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The claimant must prove a basis to reopen by a preponderance of the evidence. Section 8-43-304(4).

Dr. Kurz's declaration of MMI does not preclude adjudication of medical benefits in the context of Claimant's request to reopen his 2018 claim, because the DIME process does not apply to reopening based on a change of condition. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

As found, Claimant failed to prove his 2018 claim should be reopened. While there is no doubt that Claimant's left shoulder has worsened since he was put at MMI in 2019, he failed to prove the change of condition reflects the natural progression of the injury-related condition. Rather, the worsening is the manifestation of Claimant's underlying genetic predisposition. Dr. Failinger's opinions regarding causation of the left total shoulder arthroplasty are credible and persuasive. Initially, Dr. Failinger believed the previous labral repair was a medically probable explanation for rapid development of osteoarthritis in Claimant's left shoulder. But subsequent research failed to produce empirical data to support his anecdotal impression. He concluded that, although it is "possible" that the 2018 surgery accelerated the progression arthritis in Claimant's left shoulder, a causal nexus is not "probable." Dr. Sharma opined that "multiple" shoulder surgeries can accelerate the progression of arthritis but offered no persuasive opinion regarding the effect of a single surgery such as Claimant had in 2018. Moreover, Dr. Sharma attributed Claimant's need for a left shoulder arthroplasty primarily to his lengthy period of employment and the May 10, 2022 injury, rather than a natural progression of the 2018 injury. The preponderance of persuasive evidence fails to show that Claimant's need for treatment, including a left total shoulder arthroplasty, is causally related to the 2018 injury.

ORDER

It is therefore ordered that:

1. Claimant's claim in W.C. No. 5-211-192-001 for an injury on May 10, 2022 is compensable.

2. Claimant's request for medical benefits after May 18, 2022 in W.C. No. 5-211-192 is dismissed for lack of jurisdiction.

3. Claimant's request to reopen W.C. No. 5-091-665 is denied and dismissed.

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

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

DATED: November 13, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-268-749-001

ISSUES[1]

- Whether Respondent proved by a preponderance of the evidence Claimant was an independent contractor pursuant to §8-40-202(2) C.R.S.

- Whether Claimant proved by a preponderance of the evidence he sustained a compensable work injury arising out of and in the course of employment for Respondent.

- Whether Claimant proved by a preponderance of the evidence he is entitled to reasonable, necessary and related medical treatment.

- Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability (TTD) benefits from March 15, 2024 through May 14, 2024 and temporary partial disability (TPD) benefits from May 15, 2024 through August 20, 2024.

FINDINGS OF FACT

1. Claimant began performing services for Respondent in November 2023. At that time, Claimant owned one semi-truck, which he operated under his own company, [Redacted, hereinafter DA]. The Internal Revenue Service assigned DA[Redacted] an Employer Identification Number (EIN) on March 4, 2022. Ex. F. Claimant transported loads dispatched by Respondent. In January 2024, Claimant ceased operating DA[Redacted] and established another company, [Redacted, hereinafter TT], with its own EIN. Claimant continued providing services for Respondent in the same capacity using his own truck. Claimant was the sole individual providing services under DA[Redacted] and then TT[Redacted].

2. Claimant testified that, from November 2023 to February 9, 2024, he performed services for Respondent in the capacity of an owner/operator as an independent contractor. He testified that, during such time period, Respondent paid Claimant by the load, he was free to accept or reject any loads, and he was responsible for all expenses

[1] Claimant lists average weekly wage (AWW) as an issue for determination in his position statement. As addressed at the procedural hearing before ALJ Cayce on August 29, 2024, in ALJ Cayce's August 30, 2024 Order re: Extension of Time to Commence Hearing and Issues for Determination at Hearing, and as discussed at the beginning of the September 23, 2024 hearing, the specific issues for determination in this matter are compensability, medical benefits, temporary indemnity benefits and independent contractor status. Claimant did not properly endorse the issue of AWW, nor was the issue of AWW tried by consent by Respondent. Such issue is reserved for future determination as applicable.

related to the operation of his truck, including diesel, maintenance and insurance. Claimant testified he was free to work for any other company, although he did not do so from November 2023 to February 9, 2024. Claimant testified that, from November 2023 to February 9, 2024 he grossed an average of $5,000 to $7,000 per week performing services for Respondent, resulting in approximately $4,000 per week in earnings after expenses.

3. On February 9, 2024, Claimant parked his truck because it was no longer working due to a broken "GR." Claimant testified he had to fix the GR, the turbo, oil leaks, water hoses and tires. Claimant estimated the repairs would cost approximately $10,000. Claimant testified that, as of the date of the hearing, he has yet to fix his truck because he does not have the money to do so. Claimant testified that his company, TT[Redacted], did not provide any services to Respondent after his truck broke down on February 9, 2024. Claimant testified he has not operated TT[Redacted] since February 9, 2024.

4. Claimant testified he looked for other work but was unable to find any and, on February 13, 2024, he returned to work for Respondent as a driver using a truck provided by Respondent. Claimant alleges he became an employee of Respondent at such time. Claimant testified his pay as a driver was set by Respondent without any negotiation at $0.55/mile. Claimant testified he was not responsible for any expenses related to the truck provided by Respondent. Claimant testified he was not able to refuse any driving trips or decide which trips to take and he was required to report to Respondent to notify of when he was near the unloading location and when he picked up the next load.

5. Subsequent to February 9, 2024 Claimant continued to perform the same services for Respondent that he did prior to February 9, 2024, transporting loads.

6. On March 14, 2024 Claimant was involved in a motor vehicle accident (MVA) while transporting a load from Utah to Colorado dispatched by Respondent. The MVA occurred at the end of a ten-day trip transporting loads for Respondent. On March 14, 2024, Claimant picked up a load in Cedar City, Utah which was to be delivered to Denver, Colorado. Claimant testified that, when he arrived in Grand Junction, Colorado, he had to take a detour through Salida, Colorado because I-70 was closed due to snow. Claimant called [Redacted, hereinafter FF] to advise him of the detour. At approximately 10:40 p.m., Claimant's truck slid and crashed into a mountainside in Salida, Colorado. Claimant testified that the icy road caused the truck to slide and crash on the mountain. Claimant called the owner of Respondent, FF[Redacted], to report the MVA, who came to pick Claimant up from Salida on the evening of March 15, 2024.

7. Claimant sought treatment at Banner North Colorado Medical Center Emergency Department immediately after the MVA. He was ultimately diagnosed with a comminuted intra-articular displaced left radial shaft and distal radius fracture. Claimant testified he underwent surgery with hardware and that he returned to a medical provider to have the stitches removed. Claimant testified he did not undergo any other medical

treatment for his injury because he does not have money to pay the doctor. Claimant testified his current limitations include difficulty lifting more than 20 pounds above waist or table level and increased pain when exposed to cold temperatures.

8. The documentary evidence regarding Claimant's pay submitted by both parties does not cover the entire time period for which Claimant provided services for Respondent. Claimant's Exhibit 1 includes pay records for the following periods: 1/3/2024-1/14-2024, 1/21/2024-1/14/2024, 1/28/2024-2/4/2024 and 2/5/2024-2/11/2024. Under the section "Trip Amount" there is a total dollar amount that does not reflect any specific calculation of mileage. Claimant's Exhibit 3 includes a pay record for the period 2/18/2024-2/25/2024 in which it appears the amount is calculated based on mileage at $0.55/mile.

9. Claimant testified he earned $959.70 for his first week as a driver for Respondent. The record includes copy of a check issued by Employer, No. 1177 for $959.70, dated February 21, 2024, payable to Claimant's company, TT[Redacted], as "owner operator." Ex. 2, p. 009. No pay record was offered as evidence detailing the method of calculation for the first week Claimant purportedly worked as a driver for Respondent. Check stubs produced by Respondent include No. 1179, dated February 22, 2024, referencing payment to TT[Redacted] for $1,593.60 as "Driver." Ex. 2, p. 010. Claimant testified he did not receive a check for $1,593.60 referenced by check stub 1179.

10. Claimant testified that he was paid $1,533.75 for his second week of driving, as evidenced by Check No. 1181, dated March 2, 2024, written by Respondent made payable to TT[Redacted] as "owner operator." Id.

11. In addition to the $959.70 and $1,533.75 payment for his first two weeks of driving, Respondent also paid Claimant $800 on March 14, 2024 through the money transfer application Zelle.

12. Claimant testified that, after payment for his first two weeks of driving, he had driven an additional 7,412 miles for which he was owed $4,076 which after a deduction of the $800, left a balance of $3,276 he believes is owed to him by Respondent. Claimant testified that, after the MVA, he asked FF[Redacted] to pay him what he was owed for his driving. Claimant testified FF[Redacted] refused to pay him because Claimant had damaged the truck in the MVA. Claimant testified he stopped working for Respondent after the MVA.

13. Claimant returned to work at a mechanic shop on May 15, 2024, making $900.00 per week. He worked at these wages until August 20, 2024, when he started working as a driver making $1,700.00 per week.

14. Both before and after February 9, 2024, Respondent issued payment to Claimant in Claimant's business name (first DA[Redacted], then TT[Redacted]).

15. When asked why, after February 9, 2024, he accepted checks made payable to his company TT[Redacted] instead of his individual name, Claimant testified there was no time to discuss his checks as he was very busy driving or sleeping and he needed to get paid to pay his rent and expenses.

16. [Redacted, hereinafter VO] testified at hearing on behalf of Respondent. VO[Redacted] testified that he began providing services for Respondent in April 2024 and does so as an independent contractor. VO[Redacted] testified that Respondent "is a carrier and I'm leased on to his DLT, which is his authority. That's what I do. So we're different companies, we're just attached because he does have his Department of Transportation certificate." Hrg. Tr. 47:13-17. VO[Redacted] testified that he has his own company under FF[Redacted] authority, which he referred to as a "lease on contractor." Hrg. Tr. 47:20-21.

17. FF[Redacted] testified at hearing on behalf of Respondent. FF[Redacted] testified he hired Claimant to work as an independent contractor and that Claimant worked in such capacity throughout the entirety of his time performing services for Respondent. FF[Redacted] testified that Respondent does not hire nor have any drivers, and that all of the individuals providing services for Respondent are business owners and independent contractors.

18. FF[Redacted] testified that Claimant provided services for Respondent first as the owner/operator of DA[Redacted], and then as the owner/operator of TT[Redacted]. Claimant completed W-9 forms and provided Respondent his companies' EINs.

19. Exhibit H includes a W-9 Request for Taxpayer Identification Number and Certification for Claimant's company, TT[Redacted]. The form is dated February 12, 2024. FF[Redacted] testified that Claimant provided him the form on February 14, 2024, as Claimant said he was no longer operating DA[Redacted] due to some issues. FF[Redacted] did not ask Claimant to provide Respondent the new W-9 form for TT[Redacted].

20. FF[Redacted] testified that the truck Claimant was driving at the time of the MVA was a truck Respondent lent to Claimant because Claimant's own truck broke down. He testified, "[Claimant] let us know that his truck broke down and we loaned him one so that he could finish the job, and he was going to bring back his truck the next week." Hrg. Tr. 62:2-5. FF[Redacted] testified that Respondent had a lease agreement with another company, [Redacted, hereinafter GS], for the truck and that the truck was working under and insured under GS[Redacted]. FF[Redacted] testified that Respondent lent Claimant the truck to use because there was already a commitment to transporting loads that needed to be completed.

21. FF[Redacted] testified,

> Q: You were also responsible -- your company was responsible for paying his wages for driving whatever truck you assigned to him, correct?

A: So how it happened is for that trip in particular we were going to pay the diesel and anything that would break, that would be [Respondent] to GS[Redacted].

Q: It was not his responsibility to pay for any expenses related to the truck that you loaned him, correct? ·

A: That's correct.

Q: He was only paid for driving the vehicle that you say belonged to GS[Redacted]. His only pay was per mile, correct?

A: No, there was a commitment, an agreement to finish the job.

Q: Did that job that you claimed there was an agreement to finish, did that job ever got finished? When was it finished?

A: No, he was driving carelessly and he had an accident.

Hrg. Tr. 56:19-25, 57:1-11.

22. FF[Redacted] testified that Claimant was always paid by the load and there was no agreement to pay based on mileage. FF[Redacted] testified that owner/operators can pay for their own diesel or use Respondent's credit card for the diesel, which Respondent then deducts from their pay. As Respondent lent Claimant the GS[Redacted] truck to use after February 9, 2024, Respondent and Claimant agreed Claimant was not responsible for those truck expenses up front. FF[Redacted] testified,

Q: You loaned him a truck but you were responsible for for all expenses of using that truck, correct?· He did not have to pay maintenance, he did not have to pay insurance, correct?

A: All the expenses were going to be taken out from that and they would be paid. They had to be paid to GS[Redacted] and whatever was going to be left over, that's what he would get as his part.

Hrg. Tr. 62:6-13.

23. FF[Redacted] testified that Claimant was paid for his services performed, including the last two weeks of services, but not by miles. FF[Redacted] deducted from Claimant's pay the loss of the loads that were not delivered due to the MVA.

24. Claimant and Respondent did not enter into any written document regarding Claimant's performance of services for Respondent, either before or after February 9, 2024.

25. The ALJ finds the testimony of FF[Redacted], as corroborated by the records, more credible and persuasive than Claimant's testimony. The ALJ finds Respondent and Claimant entered into an arrangement after February 9, 2024 in which Claimant continued to provide services as an independent contractor transporting loads with the use of a truck owned by GS[Redacted] Respondent arranged for Claimant to use. The arrangement solely occurred because Claimant's truck required repair, and the intent was that this was a temporary arrangement with the expectation Claimant would perform the repairs on his truck for continued use. The ALJ finds that any changes that occurred based on the temporary arrangement did not change the actual nature of the working relationship to the extent it established direction and control and rendered Claimant an employee of Respondent.

26. The ALJ finds that Respondent proved by a preponderance of the evidence Claimant was an independent contractor and not an employee.

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).

Independent Contractor

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

Section 8-40-202(2)(b)(II), C.R.S. enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. To prove independence, it must be shown that the person for whom services are performed does not:

> (A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;
>
> (B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
>
> (C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;
>
> (D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
>
> (E) Provide more than minimal training for the individual;
>
> (F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;
>
> (G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

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

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

The determination regarding whether a worker is an independent contractor or employee requires analysis of not only the nine factors enumerated in §8-40-202(2)(b)(II), C.R.S. but also the nature of the working relationship and any other relevant factors. *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014). In *Softrock*, the Colorado Supreme Court held that whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer. *Softrock Geological Services,* 325 P.3d 565. The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

If the evidence establishes that the claimant was performing services for pay, and there is no written document establishing the claimant's independent contractor status, the burden of proof rests upon the respondents to rebut the presumption that the claimant was an employee. *Baker v. BV Properties, LLC,* W.C. No. 4-618-214 (ICAO, Aug. 25, 2006). The question of whether the respondents have overcome the presumption and established that the claimant was an independent contractor is one of fact for the ALJ. *Nelson v. Industrial Claim Appeals Office of Colo.,* 981 P.2d 210 (Colo. App. 1998)

It is undisputed Claimant was performing services for Respondent for pay. No written document was offered as evidence establishing a rebuttable presumption of an independent contractor relationship between Claimant and Respondent. Therefore, it is Respondent's burden of proof to establish that Claimant was both free from direction and control in the performance of services and customarily engaged in an independent business related to the service performed.

Claimant acknowledges he began performing services for Respondent as an independent contractor. He contends, however, that he subsequently became an employee when his own truck became inoperable on February 9, 2024. The ALJ is not persuaded. There is no credible or persuasive evidence establishing Respondent required Claimant to work exclusively for Respondent, provided more than minimal training to Claimant, dictated the time of performance outside of the completion schedules for transport and delivery, or was able to terminate Claimant's work without liability unless Claimant failed to meet applicable specifications. There is no credible or

persuasive evidence Respondent established a quality standard for Claimant or oversaw Claimant's work outside of general specifications and instructions inherent to the nature of the work. The ALJ is not persuaded by Claimant's testimony that, once he became a "driver," he was no longer able to accept or reject loads, or that he was suddenly required to report to or update Respondent in a different way than he did while operating his own vehicle. Assuming, arguendo, Respondent did require Claimant to transport certain loads, the ALJ is persuaded by FF[Redacted] testimony that they were loads Claimant had already accepted and committed to transporting at the time Claimant's own truck became temporarily inoperable.

That Claimant's pay was calculated by mile at some point, as indicated in one pay record, is insufficient to establish in light of the totality of the circumstances, Claimant became an employee of Respondent. Claimant also argues that, while he was responsible for expenses as an owner/operator, he was no longer responsible for such expenses as a driver. While Claimant was not required to pay upfront for diesel and maintenance for the GS[Redacted] truck, FF[Redacted] credibly testified that such expenses were to be deducted from Claimant's pay. The ALJ is persuaded this was an arrangement agreed upon and necessitated by the specific circumstances that led to Respondent lending Claimant the GS[Redacted] truck for use on a temporary basis, and not a benefit to Claimant as an employee.

Subsequent to February 9, 2024, Respondent did not pay Claimant personally, but instead continued to make checks payable to Claimant's business name. The ALJ is not persuaded by Claimant's testimony that, despite allegedly becoming an employee, he continued to accept checks in his business' name because he had no time to discuss the checks with Respondent. Within five days of parking his own truck, Claimant, on his own accord, submitted a new W-9 form to Respondent for his business TT[Redacted]. FF[Redacted] credibly testified Respondent did not ask Claimant to submit a new W-9 and Claimant did so of his own volition, as he would no longer be operating DA[Redacted]. Claimant's submission of a new W-9 form for TT[Redacted] on February 14, 2024, dated February 12, 2024, undermines his contention that he suddenly became an employee of Respondent. His submission of the W-9 form at that time indicates Claimant's intention to continue providing services for Respondent as an independent contractor under his own business. Claimant's submission of the W-9 form at that time also supports Respondent's contention that Claimant's use of the GS[Redacted] truck was a temporary arrangement with the expectation that Claimant was to repair his own truck.

There is no evidence Respondent provided tools or benefits to Claimant, other than lending the GS[Redacted] truck to Claimant. The credible and persuasive evidence demonstrates Respondent arranged for Claimant to use the GS[Redacted] truck specifically because Claimant's own truck became inoperable and there remained loads to be transported by Claimant. The ALJ does not consider these specific circumstances and arrangement a combining of business operations such that an employment relationship was created.

The credible and persuasive evidence further demonstrates Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed for the putative employer. At the time Claimant began performing services for Respondent in November 2023, he owned his own business, DA[Redacted], and his own truck. As indicated by the March 4, 2022 IRS letter in Exhibit F, DA[Redacted] was established well before November 2023. Claimant subsequently established TT[Redacted] and continued to perform services for Respondent using his own truck. Even after parking his truck on February 9, 2024, Claimant provided Respondent a new W-9 for TT[Redacted], indicating his intention to continue performing his services as an independent business. The ALJ is not persuaded there was any intent on behalf of either party to enter into an employment relationship upon making a temporary arrangement for Claimant to use another truck to continue providing services.

Despite Claimant's contention he became a "driver" and thus, an employee, for Respondent after February 9, 2024, Claimant continued to perform the same services for Respondent in largely the same capacity. Claimant continued to transport loads in the same manner he did prior to February 9, 2024 when he used his own truck. The ALJ is not persuaded that the specific arrangement that allowed Claimant to temporarily use another truck to continue performing the same transportation services resulted in direction and control and rendered Claimant an employee of Respondent. As credibly testified to by FF[Redacted], Respondent does not have a separate category of workers who are drivers. While it is possible for a service provider who began as an independent contractor to subsequently become an employee, considering the totality of the circumstances and the dynamics of the working relationship, this was not the case here.

The totality of the circumstances, including analysis of the nine factors in §8-40-202(2)(b)(II), as well as the nature of the working relationship between Claimant and Respondent, demonstrates that it is more probable than not Claimant was an independent contractor and did not become an employee.

As Claimant was an independent contractor and not an employee, the remaining issues of compensability, medical benefits, and temporary indemnity benefits are moot.

ORDER

1. Respondent proved by a preponderance of the evidence Claimant was an independent contractor, not an employee of Respondent.

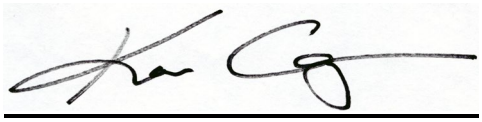
2. Claimant's claim for benefits is denied and dismissed.

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

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

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

DATED: November 14, 2024



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 5-267-135-001

ISSUES

1. A determination of Claimant's Average Weekly Wage (AWW).

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of §8-43-203(4), C.R.S. by failing to timely produce the claim file.

FINDINGS OF FACT

1. Claimant has worked for Employer as a part-time on-call intelligence analyst since January 2019. Claimant testified that she participated in a series of contracts or "exercises" at various times throughout the year. Each of the exercises lasted approximately 2-3 weeks and often occurred in Germany.

2. Claimant testified that she typically worked "a couple" of projects with Employer each year. She estimated earnings of $6,500 to $7,000 per project.

3. While working for Employer in Germany on February 29, 2024, Claimant sustained a work-related injury. She specifically suffered a traumatic brain injury (TBI), a broken right clavicle, and a cut on her left elbow.

4. On March 20, 2024 Respondents filed a General Admission of Liability (GAL) acknowledging Claimant had earned an Average Weekly Wage (AWW) of $123.10. Respondents began paying Temporary Total Disability (TTD) benefits on March 16, 2024 at the weekly rate of $82.07.

5. On July 31, 2024 Respondents filed an Amended GAL that increased Claimant's AWW to $382.65 with a weekly indemnity rate of $255.10. The increase was based on Claimant's concurrent employment with [Redacted, hereinafter CA]. Claimant has worked for CA[Redacted] in a part-time, on-call capacity as an intelligence analyst since July 2021.

6. Claimant's 2022 Form W-2 reflects that she earned $5,496.80 in wages from Employer. In 2022 Claimant earned $12,475.40 in gross wages from CA[Redacted]. Combining Claimant's earnings yields total wages of $17,972.20 in 2022.

7. Claimant's 2023 Form W-2 reveals that she earned $6,278.22 from Employer and $13,674.22 from CA[Redacted]. Combining Claimant's earnings yields total wages of $19,952.44 in 2023.

8. Since Claimant's February 29, 2024 injury she has been unable to work. On August 22, 2024 Authorized Treating Physician (ATP) Braden J. Reiter, D.O. confirmed that

Claimant is under restrictions and unable to perform her job duties.

9. Claimant testified that she was planning to increase her work hours in 2024 to pay for radon mitigation expenses for her home. Moreover, she sought to travel with her mother.

10. Claimant commented that generally she worked more projects for both Employer and CA[Redacted] in even numbered years. However, because of the Russian invasion of Ukraine, she was unable to work additional projects in 2022.

11. Claimant explained that, while she was eligible to apply for up to five assignments per year with Employer, she only planned to apply for three in 2024 because of her relationship with a specific team. Claimant knew that her team would be performing three exercises in 2024 and she sought to attend all of them. Claimant has already missed two of the preceding projects. She acknowledged that she has applied for exercises in the past but has not always been accepted onto the team.

12. Claimant detailed that with CA[Redacted] she planned on two exercises for 2024 but had already turned down one of them. Specifically, for the CA[Redacted] Venture Triad project, Claimant lost between $11,250 and $11,700. For missing the upcoming CA[Redacted] project in November Claimant will lose about $11,400.

13. Claimant also commented that she planned to work during two cycles in 2024 as an election judge in Summit County, CO. She estimated earnings of $2,250 to $2,500 per cycle.

14. Employer's HR Generalist [Redacted, hereinafter HT] testified at the hearing in this matter. She explained that, since Claimant's employment began in 2019, there have been three to four exercises that Claimant could have applied for each year.

15. HT[Redacted] disagreed with Claimant's representation that exercises were limited in 2022 due to the Ukraine invasion. Instead, Employer had four exercises available. She further refuted Claimant's assertion that opportunities were limited by the COVID pandemic. HT[Redacted] commented that Employer continued to offer three to four exercises per year within the United States during the pandemic.

16. HT[Redacted] reviewed Claimant's recent work activities. She noted that Claimant generally worked one to two exercises per year for Employer. Specifically, in 2021 Claimant worked two exercises, in 2022 she performed one exercise and in 2023 she participated in two exercises.

17. Adjuster for Third Party Administrator (TPA) [Redacted, hereinafter HD] [Redacted, hereinafter SR] testified at the hearing in this matter. She acknowledged the statutory requirements for production of a claim file under the Act. Specifically, under §8-43-203(4), C.R.S. a claim file must be produced within 15 days of a written request.

18. On April 22, 2024 Claimant, through counsel, requested the complete claim file. Based on the 15-day requirement under §8-43-203(4), C.R.S. the documents were due by May 8, 2024.

19. SR[Redacted] explained that, when she receives a request for claim file production, she sends information to HD[Redacted] support team. She also asks the group to send all medical records, regulatory activity, and indemnity documents. SR[Redacted] provides the team with the email address for transmission of the records. She believed the documents requested on April 22, 2024 had been produced.

20. On May 14, 2024 Claimant's counsel's office emailed SR[Redacted] and stated the requested documents had not been produced:

> We are in receipt of the privilege log, claim notes, and medical records. I believe there might still be items missing regarding our request for the complete claim file. For example, [Claimant] sent us the GA dated 3/20/24. Please send us all communications/letters, pleadings, wage information, employment file, etc…. HD[Redacted] has in their possession. Since the items produced do not complete the request for the claim file it is considered late.

21. SR[Redacted] testified that the May 14, 2024 email from Claimant's counsel's office was the first notice she received that all documents may not have been produced. Upon receiving the email, she resent all documents on May 21, 2024. The complete claim file was thus 12 days late pursuant to §8-43-203(4), C.R.S.

22. Claimant initially argues that her AWW should be calculated based on her estimated wages from February 28 to March 16, 2024 because she was scheduled to earn at least $6500 working in Germany for Employer. The preceding earnings divided by 17 days (2.43 weeks) yields an AWW of $2674.90 that is well above any AWW necessary to generate the applicable maximum TTD benefit rate of $1293.25. However, the preceding calculation is fundamentally flawed because it does not reflect Claimant's actual earnings. Claimant worked at most two exercises per year for Employer. Her gross annual earnings from 2022 were $5,496.80 and in 2023 she earned $6,278.22. Even including Claimant's gross earnings from employment with CA[Redacted] for 2022 ($12,475.40) and 2023 ($13,674.22), still does not approach an average of $2674.90 in weekly earnings.

23. Claimant alternatively asserts that, using the discretionary exception to the default position, the evidence supports an AWW substantially higher than admitted by Respondents. Notably, even using the low-end of her earnings from her three employers, Claimant contends she is entitled to an AWW of at least $897.11. Claimant specifies she has lost earnings of at least $6,500 from three different Employer opportunities in 2024 for a total of $19,500. She has also missed two opportunities from CA[Redacted] in 2024 including the Venture Triad project for $11,250 and another assignment for $11,400 for a total of $22,650. Finally, she has missed two opportunities to work as an election judge for Summit County. She would have earned at least $2,250 each for a total of $4,500. Combining all of the preceding amounts yields $46,650 in potential annual wages.

Dividing $46,650 by 52 weeks equals an AWW of $897.11 with a corresponding TTD rate of $590.07.

24. Despite Claimant contention, the default provision provides a fair approximation of Claimant's wage loss and diminished earning capacity. Claimant argues she would have applied for and engaged in additional exercises during 2024 if she had not been injured. Nevertheless, Claimant acknowledged that, even if she applied for exercises, she was not guaranteed a position with the team. Further, while Claimant alleges she would usually work up to four exercises per year, wage records reveal she has only averaged one to two exercises annually for Employer since 2019. Furthermore, HT[Redacted] reviewed Claimant's recent work activities and noted that Claimant generally worked one to two exercises per year for Employer. Specifically, in 2021 Claimant worked two exercises, in 2022 she performed one exercise and in 2023 she participated in two exercises.

25. The record reveals that Claimant's desire to work three exercises for Employer and two exercises for CA[Redacted] in 2024 is neither supported by her wage records nor the testimony of Ms. Harriot. Although Claimant planned or hoped to work more in 2024, she has failed to provide sufficiently definite evidence to support an increase in her AWW. Claimant's testimony does not constitute a reasonably concrete plan to warrant the inclusion of additional earnings in her AWW calculation. Therefore, Claimant's aspirations about additional exercises in 2024 are merely speculative and do not justify an adjustment in her admitted AWW for her jobs as an intelligence analyst.

26. Claimant also argues she has lost approximately $4,500 in potential income based on two election cycles where she hoped to be an election judge. Notably, Claimant has already turned down the first election cycle in 2024 because it coincided with Employer's March 2024 exercise. Moreover, although Claimant planned to work as an election judge with estimated annual earnings of $4,500, the income is also speculative. An AWW must be based upon consistent and reliable income sources rather than potential opportunities. The speculative nature of the election judge earnings further supports the reasonableness of Respondents' calculation.

27. The admitted AWW of $382.65 aligns with the statutory purpose of §8-42-102(2), C.R.S. by reflecting Claimant's earning capacity at the time of her work injury. Importantly, the admitted AWW is based on historical data rather than uncertain future opportunities. The statute's intent is to provide a fair and accurate measure of lost wages that is best achieved in the present matter by relying on actual earnings. Accordingly, the admitted AWW of $382.65, which includes gross earnings from both Employer and CA[Redacted] for the year 2023, constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

28. On April 22, 2024 Claimant's counsel sent a letter to Insurer explicitly requesting a copy of the claim file and asserting the authority of §8-43-203(4), C.R.S. Adjuster SR[Redacted] acknowledged the statutory requirements for production of the claim file under the Act. Specifically, a claim file must be produced within 15 days of a

written request. Based on the 15-day requirement under §8-43-203(4), C.R.S. the documents were due on May 8, 2024.

29. The record reflects that Insurer was aware of the statutory requirement to copy the claim file and transmit it within the time period included in the statute. Insurer is in the business of adjusting claims and §8-43-203(4), C.R.S. is a statute concerning the adjustment of claims. Although the claim file was due on May 8, 2024, it was not produced until May 21, 2024 or a total of 12 days late. The record demonstrates that Respondents thus failed to timely produce the claim file under §8-43-203(4), C.R.S.

30. SR[Redacted] explained that, when she receives a request for claim file production, she sends information to HD[Redacted] support team. She also asks the group to send all medical records, regulatory activity, and indemnity documents. SR[Redacted] provides the team with the email address to transmit the records. She believed the documents had been produced as requested. However, M SR[Redacted] testified that, when she received an email from Claimant's counsel on May 14, 2024 stating that the complete claim file had not been produced, it was the first notice she received regarding the lack of compliance. Upon receiving the email, she resent all documents on May 21, 2024.

31. Although SR[Redacted] stated she was unaware the documents had not been produced, her actions were objectively unreasonable. It was critical for Respondents to monitor the timely production of the requested claim file. The only reasonable inference from the record is that Respondents knew or should have known that their failure to timely produce the claim file would violate the statute. It can thus be presumed that Respondents' actions were objectively unreasonable.

32. Similarly, the defense Insurer pursued involving a cure of the violation pursuant to §8-43-304(4), C.R.S. has not been established. The section requires that, if the violation is cured by a respondent within 20 days of the filing of an application for hearing, then the respondent cannot be fined unless it is shown by clear and convincing evidence they "knew or reasonably should have known such person was in violation." The cure provision retains a negligence standard when referring to a violator who "reasonably" should have known of its transgression. *See Kerr v. Costco Wholesale Inc*, W.C. No. 5-076-601-002 (ICAO, June 1, 2021); *Tadlock v. Gold Mine Casino*, W.C. No. 4-200-716 (ICAO, May 16, 2007). The same documentary evidence that established the violation, the correspondence of April 22, 2024 and May 14, 2024, constitutes clear and convincing evidence that Insurer knew of its responsibility to timely exchange a copy of the claim file as provided by §8-43-203(4), C.R.S. Insurer's failure to produce the claim file until May 21, 2024 when it was due on May 8, 2024 thus mandates penalties.

33. Considering the extent of harm to Claimant, the duration and type of violation, Insurer's motivation for the violation, Insurer's mitigation, and whether the misconduct is part of a pattern, suggests a minimal penalty. Importantly, when alerted by Claimant's counsel's office that they believed records were missing, SR[Redacted] took immediate steps to remedy the issue and ensure the remaining documents were

disclosed. Moreover, there is no evidence that the document delay caused any significant prejudice to Claimant. Notably, §8-43-304(1), C.R.S. provides a violator "shall also be punished by a fine ..." It shall not be more than $1,000 per day, but it must necessarily be at least $10 each day. Accordingly, an appropriate penalty for Respondents' violation is $20.00 per day for 12 days or a total of $240.00. Fifty percent of the penalty shall be paid to the Colorado uninsured employer fund created in §8-67-105, C.R.S. and fifty percent to Claimant.

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).

Average Weekly Wage

4. 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. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. Indus. Claim Appeals Off.,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (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); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007).

5. 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 whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of the injury. *Id.; see Pizza Hut,* 18 P.3d at 869 (stating that "the fact that claimant was not concurrently employed by the hospital and the employer at the time of the injury does not preclude the exercise of discretion under §8-42-102(3)").

6. An ALJ may base an AWW determination "not only on the claimant's wage at the time of the injury, but on other relevant factors when the case's unique circumstances require." *Avalanche Indus, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008), *rev'd on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010). The ALJ's discretionary authority permits her to consider post-injury pay increases a claimant would have received absent the work-related injury. *See In Re Tibbs*, W.C. No. 4-422-333 (ICAO, Apr. 12, 2001); *Wheeler v. Archdiocese of Denver Management Corp*., W.C. No. 4-669-708 (ICAO, Dec. 21, 2010). However, an ALJ may not base an award on speculation or conjecture. *See Nanez v. Indus. Claim Appeals Off.*, 444 P.3d 820, 829 (Colo. App. 2018) (determining that the claimant's "potential future wages were too speculative to warrant increasing his AWW"). Therefore, an alleged post-injury wage increase must be "sufficiently definite" to support an increase in the AWW. *See Gibbins v. United Ground Express*, W.C. 5-170-335 (ICAO, May 9, 2023) (affirming ALJ in declining to increase the claimant's AWW based on her event planning business because her testimony did not constitute "reasonably concrete" plans for future earnings to be included in an AWW calculation"); s*ee also Ebersbach v. UFCW Local No. 7*, W.C. No. 4-240-475 (ICAO, May 5, 1997).

7. As found, Claimant initially argues that her AWW should be calculated based on her estimated wages from February 28 to March 16, 2024 because she was scheduled to earn at least $6500 working in Germany for Employer. The preceding earnings divided by 17 days (2.43 weeks) yields an AWW of $2674.90 that is well above any AWW necessary to generate the applicable maximum TTD benefit rate of $1293.25. However, the preceding calculation is fundamentally flawed because it does not reflect Claimant's actual earnings. Claimant worked at most two exercises per year for Employer. Her gross annual earnings from 2022 were $5,496.80 and in 2023 she earned $6,278.22. Even including Claimant's gross earnings from employment with CA[Redacted] for 2022 ($12,475.40) and 2023 ($13,674.22), still does not approach an average of $2674.90 in weekly earnings.

8. As found, Claimant alternatively asserts that, using the discretionary exception to the default position, the evidence supports an AWW substantially higher than admitted by Respondents. Notably, even using the low-end of her earnings from her three employers, Claimant contends she is entitled to an AWW of at least $897.11. Claimant specifies she has lost earnings of at least $6,500 from three different Employer opportunities in 2024 for a total of $19,500. She has also missed two opportunities from CA[Redacted] in 2024 including the Venture Triad project for $11,250 and another assignment for $11,400 for a total of $22,650. Finally, she has missed two opportunities to work as an election judge for Summit County. She would have earned at least $2,250 each for a total of $4,500.

Combining all of the preceding amounts yields $46,650 in potential annual wages. Dividing $46,650 by 52 weeks equals an AWW of $897.11 with a corresponding TTD rate of $590.07.

9. As found, despite Claimant contention, the default provision provides a fair approximation of Claimant's wage loss and diminished earning capacity. Claimant argues she would have applied for and engaged in additional exercises during 2024 if she had not been injured. Nevertheless, Claimant acknowledged that, even if she applied for exercises, she was not guaranteed a position with the team. Further, while Claimant alleges she would usually work up to four exercises per year, wage records reveal she has only averaged one to two exercises annually for Employer since 2019. Furthermore, HT[Redacted] reviewed Claimant's recent work activities and noted that Claimant generally worked one to two exercises per year for Employer. Specifically, in 2021 Claimant worked two exercises, in 2022 she performed one exercise and in 2023 she participated in two exercises.

10. As found, the record reveals that Claimant's desire to work three exercises for Employer and two exercises for CA[Redacted] in 2024 is neither supported by her wage records nor the testimony of HT[Redacted]. Although Claimant planned or hoped to work more in 2024, she has failed to provide sufficiently definite evidence to support an increase in her AWW. Claimant's testimony does not constitute a reasonably concrete plan to warrant the inclusion of additional earnings in her AWW calculation. Therefore, Claimant's aspirations about additional exercises in 2024 are merely speculative and do not justify an adjustment in her admitted AWW for her jobs as an intelligence analyst.

11. As found, Claimant also argues she has lost approximately $4,500 in potential income based on two election cycles where she hoped to be an election judge. Notably, Claimant has already turned down the first election cycle in 2024 because it coincided with Employer's March 2024 exercise. Moreover, although Claimant planned to work as an election judge with estimated annual earnings of $4,500, the income is also speculative. An AWW must be based upon consistent and reliable income sources rather than potential opportunities. The speculative nature of the election judge earnings further supports the reasonableness of Respondents' calculation.

12. As found, the admitted AWW of $382.65 aligns with the statutory purpose of §8-42-102(2), C.R.S. by reflecting Claimant's earning capacity at the time of her work injury. Importantly, the admitted AWW is based on historical data rather than uncertain future opportunities. The statute's intent is to provide a fair and accurate measure of lost wages that is best achieved in the present matter by relying on actual earnings. Accordingly, the admitted AWW of $382.65, which includes gross earnings from both Employer and CA[Redacted] for the year 2023, constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Penalties Related to Claimant's Request for Claim File under §8-43-203(4), C.R.S.

13. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ.

See §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Indus. Claim Appeals Off.,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

14. The cure provision of §8-43-304(4), C.R.S., provides that,

> After the date of mailing of [any application for hearing for any penalty pursuant to subsection (1)], an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking the penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed….

15. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must ascertain whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of an action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Indus. Claim Appeals Off.,* 107 P.3d 965 (Colo. App. 2003); *In Re Claim of Murray*, W.C. No. 4-997-086-02 (ICAO, Aug. 16, 2017). The question of whether a party's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005). Where the violator fails to offer a reasonable factual or legal explanation for its actions, the ALJ may infer the opposing party sustained its burden to prove the violation was objectively unreasonable. *Human Resource Co. v. Indus. Claim Appeals Off.*, 984 P.2d 1194, 1197 (Colo. App. 1999).

16. An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* W.C. No. 4-619-954 (ICAO, May 5, 2006). However, any penalty assessed should not be excessive or grossly disproportionate to the conduct in question. When determining the penalty, the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the other party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products v. Indus. Claim Appeals Off.,* 126 P.3d 323 (Colo. App. 2005).

17. Section 8-43-203(4), C.R.S. specifically addresses production of a claim file. The statute provides:

> Within fifteen days after the mailing of a written request for a copy of the claim file, the employer, or if insured, the employer's insurance carrier or third-party administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence,

investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of the injury and thereafter, regardless of the format. If a privilege or other protection is claimed for any materials, the materials must be detailed in an accompanying privilege log.

18. As found, on April 22, 2024 Claimant's counsel sent a letter to Insurer explicitly requesting a copy of the claim file and asserting the authority of §8-43-203(4), C.R.S. Adjuster SR[Redacted] acknowledged the statutory requirements for production of the claim file under the Act. Specifically, a claim file must be produced within 15 days of a written request. Based on the 15-day requirement under §8-43-203(4), C.R.S. the documents were due on May 8, 2024.

19. As found, the record reflects that Insurer was aware of the statutory requirement to copy the claim file and transmit it within the time period included in the statute. Insurer is in the business of adjusting claims and §8-43-203(4), C.R.S. is a statute concerning the adjustment of claims. Although the claim file was due on May 8, 2024, it was not produced until May 21, 2024 or a total of 12 days late. The record demonstrates that Respondents thus failed to timely produce the claim file under §8-43-203(4), C.R.S.

20. As found, SR[Redacted] explained that, when she receives a request for claim file production, she sends information to HD[Redacted] support team. She also asks the group to send all medical records, regulatory activity, and indemnity documents. SR[Redacted] provides the team with the email address to transmit the records. She believed the documents had been produced as requested. However, SR[Redacted] testified that, when she received an email from Claimant's counsel on May 14, 2024 stating that the complete claim file had not been produced, it was the first notice she received regarding the lack of compliance. Upon receiving the email, she resent all documents on May 21, 2024.

21. As found, although SR[Redacted] stated she was unaware the documents had not been produced, her actions were objectively unreasonable. It was critical for Respondents to monitor the timely production of the requested claim file. The only reasonable inference from the record is that Respondents knew or should have known that their failure to timely produce the claim file would violate the statute. It can thus be presumed that Respondents' actions were objectively unreasonable.

22. As found, similarly, the defense Insurer pursued involving a cure of the violation pursuant to §8-43-304(4), C.R.S. has not been established. The section requires that, if the violation is cured by a respondent within 20 days of the filing of an application for hearing, then the respondent cannot be fined unless it is shown by clear and convincing evidence they "knew or reasonably should have known such person was in violation." The cure provision retains a negligence standard when referring to a violator who "reasonably" should have known of its transgression. *See Kerr v. Costco Wholesale Inc*, W.C. No. 5-076-601-002 (ICAO, June 1, 2021); *Tadlock v. Gold Mine Casino*, W.C. No. 4-200-716 (ICAO, May 16, 2007). The same documentary evidence that established the violation, the correspondence of April 22, 2024 and May 14, 2024, constitutes clear and convincing

evidence that Insurer knew of its responsibility to timely exchange a copy of the claim file as provided by §8-43-203(4), C.R.S. Insurer's failure to produce the claim file until May 21, 2024 when it was due on May 8, 2024 thus mandates penalties.

23. As found, considering the extent of harm to Claimant, the duration and type of violation, Insurer's motivation for the violation, Insurer's mitigation, and whether the misconduct is part of a pattern, suggests a minimal penalty. Importantly, when alerted by Claimant's counsel's office that they believed records were missing, SR[Redacted] took immediate steps to remedy the issue and ensure the remaining documents were disclosed. Moreover, there is no evidence that the document delay caused any significant prejudice to Claimant. Notably, §8-43-304(1), C.R.S. provides a violator "shall also be punished by a fine ..." It shall not be more than $1,000 per day, but it must necessarily be at least $10 each day. Accordingly, an appropriate penalty for Respondents' violation is $20.00 per day for 12 days or a total of $240.00. Fifty percent of the penalty shall be paid to the Colorado uninsured employer fund created in §8-67-105, C.R.S. and fifty percent to Claimant.

ORDER

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

1. Claimant's AWW shall remain $382.65.

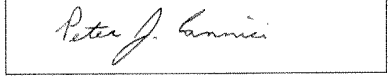
2. Respondents shall pay penalties of $20.00 per day for 12 days or a total of $240.00 under §8-43-304(1), C.R.S. for failing to timely produce the claim file pursuant to §8-43-203(4), C.R.S. Pursuant to §8-43-304(1), C.R.S. fifty percent of the penalty shall be paid to the Colorado uninsured employer fund created in §8-67-105, C.R.S., and fifty percent to Claimant.

3. Any issues not resolved in this order 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 the 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: November 13, 2024.

DIGITAL SIGNATURE:



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-262-258-001

ISSUES

1. Whether Respondents established by a preponderance of the evidence that they are entitled to reduce Claimant's indemnity benefits by 50% for willful violation of a safety rule pursuant to section 8-42-112(1)(b), C.R.S.

FINDINGS OF FACT

1. Claimant was hired by Employer in June 2009. Claimant sustained injuries arising out of and in the course and scope of her employment on January 7, 2024, when she tripped over a bunched rug in a hallway, fell, and fractured her right hip and injured her right arm. *See* Ex. A; Ex. B; Ex. C.

2. At the time of injury, Claimant was a resident care specialist for Employer and worked the night shift from 7:00 P.M. to 5:30 or 6:00 A.M. Ex. E.

3. On the date in question, Claimant was taking her scheduled lunch break at approximately 10:50 P.M. Ex. A; Ex. B. As a night-shift employee, Claimant is not required to clock out when taking her lunch break.

4. Claimant credibly testified that as was her pattern and practice for the previous 14.5 years, when she went to take her break on January 7, 2024, she switched her closed-toed nursing shoes for a pair of open-toed "sliders" to give her feet a rest while taking her break.

5. Sliders are shoes with an open-toe and an open-back with a single large strap of plastic across the top of the ball of the foot attached to the sole of the shoe that a person "slides" into. Sliders are not flip-flops.

6. Claimant kept a pair of sliders in a locker at Employer's facility. When she arrived for her shift on January 7, 2024, Claimant removed the sliders from her locker and placed them in the laundry room with her lunch. When it was time to take her scheduled break, Claimant went to the laundry room, changed out of her nursing shoes and into her sliders, and got her lunch.

7. Claimant then left the laundry room and began walking down the hallway towards the breakroom. *See* Ex. G (photographs of the hallway). The hallway is the only way for an employee to access Employer's breakroom.

8. In the hallway were rugs to help catch snow and gravel from the parking lot. Claimant tripped on the seam where two rugs met and fell. Claimant fractured her right hip and injured her right arm. Ex. A; Ex. B.

9. On January 7, 2024, Employer had a Footwear Policy in its employee handbook. That policy stated:

> FOOTWEAR
> Shoes must be clean, well polished, and in good repair. Safety, comfort, appearance, and quietness should be the prime considerations in the selection of appropriate footwear. Flip-flops, hiking boots, colored sports and play shoes are generally unacceptable. Open-toed shoes may not be worn in clinical areas. Soles and heels should be non-marking and should provide sure footing on tiled, wet, or slippery surfaces.

Ex. F.

10. Claimant credibly testified that she was aware of Employer's Footwear Policy but that she had been changing out of her close-toed shoes into open-toed sliders when taking her break for the previous 14.5 years and that she was never informed she was violating Employer's Footwear Policy.

11. No one explained to Claimant what areas of Employer's facility were "clinical areas" versus non-clinical areas. Claimant testified that in her opinion Employer's breakroom is non-clinical.

12. In the 14.5 years Claimant worked for Employer, Employer held yearly safety meetings at which Employer's dress code, including the Footwear Policy, were never discussed.

13. Claimant's decision to change into sliders on her lunch break was not a deliberate violation of Employer's Footwear Policy.

14. Claimant's direct supervisor [Redacted, hereinafter WR] testified. WR[Redacted] is currently the manager of the assisted living center for Employer. WR[Redacted] is aware of Employer's Footwear Policy.

15. As the manager of the assisted living center, WR[Redacted] is responsible for going over safety with employees working in the assisted living center. She has never discussed with an employee what the employee can or cannot wear during a scheduled break. As manager, WR[Redacted] is responsible for confronting an employee who violates Employer's Footwear Policy.

16. WR[Redacted] works a day shift for Employer. Thus, although she was Claimant's direct supervisor, they did not work the same shift and WR[Redacted] did not have occasion to see Claimant change her footwear when taking her scheduled break.

17. When asked what areas of Employer's facility were clinical, WR[Redacted] testified that in her opinion the areas of the facility where employees interacted with patients or provided resident care were clinical areas. Conversely, those areas of the facility that employees spent "on their own private time" were non-clinical areas.

18. WR[Redacted] testified that had Claimant asked for permission to change out of her nursing shoes and into open-toed sliders during her lunch break, WR[Redacted] would have given Claimant permission to change her shoes.

19. Employer permitted noncompliance with the Footwear Policy.

20. [Redacted, hereinafter EE], Employer's Director of Human Resources, also testified. When he was told of Claimant's injury, he reviewed camera footage of her fall and noticed that Claimant was wearing open-toed shoes. In his opinion, Claimant's open-toed shoes violated Employer's Footwear Policy.

21. EE[Redacted] testified that Employer has no prohibition on wearing open-toed shoes in non-clinical areas of Employer's facility. However, in his opinion, Employer's breakroom is a clinical area because it is "just a room off a hall" in Employer's facility.

22. Claimant, WR[Redacted], and EE[Redacted] each gave a different definition of which areas of Employer's facility were clinical versus non-clinical. EE[Redacted] testified that Employer's employee handbook does not define clinical versus non-clinical areas.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado, section 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. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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* Office, 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 Office*, 183 P.3d 684, 687 (Colo. App. 2008).

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

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S. authorizes a 50% reduction in compensation "[w]here injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee."

"Under section 8-42-112(1)(b) it is the respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule." *Horton v. Swift and Co.*, W.C. No. 4-779-078 (ICAO Apr. 21, 2010). A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining v. Indus. Claim Appeals Office*, 907 P.2d 715, 718 (Colo. 1995). However, where an employer does not consistently and sufficiently enforce the rule, the employer effectively acquiesces in employee non-compliance, and therefore may not rely on the rule as a basis for reducing benefits under section 8-42-112 (1)(b), C.R.S. *In re Burd v. Builder Services Group, Inc.*, W.C. No. 5-058-572-01 (ICAO Jul. 9, 2019). "The question of whether the employer permitted noncompliance with its own safety rule and acquiesced in the violation is one of fact for resolution by the ALJ, and her determination must be upheld if supported by substantial evidence in the record." *In re Claim of Ronzon*, W.C. No. 4-914-996-01 (ICAO Nov. 6, 2014).

Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alvarado*, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id*. Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining*, 907 P.2d at 719 (Colo. App. 1995).

Here, the evidence presented at hearing failed to establish that Claimant willfully failed to obey a reasonable safety rule. First, it is unclear whether Claimant's decision to change into open-toed sliders over her break was a violation of Employer's Footwear Policy as that policy only precludes open-toed shoes in clinical areas. As Employer failed to define clinical and non-clinical areas, it was reasonable for Claimant to believe Employer's breakroom was non-clinical, and, therefore, open-toed sliders were not prohibited. Second, even assuming Claimant's decision to change into open-toed sliders on her break was a violation of Employer's Footwear Policy, due to the ambiguity of what areas of the facility were clinical versus non-clinical, Claimant's decision could not rise to the level of a willful violation. And third, Employer permitted Claimant's noncompliance with the Footwear Policy by failing to enforce that policy for 14.5 years. Significantly, WR[Redacted] testified that had Claimant sought permission to change into open-toed sliders during her lunch break, WR[Redacted] would have granted her permission. Therefore, Employer did not establish by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule such that Claimant's benefits should be reduced.

In conclusion, the totality of the credible and persuasive evidence does not establish that Claimant willfully violated a reasonable safety rule. Therefore, a 50% reduction of benefits under section 8-42-112(1)(b), C.R.S. is not appropriate.

ORDER

It is therefore ordered that:

1. Respondents' request to reduce Claimant's compensation by 50% pursuant to section 8-42-112(1)(b), C.R.S. is denied and dismissed.

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

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

SIGNED: November 14, 2024.

Robin E. Hoogerhyde
Administrative Law Judge

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she is permanently and totally disabled as a result of her July 4, 2020 injury.

2. Whether Claimant proved by a preponderance of the evidence that Respondents' admission for maintenance medical benefits on the Final Admission of Liability should be modified so as to not limit the scope of maintenance medical benefits.

3. Whether Respondents have proved by a preponderance of the evidence entitlement to an overpayment of temporary disability benefits paid in excess of the statutory cap.

FINDINGS OF FACT

1. Claimant was a store manager for Respondent-Employer, a convenience store, who sustained a compensable injury on July 4, 2020. She had gone to the back room to get some soda to stock. While carrying the soda, she tripped over a missing tile, causing her to roll her ankle and fall.

2. As of the last date of hearing, Claimant was sixty-four years old.

Prior vocational history

3. In the 1970s, Claimant began her career working at various fast-food and convenience store chains, including [Redacted, hereinafter KC], [Redacted, hereinafter BK], and [Redacted, hereinafter SE], where she performed a range of duties as a cashier, cook, food preparer, and stocker.

4. From 1977 to 1978, Claimant worked at [Redacted, hereinafter HL] on an assembly line, where she soldered parts of circuit cards. She secured this job through her mother. In 1978, during her pregnancy, she moved in with her parents and took a break from the workforce to care for her newborn son until 1980.

5. In 1980, Claimant joined [Redacted, hereinafter KS], where she remained employed until 2001. Over her two decades there, she worked in various roles, including courtesy clerk, cashier, produce worker, and in the floral department. She also underwent training for a produce manager position. Claimant retired from KS[Redacted] in 2001, feeling the need to explore new opportunities.

6. Claimant then worked at [Redacted, hereinafter HD] from 2001 to 2002 as a cashier and front-end supervisor, where she was responsible for reconciling cash drawers, handling money drops, performing general office duties, tracking money collected, supervising staff, and providing customer service. She also served as an inventory manager for three departments: building materials, millworks, and lumber. Her duties included counting and ordering inventory, ensuring product deliveries, and using a handheld computer and forklift to manage products. Claimant left HD[Redacted] after being recruited for a position at [Redacted, hereinafter AA].

7. From 2002 to 2009, Claimant worked at AA[Redacted], a Hispanic grocery store, where she started as a produce clerk and was quickly promoted to produce manager. Her responsibilities included breaking down pallets, unloading trucks, stocking, ordering, and counting products, and making inventory predictions using a computer. She also trained new employees and traveled to different locations to assist with store openings. She left AA[Redacted] to relocate from Greeley.

8. From 2009 to 2016, Claimant served as a produce manager at [Redacted, hereinafter SS] in Boulder, performing duties similar to those at AA[Redacted]. She found this position through an online job search. During her time at SS[Redacted], Claimant suffered a work-related left rotator cuff injury and underwent surgery. After a period of light-duty work and a second surgery following re-injury, she did not return to SS[Redacted].

9. Later, Claimant worked at [Redacted, hereinafter CK] for a year at the 92nd and Wadsworth location as a Manager in Training. She was hired and trained in all aspects of store management. She found the position online. Claimant left CK[Redacted] after being recruited by another grocery store for a store manager position.

10. Claimant then took on the role of store manager at [Redacted, hereinafter MO], another Hispanic grocery store, where she managed all store departments and staff, including payroll, supervision, training, and health code management. She was responsible for overseeing five managers and one hundred fifty employees. During her time at MO[Redacted], she sustained a back injury while lifting produce, filed a workers' compensation claim, and completed physical therapy. She was unable to work for six to twelve months.

History of July 4, 2020 injury

11. On October 14, 2020, Claimant underwent ankle surgery with Dr. Daniel Ocel. Dr. Ocel repaired her tendon and stabilized her ankle. However, as a result of the surgery, Claimant developed chronic regional pain syndrome (CRPS).

12. On January 7, 2021, Claimant underwent a comprehensive biopsychosocial psychomedical report with Dr. John Mark Disorbio at the referral of her authorized treating physician, Dr. Hyeong Kim. Claimant's intake questionnaire responses did not raise any validity concerns and tended to be consistent with a patient with lowered defenses. The results did not appear exaggerated or minimized and were not above average with regard to catastrophizing. Claimant reported that her biggest problems arose from her being disabled, as she reported that she had always been stridently independent. Dr. Disorbio noted that Claimant "is now at a point where she is rehabbing. She is getting around with her crutches more effectively and more than anything she wants to get back to work at CK[Redacted]." Dr. Disorbio recommended a regimen of cognitive behavioral therapy sessions. Claimant continued to see Dr. Disorbio over the next year.

13. During her January 12, 2021 appointment with Dr. Kim, Claimant reported she was unable to put her full weight on her left lower extremity; that her left ankle felt very stiff; that when she tried to move her left foot, it did not move very well at all; and that the ball of her left foot felt very raw and sensitive. Notwithstanding these complaints, she asked Dr. Kim to "advance [her] duty today" with the "hope to return her to her own place of work." Dr. Kim increased her walking and standing limits from ten minutes to thirty minutes per hour.

14. Claimant began working modified duty on January 18, 2021, as a facility assistant at [Redacted, hereinafter AC]. Claimant was to work as a volunteer for AC[Redacted] while Respondent-Employer paid her wages.

15. Claimant saw Dr. Ocel on February 4, 2021, and Dr. Ocel observed that the entirety of Claimant's left leg from the knee down appeared "somewhat swollen."

16. The next day, the nurse case manager reported that Claimant's calf and ankle started to swell up within a couple of hours of staring work. Claimant reported that her ankle was still very tender and Claimant continued to exhibit a limp. The nurse case manager also noted that Dr. Ocel ordered an ultrasound to make sure Claimant did not have a blood clot. Claimant was to discontinue physical therapy in the meantime.

17. On February 9, 2021, Claimant reported to Dr. Kim that work was going well and that she was working within her restrictions.

18. On February 25, 2021, Claimant reported to Dr. Kim that events kept happening at work that prevented Claimant from staying within her restrictions; that her left foot was swollen and painful; that the longer she stood the more burning sensation she felt on her left ankle and foot, and that Claimant's manager told her to see her doctor and be taken off work completely. Dr. Kim took her off work for three days.

Dr. Kim had referred Claimant "to PM&R to manage neuropathic pain." Claimant would later testify that the store was short-staffed as a result of the pandemic, and she felt compelled to fill in.

19. Claimant told Dr. Kim on March 23, 2021, that she felt it was impossible to work within her restrictions, which made her symptoms worse at the end of the day. Claimant stopped working modified duty at AC[Redacted] on March 28, 2021.

20. Claimant was evaluated by Dr. Ocel six months after her left ankle arthroscopy, on April 15, 2021. Claimant was noted to be doing well overall six-months status post left peroneal exploration and debridement with stabilization of the superior peroneal retinaculum. She was feeling a bit weak in the ankle, but she was in physical therapy for this. She was back to relatively normal activities. She had no instability episodes. On exam she had no soft tissue swelling edema or erythema at that point in time. Passive range of motion was relatively normal and without mechanical symptoms, and she was noted to be neurovascularly intact. Dr. Ocel discharged Claimant from his care.

21. Claimant began modified duty work again on April 22, 2021, at AC[Redacted]. Claimant's temporary work restrictions at that time were: lifting/carrying up to ten pounds; repetitive lifting up to five pounds; pushing/pulling up to five pounds; walking/standing no more than fifteen minutes per hour; minimal kneeling; and no squatting or climbing.

22. Claimant injured her left lower leg while volunteering at AC[Redacted] on June 11, 2021. She bumped her left foot on a clothing rack which aggravated her CRPS pain. Later that day, Dr. Kim tightened Claimant's temporary work restrictions. AC[Redacted] was unable to accommodate Claimant's new temporary work restrictions.

23. Respondents made no further offers of employment.

24. For about four weeks in September and October 2021, Claimant was hospitalized with COVID-19 and then transferred to a rehabilitation facility. Due to COVID, she developed masses in her kidneys and spots in her lungs, for which she would undergo periodic screenings. She also developed diabetes, for which she was prescribed medication and was monitored by a personal physician.

25. Claimant returned to Dr. Kim on November 18, 2021, following her treatment for COVID and the related conditions. Claimant reported that her pain in her left knee and ankle remained between a four and a seven out of ten with constant aching, burning, pins and needles, and throbbing.

26. Claimant returned to Dr. DiSorbio on January 13, 2022. Dr. DiSorbio reported, "she has a difficult time sleeping at night because of the pain." Dr. DiSorbio noted that Claimant had been "depressed about her situation, especially that she cannot work. She needs to work from her perspective."

27. On April 11, 2022, Claimant saw Dr. Giancarlo Barolat. Dr. Barolat noted that Claimant's CRPS was "substantially disrupting her sleep on a nightly basis and rendering her feeling exhausted as well as debilitated." Claimant also told Dr. Barolat that her mother and sister died from COVID in October 2021.

28. On April 19, 2022, Claimant underwent a trial spinal cord stimulator with Dr. Barolat. Dr. Barolat implanted two peripheral nerve stimulation electrodes on the left sciatic nerve for postoperative diagnoses of chronic pain syndrome and complex regional pain syndrome of the left lower extremity. This was a two-stage trial with second stage on May 3, 2022.

29. Claimant subsequently underwent a permanent implant in her left anterior thigh of the spinal cord stimulator on May 3, 2022. The stimulator helped reduce Claimant's foot sensitivity and helped her sleep. Dr. Barolat later documented on May 12, 2022, that Claimant was doing exceedingly well.

30. When Claimant saw Dr. Kim on May 27, 2022, she reported that although the stimulator was working well, the surgical site on her left thigh was bothering her. The benefits of the stimulator waned with time, and on June 1, 2022, Claimant reported to Dr. Barolat that she had a worsening burning and pain in her left foot and leg over the past several days. Dr. Barolat was unsure of the cause, but he suspected an increase in activity. Claimant began experiencing numbness in her posterior thigh and proximal calf several weeks later. Claimant reported to Dr. Barolat on June 15, 2022, that she had been more active but that her pain would flare up if she walked any substantial distance. Dr. Barolat provided Claimant with some programming changes for her spinal cord stimulator.

31. When Claimant returned to Dr. Kim on July 12, 2022, Claimant reported to Dr. Kim that all of her symptoms had returned and that she was having to continually change the settings on her spinal cord stimulator. She reported that the burning, pain, and hypersensitivity had all returned and that Dr. Barolat's change in the settings helped only a little. Claimant was working with the manufacturer of the stimulator to assist with alternating between eight different programs on the unit. Claimant continued to complain to her providers over the next several months of the lack of relief provided by the stimulator despite alternating the programs.

32. At a September 9, 2022, physical therapy appointment, Claimant reported significant sensitivity to areas around initial injury as well as surrounding placement of nerve stimulator, limitations in the left ankle mobility and strength, and poor

functional strength deficits and balance. Claimant's goal was "to get more movement and to be on [her] feet for long periods of time & pain to go away."

33. At her September 22, 2022 physical therapy appointment, Claimant reported that she would experience significantly more leg pain when she did not sleep well. She also reported that with fatigue she would have increased sensitivity in her skin such that a blanket would cause discomfort and that her toenails would feel like they were on fire.

34. Claimant's symptoms continued such that she complained over the next several weeks of burning in her ankle and aching in her left foot, throbbing, and sensitivity to wearing shoes. Claimant also continued to complain of left posterior thigh pain, as well as pain and sensitivity in her posterior knee and leg.

35. Claimant underwent an independent medical examination (IME) with Dr. Wallace Larson on November 21, 2022. Dr. Larson examined Claimant, took her history, reviewed Claimant's medical records, and provided his opinions in response to questions presented by Respondents. Dr. Larson felt that Claimant had CRPS in the left leg and had reached maximum medical improvement as of the date of his examination of Claimant. He felt that no further intervention was expected to improve her symptoms, but she would need ongoing medication management with Dr. Wakeshima. He opined that the current treatment, including Cymbalta for neuropathic pain, would be reasonable, though tapering off oxycodone was also advised. Dr. Larson opined that Claimant could return to sedentary work but would be unlikely to return to her previous occupation. She should follow specific restrictions, including limited lifting and regular breaks, and avoid climbing or frequent stair use.

36. Claimant's complaints to her treating physicians of left lower extremity burning and pain continued. When she returned to Dr. Barolat on January 16, 2023, Dr. Barolat noted that Claimant's pain was located about the incision site for the stimulator. However, Dr. Barolat noted that there was no hardware present that would cause the pain.

37. On March 8, 2023, Dr. Barolat wrote a letter to Dr. Wakeshima advising him that he was "not truly sure" of the source of Claimant's left thigh pain. He wrote that Claimant was noted to be "very happy" with the results of the stimulation which was giving her substantial relief from her pain.

38. On March 15, 2023, Respondents obtained surveillance footage of Claimant. At 10:27:54 A.M., Claimant was observed standing unsupported on the porch of the next-door neighbor, but she struggled to descend the steps two minutes later, relying heavily on the railing for support. By 10:43:05 A.M., the footage skipped to Claimant operating a parking lot ticket machine in her car.

39. The video then showed her walking outside with her hands full at 10:44:58 A.M., before jumping to 10:48:06 A.M., where she was seen driving. Later, at 11:10:37 A.M., she was filmed walking outside a credit union and subsequently got back into her car at 11:14:13 A.M.

40. At 1:15:40 P.M., Claimant was seen cleaning her car, including bending over and vacuuming. She continued this task until 1:36:13 P.M., when she returned to her car. By 3:38:40 P.M., she entered a building and was seen multiple times carrying various items, including a basket and several large bottles of water. Despite appearing to struggle, she managed to load these items into her car, returning inside and emerging with more water bottles around 4:07:37 P.M.

41. Returning home around 4:19:07 P.M., she unloaded groceries while conversing with two young men. The footage showed her navigating a curb and steps multiple times with groceries, both with and without the aid of railings. She repeated this process several times, including going up the steps empty-handed. Later, at 4:38:35 P.M., she departed in her car, returning around 5:30 P.M. After sitting in her car to eat, she drove to a park at 5:56:30 P.M. and walked until 6:39:54 P.M. She then visited a neighbor, conversed, and walked back home, navigating stairs with railing support and walking along the sidewalk.

42. Claimant returned to Dr. Wakeshima on March 17, 2023. Dr. Wakeshima ordered a neuromuscular electrical stimulation device for her posterior thigh region.

43. On March 24, 2023, Dr. Douglas Scott performed a Division independent medical examination (DIME). Dr. Scott wrote in his report: "By 4/15/2021, i.e. over 10 months post injury, [Redacted, hereinafter HY] had no instability of the left ankle with relatively normal passive range of motion of the left ankle and without mechanical symptoms. She had stable ligaments on stressing." He noted that she was able to ambulate in a non-antalgic fashion. She was neurovascularly intact. Dr. Scott determined that Claimant was at MMI as of that day's visit and provided Claimant with a 5% whole person impairment rating. Dr. Scott recommended that Claimant's work restrictions include "alternate sitting with standing with walking as needed to minimize pain in the left hindfoot." He recommended medical maintenance care of return visits to Dr. Barolat for inspection and maintenance of the spinal cord stimulator, return visits with Dr. Wakeshima over the next year as needed, and refills on Claimant's medications, including Lyrica, lidocaine patches, and Cymbalta.

44. On May 4, 2023, Respondents filed a Final Admission of Liability (FAL), admitting for a date of MMI of March 24, 2023, an average weekly wage of $1,583.32, and a weekly temporary total disability (TTD) rate of $1,055.55. The FAL also admitted for medical maintenance care, but specifically cited Dr. Scott's March 24, 2023

DIME report. Where the FAL form read "Admit to Maintenance Care after MMI?", Respondents checked the box for "Yes." In the "Remarks" section of the FAL, Respondents included the following language:

> *Claimant placed at MMI on 03/24/2023 with a 5% Whole Person rating. See attached DIME report from Dr. Scott dated 03/24/2023. Calculation 5% x 1.0 x 400 weeks x $1,055.55 = $21,111.00. TTD/TPD was overpaid by $34,422.12. Respondents will take credit from the PPD award. Respondents reserve the right to take credit off any future PPD award. Indemnity cap of $99,094.93 is in place. Any benefits & penalties not specifically admitted herein are denied.*

45. Although the FAL documented that PPD benefits based on the 5% impairment assigned by Dr. Scott corresponded with a PPD award of $21,111.00, the FAL also noted that $0 was paid out to Claimant for a PPD award, as Respondents asserted that the combined temporary disability and PPD award exceeded the statutory cap. While the Court finds that the combined temporary disability and PPD benefits exceed the statutory cap, the Court also finds that the temporary disability, at the time it was paid out, did not exceed the statutory cap, as there is no credible evidence that PPD had been paid out at the time the temporary disability benefits were owed and paid. Therefore, the Court finds no overpayment resulting from combined temporary disability and PPD benefits in this case.

46. The ALJ is not persuaded Respondents' reference to the DIME's report in the FAL limited the award of maintenance care to only the specific treatment mentioned in the DIME's report. The reference to the DIME's report is found to be an attempt to comply with the Rule 5-5(A)(1), W.C.R.P. By checking "Yes," Respondents admitted to a general award of reasonable and necessary maintenance care related to the work injury pursuant to § 8-42-107(8)(f), C.R.S.

47. The Court finds that Respondents' admission for maintenance medical benefits did not limit maintenance medical benefits to any specific benefits and was a general award of maintenance medical benefits and that the language need not be changed.

48. The Court finds that Respondents' claim of overpayment of $34,422.12 was based on the total temporary disability benefits paid ($133,517.10) paid in excess of a statutory indemnity cap of $99,094.93 for combined temporary disability and permanent partial disability benefits.

49. The Court finds that the temporary partial and temporary total disability benefits admitted on the FAL were paid when due and were in fact owed at that time, notwithstanding the statutory cap on benefits, as no permanent partial disability

benefits had been paid. Therefore, the Court finds that there exists no overpayment of temporary disability benefits.

50. On May 26, 2023, Claimant underwent a functional capacity evaluation (FCE). During the FCE, Claimant exhibited consistent maximal effort with testing, even during distraction-based clinical testing. Claimant consistently asked for and tried additional weight with lifting and carrying tests to fully assess her tolerance. However, in several instances, the FCE evaluator stopped Claimant for safety reasons when Claimant's movements became awkward. Throughout the FCE, Claimant was documented to exhibit compensatory behavior to bypass her physical limitations.

51. During the FCE, Claimant tolerated sitting or standing each for no more than fifteen minutes at a time, needing to alternate. Claimant tolerated walking for no more than five minutes at a time, exhibiting a limp. Claimant reported the following day that she experienced significantly increased pain immediately following the FCE and was unable to sleep.

52. Ultimately, the evaluator recommended the following permanent work restrictions: only occasional lifting of fifteen pounds and frequent lifting of five pounds from floor to knuckle, floor to shoulder, and "horizontal transfer"; only occasional lifting of twelve pounds and frequent lifting of five pounds from shoulder to overhead and with "bilateral carry"; occasional crouching or bending at the waist; occasional stair climbing and descending only with railing; no kneeling, crawling, or climbing ladders; no pushing, pulling, carrying; no walking more than fifteen minutes per hour; and freedom to change positions as needed when standing or sitting.

53. On June 22, 2023, Dr. Kim provided Claimant with permanent work restrictions limiting Claimant to lifting no more than fifteen pounds, with repetitive lifting only to five pounds, no lifting more than fifteen pounds, no pushing or pulling, and limiting walking and standing to two hours per day with no more than fifteen minutes sustained at any given time, no prolonged sitting, no ladder work, no crawling, kneeling, squatting, or climbing, and that Claimant must use the side rail with stairs. There was no restriction on Claimant's overhead reaching or other repetitive motion.

54. On June 26, 2023, Dr. Wakeshima evaluated Claimant's impairment. He noted that she continued with "profound pain in the left lower extremity due to her complex regional pain syndrome. She walks with difficulties and has difficulties climbing and descending stairs, and has to take one step at a time. She has difficulties but can manage to ambulate over different levels." Dr. Wakeshima disagreed with Dr. Scott's 5% rating. He assigned a final impairment rating of 24%.

55. On August 21, 2023, Claimant reported to Dr. Wakeshima that her personal physician had prescribed Mirtazipine for sleep and she inquired about other sleep medications. In response, Dr. Wakeshima increased Claimant's Lyrica. Claimant reported to Dr. Wakeshima that she had been surveilled during the wintertime. He informed her that he did not anticipate Respondents would contact him to view the videotape since no maintenance care had been denied. In the meantime, Dr. Wakeshima referred Claimant back to Dr. DiSorbio.

56. Claimant underwent an IME with Dr. Parry on August 8, 2023, at the referral of her counsel. Dr. Parry reviewed Claimant's medical records and history, including the FCE report and the IME report by Dr. Larson, and she took Claimant's subjective history. Claimant reported to Dr. Parry that her left foot continued to be hypersensitive and that her leg and foot were always cold. Claimant reported that she would experience jolts of pain in the foot with continuous achiness. Claimant did report that the spinal cord stimulator was helpful for her left foot, reducing pain and allowing her to walk, though Claimant reported that it was not always effective in reducing Claimant's foot pain, and she would have to alternate turning it on and off to obtain the benefit. Claimant also reported that since the implant of the stimulator, she began experiencing sharp thigh pain just below where the stimulator is as well as numbness on the anterior thigh, which would cause her problems with sitting. Claimant reported difficulties with activities of daily living, like vacuuming, carrying objects, navigating stairs, walking on uneven surfaces, attributing some of these to a lack of kinesthesia. Claimant told Dr. Parry that there were times when her stimulator would work effectively and that there would be other times where she could walk for only fifteen minutes before having to sit down. Claimant also reported to Dr. Parry that she was suffering from "long COVID" symptoms, including the development of diabetes, pulmonary problems, and kidney dysfunction. Claimant reported depression and discouragement because she felt useless.

57. On physical examination, Dr. Parry noted that Claimant exhibited an antalgic gait and that Claimant would sit leaning forward with her weight primarily on her right pelvis. She also observed several autonomic signs consistent with CRPS of the left lower extremity.

58. Dr. Parry opined that Claimant had type I CRPS with a risk of the CRPS spreading to Claimant's right lower extremity. She felt that the sensitivity on Claimant's left anterior thigh was likely the result of scarring in the region of the posterior cutaneous femoral nerve rather than a symptom related to Claimant's CRPS. Dr. Parry noted that Claimant had done well with a TENS unit. Dr. Parry agreed that Claimant had reached MMI. She performed an impairment evaluation and concluded that Claimant had a permanent impairment of 24% of the whole person.

59. Dr. Parry felt that Claimant's CRPS was likely to improve over time. However, regarding Claimant's occupational prospects, Dr. Parry opined, "[I]t will be challenging to find a competitive job which her ability to walk and stand will vary on a day to day basis and on an unpredictable basis and where she cannot accept a sedentary job because of the posterior thigh sensitivity and her inability to sit for any prolonged period."

60. Regarding Claimant's need for medical maintenance care, Dr. Parry felt that long term monitoring by Drs. Barolat and Wakeshima and reevaluations with Dr. Disorbio, as well as pool therapy, replacement for her TENS unit, and medications.

61. Regarding Claimant's chronic fatigue issues, Dr. Parry testified that individuals are more susceptible to pain when tired or falling asleep due to the pain being more prominent in the absence of other stimuli normally present during active hours. Therefore, individuals like Claimant who suffer from chronic pain will tend to have sleep difficulties.

62. Regarding the FCE, Dr. Parry testified that there is evidence that Claimant used unsafe compensatory motion to achieve the functions tested in the FCE, which she referred to as "validity criteria in terms of behavior." This led her to conclude that Claimant's level of function was not as good as the FCE indicated.

63. Dr. Parry testified at hearing that the medical records documenting Claimant's eagerness to return to work were of clinical significance, pointing specifically to Claimant's depression. However, she opined that Claimant's eagerness to return to work results in her pushing herself to a point where she exacerbates her CRPS.

64. Dr. Parry testified that in her experience she had never seen a spinal cord stimulator last in its effectiveness, often requiring modifications of its signals.

65. The Court finds Dr. Parry's testimony credible and persuasive.

66. Respondents commissioned a vocational evaluation by Kristine Harris, MS, CRC. Ms. Harris interviewed Claimant on August 11, 2023, as part of the vocational evaluation.

67. Claimant reported to Ms. Harris that she was struggling with maintaining a consistent sleep schedule, often sleeping in "spurts" which would lead to daytime fatigue. She would take a "low dose" sleep medication. Claimant reported to Ms. Harris that during the day, she would usually take an hour-long nap and then stay on the couch with her leg elevated, sometimes preparing a meal for herself. She would enjoy reading the Bible, devotionals, articles, news, and books from her sister-in-law. In the evenings, she would visit her son's home, a fifteen-minute drive away, where she would enjoy playing board games with her grandchildren.

68. Claimant told Ms. Harris that she was independent in personal hygiene and dressing, using a shower chair for safety. She would manage her grocery shopping with an electric cart and receive assistance with chores from her eldest son, who also placed a refrigerator in her bedroom to minimize stair use. Her sons would frequently help with household tasks, as would her granddaughters.

69. Claimant mentioned to Ms. Harris that she would go to [Redacted, hereinafter AD] to walk, trying to stay active despite feeling tired. She would run errands at places like [Redacted, hereinafter RO], [Redacted, hereinafter TT], and [Redacted, hereinafter JY] but felt constantly fatigued. Claimant lamented the loss of her sister and mother to COVID-19 and expressed a desire to be more active with her nine-year-old grandson. Her primary social activities included watching TV and movies with friends and family, both at home and in theaters. She would satay connected with loved ones via phone and social media, including TikTok, Instagram, and Facebook. When outside her home, she would use a cane for balance, and while driving her SUV, she would adjust her seating for comfort, sometimes elevating her leg on the dashboard.

70. Claimant denied having access to a computer or tablet at home, though she stated that she would use a smart phone to read, text, talk, e-mail, and Zoom, and she had experience using computers at work.

71. Claimant told Ms. Harris that she was interested and motivated to return to work and that she loved her job, the camaraderie with employees, interacting with customers, and the physical nature of the position. Although Claimant had been searching for jobs online, Claimant indicated that she had been applying using an out-of-date resume.

72. Ms. Harris reviewed Claimant's medical history and records as well as surveillance from several dates in March 2023. Based on the surveillance, Ms. Harris noted that Claimant was observed engaging in various activities throughout the day, including driving, running errands, and shopping, without any visible signs of discomfort or limitation. Claimant demonstrated the ability to stand, walk, bend, grasp, reach overhead, balance, and squat. She carried bags and a backpack, vacuumed her vehicle, cleaned snow off vehicles, and navigated uneven terrain, steps, and icy conditions. At no point did Claimant elevate her left leg or show signs of pain. She was seen sitting, standing, and walking without difficulty, including a thirty-minute walk in a park.

73. Ultimately, Ms. Harris opined:

    a. *"The records reviewed to date, vocational literature, and labor market research and sampling collectively provide evidence that there are*

vocational options available for which HY[Redacted] is qualified and able to perform within her commutable labor market. Vocational literature confirms returning to work would positively impact HY[Redacted] both physically and psychologically. It is my overall opinion HY[Redacted] is able to earn a wage. Review of the video surveillance further cements my opinion regarding her employability."

74. In her testimony, Ms. Harris explained that labor market research involves using data from sources like the Occupational Outlook Handbook and the Bureau of Labor Statistics (BLS) and includes labor market sampling, involving contacting employers to understand job requirements and assess if Claimant is competitive for those positions.

75. Ms. Harris testified that Claimant, with her extensive experience in retail management, has skills such as customer service and management that are transferable to other jobs. Based on Claimant's physical limitations, Ms. Harris felt she might be suited for positions with minimal lifting and physical strain, such as a receptionist or concierge. She referenced a list of jobs in the Denver area that align with those limitations, noting that employers are generally willing to make reasonable accommodations.

76. Ms. Harris also addressed some of Claimant's weaknesses as a job applicant. Specifically, she felt that Claimant's physical restrictions could be accommodated. She emphasized that employers are often open to making reasonable accommodations for limitations related to sitting, standing, walking, or lifting. She also testified that older workers are increasingly present in the workforce and that gaps in employment, such as those caused by injury, do not necessarily prevent someone from returning to work.

77. Ms. Harris also touched on the importance of reliability in employment and noted that while some employers may be hesitant about an applicant's reliability, others, particularly those offering remote positions, are more flexible. She pointed out that the COVID-19 pandemic had increased the acceptance of remote work, which could benefit individuals facing physical challenges.

78. On cross-examination, Ms. Harris acknowledged that the labor market survey forms did not contain specific inquiries related to Claimant's specific restrictions as assigned by Dr. Kim, but she maintained that the flexibility in position changes should inherently accommodate those restrictions.

79. Ms. Harris testified that she reviewed the surveillance footage as part of her analysis of the case. However, she expressed that her opinion would not change even if she were not to consider the surveillance footage.

80. Claimant later returned to Dr. Wakeshima on September 8, 2023. As a result of Claimant's foot sensitivity interfering with her sleep, Dr. Wakeshima prescribed a Micro Z II direct current electrical stimulation device with conductive sock and conductive cream for the foot. In support, he wrote that Claimant "reports worsening of her CRPS pain in her foot at night that is keeping her up at night, that is not adequately being controlled with her current implanted stimulator." In addition, he suggested she take her Cymbalta in the morning, since it may cause insomnia.

81. On October 13, 2023, Dr. Kim reviewed the surveillance footage from March. He expressed:

    a. *"In my medical opinion, the 5/26/2023 functional capacity evaluation report is valid and appropriate for the use of setting HY[Redacted] permanent restrictions, and as such, her permanent work restrictions remain unchanged. I concur with Dr. Parry in her 9/1/2023 report that the surveillance videos do not provide any level of function that changes the diagnosis or impairment experienced by HY[Redacted]."*

82. On October 27, 2023, Claimant returned to Dr. Wakeshima and reported that the sock he had prescribed was helping relieve symptoms such that she could fall asleep but not enough that she could stay asleep.

83. Claimant obtained a vocational evaluation by Daniel Best, MA, a vocational consultant, on October 16, 2023. As part of his evaluation, Mr. Best reviewed Claimant's personal, medical, and employment histories, including Claimant's permanent work restrictions.

84. Mr. Best considered Claimant's self-described limitations as well. Claimant reported what Mr. Best considered "essentially sedentary and light levels of exertion, but with very limited abilities in standing and walking." He noted, however, that Claimant also exhibited significant functional limitations with regard to her ability to remain seated for prolonged periods. Claimant also described needing frequent rest breaks, including the ability to recline and elevate her lower extremities. Mr. Best also found it notable that Claimant experienced significant variability in her limitations from day to day. With regard to Claimant's age and disability, Mr. Best opined that Claimant was "at a disadvantage when attempting to compete for employment in the general labor market," citing the combined effects of ageism and ableism.

85. Mr. Best also gave substantial attention to Claimant's reliability in the employment context. He felt that Claimant's description of functional limitations and resultant unreliability "simply does not allow her to guarantee reliability to competitive employment standards."

86. Ultimately, Mr. Best felt that Claimant would not be considered “the best available candidate” for any job in light of “the variability of her medical condition and symptoms, her age, relatively limited education, work restrictions, disability status, etc.” He concluded that Claimant was “not capable of regular and reliable competitive employment, and is subsequently not considered to be capable of earning wages.”

87. Mr. Best also testified at hearing consistently with his report. Additionally, he testified regarding the labor market survey conducted by Ms. Harris. He felt that Claimant’s lack of experience relevant to the positions, such as in hospitality or medical billing, would make her less competitive compared to other candidates. Regarding remote work, he testified that Claimant’s lack of necessary equipment like a computer and high-speed internet posed a particular challenge. He noted that some remote jobs have fixed schedules and may even track keystrokes, adding another layer of difficulty for someone with Claimant’s condition, referring to her ability to remain productive and reliable. He explained that the key issue is not whether she can perform sedentary tasks but whether she can consistently meet the demands of a job, such as showing up on time, working without frequent breaks, and maintaining a regular work schedule.

88. Claimant also testified at hearing on her own behalf.

89. Claimant testified about the severe pain she experienced in her foot, describing it as feeling "like it was on fire," swollen, and very painful. The store where she worked was short-staffed due to the pandemic, forcing her to fill in, which exacerbated her condition.

90. The relief from the stimulator, which she once described as "life-saving," eventually diminished. She continually adjusted the settings, turning it up or down, and switching programs to try and manage her pain. However, when overstimulated, she would turn the stimulator off, which led to her foot shaking and the pain gradually returning until she could no longer endure it and turned the stimulator back on. Dr. Barolat noted that the stimulator continued to provide relief for a short period after being turned off. Despite these challenges, Claimant reported having "good days" thanks to the stimulator, which were not possible before. However, these good days often led to "bad nights." She recounted a day when she felt well enough to walk up and down her stairs multiple times, but this resulted in overstimulation that required her to turn off the stimulator. That night, her skin became too sensitive to even put on her electrical sock.

91. During the FCE, Claimant pushed herself to do her best, reflecting her pride in being physical and active despite her pain. She believed that staying active would

lead to improvement. By the end of the evaluation, however, her pain and sensitivity had increased significantly, making it difficult for her to walk. The activities, including lifting weights and alternating between sitting, standing, and walking, were too much to tolerate in a work environment. This experience reminded her of her return to work at her previous employer when the pain became unbearable.

92. Claimant also testified about the impact of weather on her condition. Both cold and hot weather could trigger her symptoms. In cold weather, she experienced a dull ache throughout her leg, down to the surgery site, along with discoloration and swelling. Hot weather caused her skin to turn purple and a different type of ache to develop, feeling swollen. She recalled a cold, snowy day when she went to pick up prescriptions and had to turn off her stimulator due to overstimulation. The pharmacy's lack of accommodations made her discomfort worse, and she struggled to get comfortable when she returned home.

93. Claimant explained that she often had trouble feeling where her foot was positioned, which led to her bumping it against objects, especially when tired or when the stimulator was off. She believed she did not lift her leg high enough because she could not feel it, resulting in frequent, albeit usually light, bumps. However, once or twice a week, she bumped it hard enough that she had to rest for at least an hour. She reported to Dr. Wakeshima that she needed a single-point cane because she could not feel her foot in space, which helped prevent falls but did not stop her from bumping her foot.

94. Claimant also testified that she has experience working with money, training employees, collaborating with other people, hiring employees, interviewing individuals, overseeing departments, scheduling, merchandise ordering, OSHA compliance, and payroll.

95. At hearing, Claimant testified on her own behalf. Claimant testified about the severe pain she experienced in her foot, describing it as feeling "like it was on fire," swollen, and very painful. The store where she worked was short-staffed due to the pandemic, forcing her to fill in, which exacerbated her condition.

96. She testified that the relief from the stimulator, which she once described as "life-saving," eventually diminished. She continually adjusted the settings, turning it up or down, and switching programs to try and manage her pain. However, when overstimulated, she would turn the stimulator off, which led to her foot shaking and the pain gradually returning until she could no longer endure it and turned the stimulator back on. Dr. Barolat noted that the stimulator continued to provide relief for a short period after being turned off. Despite these challenges, Claimant testified to having "good days" thanks to the stimulator, which had not been

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97. Claimant testified that during the FCE, she pushed herself to do her best, reflecting her pride in being physical and active despite her pain. She believed that staying active would lead to improvement. By the end of the evaluation, however, her pain and sensitivity had increased significantly, making it difficult for her to walk. The activities, including lifting weights and alternating between sitting, standing, and walking, were too much to tolerate in a work environment. This experience reminded her of her return to work at her previous employer when the pain became unbearable.

98. Claimant also testified about the impact of weather on her condition. Both cold and hot weather could trigger her symptoms. In cold weather, she experienced a dull ache throughout her leg, down to the surgery site, along with discoloration and swelling. Hot weather caused her skin to turn purple and a different type of ache to develop, feeling swollen. She recalled a cold, snowy day when she went to pick up prescriptions and had to turn off her stimulator due to overstimulation. The pharmacy's lack of accommodations made her discomfort worse, and she struggled to get comfortable when she returned home.

99. Claimant testified that she often had trouble feeling where her foot was positioned, which led to her bumping it against objects, especially when tired or when the stimulator was off. She believed she did not lift her leg high enough because she could not feel it, resulting in frequent, albeit usually light, bumps. However, once or twice a week, she bumped it hard enough that she had to rest for at least an hour. She testified that she had told Dr. Wakeshima that she needed a single-point cane because she could not feel her foot in space, which helped prevent falls but did not stop her from bumping her foot.

100. Claimant also testified that four to five days a week, she experienced too much pain or exhaustion to work. She expressed a willingness to try a job to see if she could manage it, despite the unpredictability of her condition. She noted that sometimes even short walks could trigger her symptoms, while at other times, she could tolerate longer distances. However, overexertion often led to severe pain.

101. Regarding the surveillance, Claimant testified that on the day she was surveilled, she was having a relatively good day. She woke up with minimal pain and just skin sensitivity. Her CRPS foot was not “lost in space,” likely due to a good night’s sleep. She did not recall any difficulties with curbs or walking on grass. During the 11-minute surveillance footage of her sitting, she positioned herself at the front of the

chair to avoid putting pressure on her thigh. In a store, she spent much of her time sitting. Initially, she felt okay walking around the track, but as time went on, she became tired and started experiencing pain. Upon watching the tape, she noticed that her pace slowed, and she developed a limp, with her left leg lagging at times. She was seen shifting her weight between her feet and lifting her left leg to relieve pressure. During a brief disappearance from the footage, she rested and retrieved an item of clothing. She later realized she had overexerted herself that day, leading her to take an oxycodone to manage the pain. When questioned about the surveillance footage showing her lifting her foot off the ground, Claimant explained that she did so to relieve pressure, favoring her left leg because of the pain when weight was placed on her foot.

102. Claimant also testified that she has experience working with money, training employees, collaborating with other people, hiring employees, interviewing individuals, overseeing departments, scheduling, merchandise ordering, OSHA compliance, and payroll.

103. The Court finds Claimant's testimony credible.

104. The Court also finds Mr. Best's testimony more credible and persuasive than that of Ms. Harris. Mr. Best's thorough analysis of Claimant's functional limitations, including the variability of her symptoms, presents a more realistic assessment of those human factors pertinent to whether Claimant is able to earn wages in the competitive job market. His focus on Claimant's reliability—specifically, her capacity to maintain consistent attendance and performance in light of her chronic fatigue—provides a practical understanding of the demands of even the remote workplace. Additionally, Mr. Best's attention to the socio-economic challenges faced by older workers and individuals with disabilities presents a realistic portrayal of Claimant's job prospects even in the context of anti-discrimination laws. His consideration of the logistical difficulties associated with remote work, particularly Claimant's lack of access to a computer and lack of software skills, highlights another critical aspect of her employability that Ms. Harris largely overlooks and which is critical in assessing Claimant's ability to earn wages performing remote work, the only type of work that would otherwise provide Claimant the ability to accommodate her physical restrictions. Overall, Mr. Best's testimony offers a more nuanced and comprehensive evaluation, grounded in the practical realities of the workplace and the Claimant's specific limitations, making it more persuasive than Ms. Harris's more generalized conclusions.

105. Ultimately, while it is possible that Claimant might be able to find work, the Court finds that it is more probable than not that under Claimant's particular circumstances there is not employment that is reasonably available to her and

which she could reasonably maintain. Therefore, the Court finds that Claimant has proved that she is unable to earn any wages in the same or other employment.

106. The Court finds that Claimant is entitled to PTD benefits in the amount of $1,055.55 per week beginning on Claimant's date of MMI, March 24, 2023, subject to any credits to be taken by Respondents for TTD paid past the date of MMI.

107. As found above, Respondents' admission for maintenance medical benefits did not limit maintenance medical benefits to any specific benefits and was a general award of maintenance medical benefits and that the language need not be changed.

108. As found above, the temporary partial and temporary total disability benefits admitted on the FAL were paid when due and were in fact owed at that time, notwithstanding the statutory cap on benefits, as no permanent partial disability benefits had been paid. Therefore, the Court finds that there exists no overpayment of temporary disability benefits.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in 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).

Permanent Total Disability

A claimant is entitled to PTD benefits only if he can demonstrate that he is unable to earn any wages in the same or other employment. § 8-40-201(16.5)(a), C.R.S. Case law maintains that "employment" means competitive and continued employment, not precluding a claimant from earning temporary wages for certain periods of time. *New Jersey Zinc Co. v. Industrial Commission*, 440 P. 2d 284 (Colo. 1968); *Hobbs v. Indus. Claim Appeals Off.*, 804 P.2d 210 (Colo.App.1990); *Gruntmeier v. Tempel & Esgar Inc.*, 730 P.2d 893 (Colo.App.1986). Courts also analyze a Claimant's eligibility to receive PTD benefits by using a non-exclusive list of certain "human factors" to account for those intangible and qualitative elements of employability. *Weld Cnty. School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). These factors include but are not limited to Claimant's age, access to a commutable labor market, skills, education, physical and mental ability, and work history. *Id.* at 558.

A claimant's ability to earn wages "is not measured by any single criterion, such as the worker's physical condition, or loss of income." *Prof'l Fire Prot., Inc. v. Long*, 867 P.2d 175, 177 (Colo.App.1993) *citing Casa Bonita Restaurant v. Indus. Commission*, 624 P.2d 1340 (Colo.App.1981) and *Gruntmeir v. Tempel & Esgar, Inc.*, 730 P.2d 893 (Colo.App.1986). It is also not determined "exclusively from general impairment or impairment of capacity to perform specific work." *Id. citing Rio Grande Motor Way, Inc. v. De Merschman*, 68 P.2d 446 (Colo. 1937) *and Prestige Painting & Decorating, Inc. v. Mitchusson*, 825 P.2d 1049 (Colo.App.1991).

Instead, "the extent and degree of permanent disability is assessed on the basis of various interdependent factors which affect the worker's capacity to be gainfully employed. *Id.* Included in these factors are "the worker's age, education, prior work experience and vocational training, the worker's overall physical condition and mental capabilities, and the availability of the type of work which the worker can perform," as well as the local labor market in which the claimant resides, which takes into account the claimant's capacity to travel. *Id. citing Colorado Fuel & Iron Corp. v. Indus. Commission*, 379 P.2d 153 (Colo. 1962); *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The weight given to any factor varies depending on the particular facts of

a case. *Id*. The impairment rating assigned to the claimant is also a factor to take into consideration, but this too is not determinative of permanent total disability. *Colorado Mental Health Inst. v. Austill*, 940 P.2d 1125 (Colo.App.1997). The court should consider whether there exists "employment that is reasonably available to the claimant under his or her particular circumstances." *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.*, 21 P.3d 866, 868 (Colo.App.2001).

As found above, Mr. Best's thorough analysis of Claimant's functional limitations, including the variability of her symptoms, presents a more realistic assessment of those human factors pertinent to whether Claimant is able to earn wages in the competitive job market. His focus on Claimant's reliability—specifically, her capacity to maintain consistent attendance and performance in light of her chronic fatigue—provides a practical understanding of the demands of even the remote workplace. Additionally, Mr. Best's attention to the socio-economic challenges faced by older workers and individuals with disabilities presents a realistic portrayal of Claimant's job prospects even in the context of anti-discrimination laws. His consideration of the logistical difficulties associated with remote work, particularly Claimant's lack of access to a computer and lack of software skills, highlights another critical aspect of her employability that Ms. Harris largely overlooks and which is critical in assessing Claimant's ability to earn wages performing remote work, the only type of work that would otherwise provide Claimant the ability to accommodate her physical restrictions. Overall, Mr. Best's testimony offers a more nuanced and comprehensive evaluation, grounded in the practical realities of the workplace and the Claimant's specific limitations, making it more persuasive than Ms. Harris's more generalized conclusions.

As found above and as concluded in here, while it is possible that Claimant might be able to find work, the Court finds that it is more probable than not that under Claimant's particular circumstances there is not employment that is reasonably available to her and which she could reasonably maintain. Therefore, the Court finds that Claimant has proved that she is unable to earn any wages in the same or other employment.

As found, the Court concludes that Claimant is entitled to PTD benefits in the amount of $1,055.55 per week beginning on Claimant's date of MMI, March 24, 2023, subject to any credits to be taken by Respondents for TTD paid past the date of MMI.

Maintenance Medical Benefits

Section 8-42-107(8)(f), C.R.S. provides, "In all claims in which an authorized treating physician recommends medical benefits after maximum medical improvement, and there is no contrary medical opinion in the record, the employer shall, in a final admission of liability, admit liability for related reasonable and necessary medical benefits by an authorized treating physician." An award of award of maintenance medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services,* W. C. No. 4-543-730, (ICAO, July 14, 2006).

In cases where the respondents file a FAL admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and

necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App.2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (Feb. 12, 2009). The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo.App.2002).

As found above, the ALJ is not persuaded Respondents' reference to the DIME's report in the FAL limited the award of maintenance care to only the specific treatment mentioned in the DIME's report. The reference to the DIME's report is found to be an attempt to comply with the Rule 5-5(A)(1), W.C.R.P. By checking "Yes," Respondents admitted to a general award of reasonable and necessary maintenance care related to the work injury pursuant to § 8-42-107(8)(f), C.R.S.

As found above, and as the Court concludes here, Respondents' admission for maintenance medical benefits did not limit maintenance medical benefits to any specific benefits and was a general award of maintenance medical benefits and that the language need not be changed.

Overpayment

The Workers' Compensation act caps combined temporary disability and permanent partial disability awards as of the date of injury. Section 8-42-107.5, C.R.S. (2020). Whether a claim has reached the cap is determined by total value of the combined temporary disability and permanent partial disability awards. However, temporary disability benefits are to be paid when due, regardless of whether the statutory cap is met. *United Airlines v. Indus. Claims Appeal Off.*, 312 P.3d 235 (Colo.App.2013); *Danks v. Rayburn*, W.C. No. 4-770-978-01 (Sept. 10, 2014).

The Act defines an overpayment as:

> "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."

Section 8-40-201(15.5), C.R.S. (2020).

As found above, Respondents' claim of overpayment of $34,422.12 was based on the total temporary disability benefits paid ($133,517.10) paid in excess of a statutory

indemnity cap of $99,094.93 for combined temporary disability and permanent partial disability benefits.

Respondents argue in their Position Statement that they are entitled to the overpayment asserted in their FAL because the case arose from a 24-month DIME requested by Respondents and because the case was "factually distinguishable from *United Airlines v. ICAO*, 312 P.3d 235 (Colo. App., 2013) [*sic*] and its interpretive case law." Respondents did not develop the argument further.

United Airlines v. Indus. Claims Appeal Off., 312 P.3d 235, involved a case where a claimant received TTD benefits exceeding the statutory cap and who was placed at MMI by a DIME with a permanent impairment. The employer in *United Airlines* sought to recover an overpayment for TTD benefits paid in excess of the cap. The ALJ declined to find an overpayment, finding instead that the claimant's receipt of TTD benefits, although exceeding the cap, did not constitute an overpayment. The Colorado Court of Appeals agreed, reasoning that "because she exceeded the cap before an award of permanent benefits was made, none of the benefits paid to her was compensation for permanent impairment. Thus, she never received combined permanent and temporary benefits exceeding the cap." *Id.* at 239.

Here, just like in *United Airlines*, Claimant's temporary disability benefits exceeded the statutory cap before any PPD benefits were awarded. The Court finds that the TTD benefits paid above the statutory cap do not constitute an overpayment because they were statutorily required at the time they were issued. As held in *United Airlines*, the Act mandates that TTD benefits continue until the claimant reaches MMI or other statutory termination criteria are met, regardless of whether the total of those payments exceeds the statutory cap set forth at § 8-42-107.5, C.R.S. (2020). Therefore, because Claimant there is no credible evidence that Claimant received any PPD benefits at the time she was paid TTD, no combined temporary and PPD benefits were paid in excess of the cap, and thus no overpayment exists.

ORDER

It is therefore ordered that:

1. Claimant is permanently and totally disabled.

2. Respondents shall pay Claimant $1,055.55 per week in PTD benefits beginning as of the date of MMI and continuing until terminated by statute.

3. Respondents' admission for maintenance medical care is sufficient and compliant with the Act as it does not limit the scope of maintenance medical care.

4. Respondents shall, pursuant to § 8-43-410, C.R.S. (2020), pay interest at the rate of eight percent per annum upon each past-due permanent total disability payment owed as a result of this Order.

5. No overpayment exists for temporary disability benefits paid in excess of the statutory cap.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference regarding the requirements for filing a Petition to Review a supplemental order, see § 8-43-301(6), 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: November 18, 2024.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-257-415-002

ISSUES

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

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment she received from Dr. Cook was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury[1]?

FINDINGS OF FACT

1. Claimant was employed with Employer as a cashier. Claimant was hired by Employer in June 2021.

2. Claimant testified she has a history of injuries to her right ankle, including an injury in 2006 when she was working as a housecleaner in Telluride and fell from a countertop, injuring her right ankle and low back. Claimant was treated for that injury and was eventually placed at maximum medical improvement and provided with an impairment rating. Claimant later applied for and received Social Security Disability Insurance.

3. Claimant testified she continued to treat for issues involving her right ankle including receiving orthotics in 2016 after reporting that her ankles were unstable.

4. Claimant sought medical treatment in 2022 after a fall in her kitchen reinjured her right ankle. Claimant testified that she then sustained a work injury for Employer on August 14, 2022. Treatment related to this injury involved Claimant's right foot and low back. Claimant testified that after the August 14, 2022 work injury she was taken off of work by Employer until January 11, 2023 when she was released to return to work with restrictions. Claimant has continued receiving medical treatment related to the August 2022 work injury.

5. Claimant testified that on November 16, 2023, Claimant was at work when a box of 12 turkeys fell and landed on her foot. Video of the incident was entered into evidence at hearing as Respondents' Exhibit L. The video shows Claimant standing with a cane when the turkey falls and hits Claimant's right foot/shin after the frozen

[1] The date of the medical treatment with Dr. Cook was identified by the parties to be November 17, 2023, but the specific medical record identified by the parties prior to hearing involves treatment on November 29, 2023, and therefore, the ALJ is using the evaluation of November 29, 2023 at the contested medical treatment for purposes of the compensability determination.

turkey that falls out of a box when the boxes fall off a garbage can. Claimant lifts her right leg after it is struck and stands on one leg for a short period of time. Claimant testified that she continued to work her shift on November 16, 2023. The surveillance video does not show how many frozen turkeys are in each box, but does demonstrate the boxes falling and striking Claimant's right lower extremity.

6. Claimant reported her injury to Employer on November 27, 2023 according to the Employer's First Report of Injury. Claimant filed a Worker's Claim for Compensation on November 29, 2023.

7. Respondents presented the testimony of the store manager, [Redacted, hereinafter BD]. BD[Redacted] testified he was been the store manager for 5 years and his job duties include overseeing the maintenance and operation of the store. BD[Redacted] testified he was working at the store on November 16, 2023 and Claimant did not report sustaining an injury on that day. BD[Redacted] testified he completed the Employer's First Report of Injury on November 30, 2023 which noted Claimant reported the injury on November 27, 2023. BD[Redacted] testified Claimant has not missed any time from work due for the injury after November 16, 2023. BD[Redacted] testified that prior to November 16, 2023 Claimant was using a cane while at work. BD[Redacted] testified that sometime after November 16, 2023, Claimant asked if she could use a knee scooter, which he accommodated.

8. Claimant sought medical treatment with Dr. Cook on November 29, 2023. Claimant reported to Dr. Cook that she received new injuries at work on November 16, 2023. Dr. Cook noted that Claimant described the new pain as being to the upper outside ankle where he noted there was a faint dark line. Dr. Cook noted that Claimant's "foot is very swollen". Claimant reported that there was bruising following the accident. Dr. Cook further noted that Claimant's foot looked fine now and Claimant had been trying to elevate her foot and ankle. Dr. Goldman provided Claimant with work restrictions that included allowing Claimant to sit and elevate her foot for the next six weeks.

9. Claimant testified that after November 16, 2023, she began using a knee scooter to get around as opposed to her cane. Claimant testified that after her foot was struck by the frozen turkeys she had swelling in her foot and increased pain.

10. Claimant was examined at Chinle Comprehensive Health Care Facility on December 12, 2023. Claimant's restrictions for her August 14, 2022 work injury had previously been 5 pounds lifting with no bending, twisting, kneeling or stooping movements and at least half of her work time seated with the other half allowing Claimant to use her cane. As of December 12, 2023, her work restrictions were modified to include Claimant working at the cash register, and between customers, being provided with a place to sit and elevate her right leg.

11. Claimant returned to Dr. Cook on January 22, 2024 and reported a 40% improvement in her pain. Claimant reported her foot did not hurt in the Cam boot

during her work duties. Dr. Cook noted on examination that Claimant had pain at the left sinus tarsi similar to the previous examination.

12. Claimant was again evaluated by Dr. Cook on March 12, 2024 when Claimant reported 60-65% improvement. Dr. Cook noted that Claimant's right brevis tendon was improved, but should be further along. Dr. Cook recommended physical therapy.

13. Claimant underwent an Independent Medical Examination ("IME") at the request of Respondents on June 17, 2024 with Dr. Goldman. Dr. Goldman reviewed Claimant's medical records, obtained a medical history from Claimant and performed a physical examination in connection with the IME. Dr. Goldman noted in his report that he was missing some medical records related to the November 16, 2023 work injury. Dr. Goldman noted that Claimant presented at the IME with moderate to severe pain behaviors. Dr. Goldman further found that Claimant presented with substantial to extreme somatic focus and perseveration. Dr. Goldman opined that Claimant's right ankle examination relative to the left demonstrated diminished plantar flexion and eversion, and palpatory examination could be consistent with a chronic ATLF sprain, peroneus tenosynovitis and mild talar-calcaneal arthritis. But Dr. Goldman concluded that Claimant's adaptive equipment and orthosis presentation is extraordinary and "over the top" for a patient with the objective differential diagnoses potentially applicable to her condition.

14. With regard to the November 16, 2023 work injury, Dr. Goldman provided a diagnosis of a subjective exacerbation of prior chronic right ankle and foot pain that may be due to chronic pre-existing ATLF sprain, Peroneus tenosynovitis, and talar-calcaneal osteoarthritis pending review of the recently obtained right ankle-foot ultra sound and MRI reports.

15. Dr. Goldman testified at hearing in this matter. Dr. Goldman noted that Claimant's report of her condition prior to November 16, 2023 was not consistent with what was contained in the medical records. Dr. Goldman testified that after his IME, he reviewed Claimant's June 13, 2024 MRI. Dr. Goldman further opined the MRI did not show any traumatic findings. Dr. Goldman further testified that after his IME, he was able to review Dr. Cook's medical records. Dr. Goldman opined that he did not see objective evidence of a recent work injury. With regard to the MRI of the right ankle, Dr. Goldman opined that the findings did not show signs of an injury, but instead showed more of a degenerative condition. Dr. Goldman testified he reviewed the store surveillance video and it was his opinion that the November 16, 2023 incident did not aggravate Claimant's preexisting condition. Dr. Goldman testified that there may have been a temporary aggravation with a contusion or bruise on the foot, but nothing permanent. Dr. Goldman opined with a medical probability that Claimant's current complaints were most likely not related to the November 2023 incident.

16. On cross examination, Dr. Goldman noted that he had not reviewed a complete copy of the November 29, 2023 report from Dr. Cook until 2 days prior to the hearing. Dr. Goldman further acknowledged that the faint dark line noted in Dr.

Cook's November 29, 2023 report and swelling could be objective evidence of an injury. Dr. Goldman testified that the use of a knee scooter could be subjective evidence of an injury.

17. The ALJ credits the testimony of the Claimant along with the surveillance video entered into evidence and determines that Claimant was struck by a frozen turkey on her right foot/shin area on November 16, 2023. The ALJ credits Claimant's testimony and the medical records from Dr. Cook and finds that the striking of her right foot/shin caused bruising and swelling of her right foot and ankle along with an increase in Claimant's pain in her right lower extremity that necessitated medical treatment related to the November 16, 2023 work injury.

18. The ALJ further credits the medical reports from Chinle Comprehensive Health Care Facility from December 12, 2023 along with the reports from Dr. Cook and finds that Claimant has established that it is more probable than not that the work injury resulted in additional work restrictions related to the November 16, 2023 work injury.

19. The ALJ acknowledges the contrary opinions of Dr. Goldman regarding whether Claimant sustained an injury on November 16, 2023. However, considering the video surveillance that demonstrate the incident in which Claimant's right foot/shin is struck by a falling box containing frozen turkeys, Claimant's testimony in this case that she sustained bruising, swelling and increased pain, the medical records from Dr. Cook demonstrating that Claimant still had swelling and evidence of bruising on November 29, 2023, the increased work restrictions and recommendations for physical therapy on March 12, 2024, the ALJ determines that Claimant has established that it is more probable than not that the November 16, 2023 incident represents a compensable work related injury as contemplated by the Colorado Workers' Compensation Act.

20. The ALJ therefore finds that Claimant has established that it is more likely than not that she sustained a compensable injury arising out of and in the course and scope of her employment with Employer when her right foot was struck by a falling frozen turkey on November 16, 2023.

CONCLUSIONS OF LAW

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

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

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

4. As found, Claimant has established by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment with Employer when she was at work on November 16, 2023 and was struck by a falling box of frozen turkey on her right foot/shin resulting in increased pain in her right foot associated with bruising and swelling. As found, the testimony of Claimant and the supporting medical records from Dr. Cook on November 29, 2023 are found to be credible and persuasive with regard to this issue. The ALJ notes that after the November 29, 2023 work injury, Dr. Cook has recommended treatment to the right lower extremity including an MRI of the right ankle and physical therapy.

5. As found, the medical records from Chinle Comprehensive Health Care Facility from December 12, 2023 in which Claimant's work restrictions were increased to include allowing Claimant to elevate her right leg while at work are additional credible evidence that the November 16, 2023 incident in which Claimant's right foot/shin was struck by a frozen turkey resulted in a compensable work injury arising out of and in the course of Claimant's employment with Employer.

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

7. As found, Claimant has proven by a preponderance of the evidence that the medical treatment she received from Dr. Cook on November 29, 2023 was reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the November 16, 2023 work injury.

ORDER

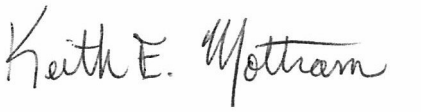
It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the November 16, 2023 industrial 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, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 19, 2024



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

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS
Workers' Compensation No. 5-239-161-001

STIPULATION

- The parties stipulated that Claimant's average weekly wage is $950.90.

ISSUE

I. Whether Claimant is entitled to disfigurement benefits, and if so, the appropriate amount.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence submitted at the hearing, the ALJ finds and concludes that as a result of his work injury, Claimant has a visible disfigurement to the body consisting of 2 surgical scars on his left shoulder.

Based on the observations made during the virtual hearing, Claimant has a surgical scar on the top of his left shoulder that is approximately 3 inches long and 1/8 of an inch wide. The Claimant also has a very faint arthroscopic surgical port scar on his left shoulder that is approximately ½ inch long and 1/8 of an inch wide. Each scar is different in color and texture compared to the surrounding skin.

Claimant submitted a photograph post hearing, Exhibit 5, which was accepted into evidence via agreement of the parties. While the photograph shows some additional irregularities of the skin on Claimant's left shoulder, the ALJ cannot conclude that those additional irregularities are related to his work injury and the surgery based on the evidence. The ALJ, has, however, used the photograph to determine the extent of the disfigurement found above and awarded.

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

ORDER

1. Respondents shall pay Claimant $1,150.00 for his disfigurement.
2. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.
3. Claimant's average weekly wage is $950.90.
4. Issues not expressly decided herein are reserved to the parties for future determination.

ENTERED this 20th day of November, 2024.

STATE OF COLORADO

OFFICE OF ADMINISTRATIVE COURTS

/s/ Glen Goldman
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-22--247-001

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the physical therapy recommended by Lindsey Harr is reasonable medical treatment necessary to cure and relieve the Claimant from the effects of her industrial injury?

FINDINGS OF FACT

1. Claimant is employed with Employer as a Human Resources ("HR") specialist. Claimant sustained an admitted injury on January 6, 2023 when she slipped and fell twice while crossing the parking lot after work. Claimant testified that when she fell, she jammed her right arm, shoulder, elbow and right wrist.

2. Claimant sought medical treatment after the injury and was diagnosed with a right shoulder rotator cuff tear, right shoulder impingement and right shoulder acromioclavicular ("AC") joint arthritis. Claimant underwent shoulder surgery on April 4, 2023 which consisted of a right shoulder subacromial decompression, right rotator cuff repair and a distal clavicle excision under the auspices of Dr. Andreas Sauerbrey.

3. Following Claimant's surgery, Claimant underwent a course of physical therapy as recommended by Dr. Sauerbrey. Claimant continued to complain of issues involving her right shoulder to Dr. Sauerbrey who recommended a repeat MRI scan. The repeat MRI demonstrated supraspinatus tearing and biceps tendon irritation. Based on Claimant's continued complaints and the results of the MRI, Dr. Sauerbrey recommended a second surgery to her right shoulder.

4. Dr. Provencher performed the second surgery on November 2, 2023 which consisted of a revision of the right shoulder rotator cuff repair, right biceps tenodesis, right subacromial decompression, right shoulder arthroscopy with extensive debridement and platelet rich plasma ("PRP") injections.

5. After Claimant's second surgery, Claimant underwent another course of physical therapy which began on November 27, 2023. Claimant testified at hearing that with the physical therapy following her surgery she was progressing slowly and was frustrated with the process.

6. The physical therapy notes show Claimant's continued complaints of pain with her shoulder. On December 13, 2023, Claimant reported to her physical therapist that she had an increase in shoulder soreness after returning to work. On January 11, 2024, Claimant reported to Dr. Provencher that she had continued shoulder pain despite Flexeril, physical therapy and activity modification. Dr. Provencher noted that Claimant's pain was likely due to scarring or subacromial/subdeltoid bursitis. Dr.

Provencher recommended a repeat MRI of the shoulder to rule out a repeat rotator cuff tear. Dr. Provencher also recommended a steroid injection.

7. Claimant returned to Dr. Provencher on February 26, 2024 and reported significant relief following the steroid injection. Dr. Provencher noted there was no acute postoperative issues shown on the repeat MRI. Claimant reported she was back on a good physical therapy program and was very happy with her current progress.

8. Claimant reported to the physical therapist on March 4, 2024 that she had met her goal of increasing her active range of motion. On March 11, 2024, Claimant reported an audible pop during shoulder passive range of motion flexion. Claimant reported her shoulder felt crunchy and weak with overhead active range of motion. Claimant reported on March 14, 2024 that she was having some ongoing weakness and was now using 2-3 pound weights instead of the 5 pound weights.

9. Claimant was examined by PA Harr on March 20, 2024 and reported she had an episode in physical therapy where her shoulder popped and had continued to be popping since that time with any lifting of weights. Claimant reported decreased range of motion.

10. Claimant reported continued popping in her shoulder on March 21, 2024, but no pain to her physical therapist. The therapist recommended gradual progression, as tolerated, to allow return to prior level of previous function without limitation.

11. Claimant was examined by PA Scott Liegel at Dr. Provencher's office on March 26, 2024. Claimant reported more popping and crunching in her shoulder especially with physical therapy. PA Liegel noted that the popping could be due to scar formation and recommended considering another steroid injection.

12. Claimant returned to PA Harr on April 23, 2024 and reported she was still seeing the physical therapist, but did not feel she was able to progress much due to pain. Claimant reported that she was advised by the Steadman Clinic that the popping noise she is hearing is part of the healing. PA Harr noted that Claimant's status was stagnant but felt the physical therapy was preventing worsening. PA Harr recommended additional sessions of physical therapy.

13. Respondents obtained a review of the request for additional physical therapy by Dr. Orgel. Dr. Orgel issued a report dated May 2, 2024 that noted that the records showed Claimant was initially improving, but then more recently she had popping and crunching in the shoulder, especially with physical therapy. Dr. Orgel noted that with regard to the physical therapy request, it was his opinion that Claimant has both been stagnant and has good strength and excellent range of motion with the popping that was felt to be related to scar tissue. Therefore, Dr. Orgel opined that no additional treatment was indicated and Claimant could be released to work full duty.

14. PA Harr issued a letter on May 9, 2024 noting that Claimant had received a corticosteroid injection on May 7, 2024 that caused increased pain in her shoulder.

PA Harr requested an additional 12 physical therapy session and noted that Claimant benefits from physical therapy and her symptoms are still not stagnant.

15. Dr. Orgel issued a follow up report on May 14, 2024 after he reviewed PA Harr's May 9, 2024 letter. Dr. Orgel noted he understood PA Harr's request and agreed that continued exercises are indicated and that should be done as part of maintenance medical care after she receives a rating. Dr. Orgel noted that 6 physical therapy sessions to help her in her gym membership may be reasonable, but physical therapy as a form of treatment to bring Claimant to MMI was not indicated.

16. Claimant returned to PA Harr on May 29, 2024. PA Harr noted that Claimant's progress in strength and range of motion remains stagnant. PA Harr further noted she was hesitant to place Claimant at maximum medical improvement given there are several pain relieving option that had not been tried. PA Harr noted that she would like to order a TENs unit for Claimant to use at home since her physical therapy sessions had been denied after an appeal.

17. Claimant returned to Dr. Provencher on June 17, 2024. Dr. Provencher noted that Claimant had persistent complaints of pain that were limiting Claimant's ability to progress in physical therapy. Dr. Provencher noted the steroid injection performed on May 7, 2024 had provided no relief and Claimant currently had pain at rest and with any movement of the right shoulder, particularly movements overhead or across her body. Dr. Provencher recommended additional x-rays and another MRI.

18. Claimant returned to PA Harr on July 30, 2024. PA Harr noted Claimant was continuing to perform her physical therapy at home, but felt limited in her progress. PA Harr noted that may be referred to a pain management specialist.

19. Claimant testified at hearing that following her second surgery, she felt she was stagnant with regard to the progress of her right shoulder. Claimant testified that she had approximately 40 physical therapy sessions following her first surgery and approximately 38 physical therapy sessions following her second surgery before her physical therapy was denied by Respondents. Claimant testified that after the physical therapy was denied, she continued with her home therapy but felt like her range of motion and strength had decreased a small amount.

20. Dr. Orgel testified at hearing in this matter consistent with his medical reports. Dr. Orgel testified that based on his review of the records, Claimant was on work restrictions in May, but had no objective deficits as her range of motion and strength were good. Dr. Orgel testified that the Colorado Medical Treatment Guidelines indicate that the purpose of physical therapy related to post-surgical care is to help regain objective measures of function, including strength and range of motion, along with work activities. Dr. Orgel opined that additional physical therapy will not improve Claimant's function. Dr. Orgel further testified that additional physical therapy may be appropriate to help Claimant with gym exercises if her physicians recommend a gym membership.

21. The ALJ credits the testimony of Claimant at hearing and the medical records from PA Harr and Dr. Provencher and finds that Claimant has established that it is more likely than not that the recommended physical therapy is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury.

22. The ALJ recognizes the contrary opinion by Dr. Orgel, but finds that the recommendation from PA Harr for additional physical therapy to assist with Claimant regaining additional function of her shoulder to allow her to return to work without extensive restrictions to be more credible and persuasive.

23. The ALJ notes that the physical therapy in this case would be necessary to assist with Claimant's recovery in this case as a result of the two surgeries to Claimant's right shoulder. Therefore, it is more likely than not that the physical therapy recommended by PA Harr is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury.

CONCLUSIONS OF LAW

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

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

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

4. As found, Claimant has proven by a preponderance of the evidence that the medical treatment recommended by PA Linsey Harr in the form of physical therapy is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury. As found, the testimony of the Claimant along with the medical records from PA Harr and Dr. Provencher are found to be credible and persuasive with regard to this issue.

ORDER

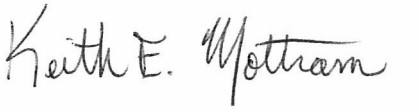
It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the January 6, 2023 industrial injury including the physical therapy recommended by PA Harr.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 20, 2024



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

ISSUES

- Did Claimant prove he suffered a compensable injury on November 23, 2022? If Claimant proved a compensable injury, the following issues will be addressed:
- Did Respondents overcome the DIME's 14% whole person rating by clear and convincing evidence?
- Average weekly wage.
- Medical benefits.
- Medical benefits after MMI.

FINDINGS OF FACT

1. Claimant worked for Employer as a laboratory technician since October 2020, processing samples from animal patients.

2. Employer leases space inside an animal hospital. The building has an associated parking lot utilized by patients and staff. Claimant does not know who owns the parking lot but was told by an unidentified person that the animal hospital owns it. Claimant and his co-workers routinely parked in the lot. Employer knew its employees used the parking lot and made an allowance in its tardiness policy to accommodate delays employees occasionally experienced finding a parking space. Claimant considered access to the parking lot to be an important workplace amenity. He much preferred parking in the lot and would only park on the street as a last resort, "because you do not want to park in the street not knowing what would happen to your car." The parking lot was a fringe benefit of Claimant's employment, and therefore is part of Employer's "premises."

3. Claimant injured his low back in a slip and fall accident on November 23, 2022. On that date, Claimant clocked out after his shift and walked to his vehicle in the parking lot. There was ice and snow from a recent snowstorm in areas of the parking lot. Claimant's vehicle was parked next to a grass-covered "island" at the far end of the lot. Claimant slipped on ice while getting into his vehicle. He fell onto his buttocks and struck his low back on the curb of the parking "island." He felt immediate, sharp pain in his lower back.

4. The parking lot is under continuous video surveillance, and the parties submitted surveillance footage from the time of the accident. Claimant's vehicle is only partially visible in the video, and the accident occurred off-camera. The video footage confirms the presence of ice and/or snow near Claimant's vehicle, but otherwise does not

directly confirm or refute the occurrence of an accident. Nevertheless, the video is consistent with Claimant's account of the incident.

5. Claimant's hands were soiled and wet from the fall, so he went back into the office to wash up. Claimant's co-worker, [Redacted, hereinafter KN], observed that Claimant appeared distressed. She asked Claimant what happened, and he said he had just fallen on ice. She gave Claimant an ice pack for his "sacrum area." Claimant washed his hands, took the ice pack, and went home.

6. Claimant did not report the injury to Employer that evening, because he did not want to bother his supervisor after hours. He was off the next day for the Thanksgiving Day holiday, and assumed the pain would resolve before his next shift.

7. On Thanksgiving Day, Claimant took OTC NSAIDs and alternated with a heating pad and an ice pack. The pain did not subside. He did not contact Employer because he did not want to intrude on his supervisor's holiday.

8. Claimant was scheduled to work on the Friday after Thanksgiving, but he was still having back pain and did not feel he could tolerate working. He texted his supervisor, [Redacted, hereinafter HS], that, "I am in pain now and can't make it to work today. I slipped and fell in the parking lot the other night while leaving work and hurt myself."

9. Claimant communicated with management about the injury several times over the next few days. On November 28, 2022, he was told he would need to fill out paperwork with the animal hospital because the accident occurred "off the clock in their parking lot." Employer did not offer medical treatment.

10. Claimant went to the North Suburban Medical Center emergency department on the evening of November 28. Claimant told the ER personnel he "slipped on ice, landed with his buttock hitting the curb." He reported pain in his right buttock and hip area since the accident. The pain was aggravated by laying on his right side, walking, and prolonged sitting. Physical examination showed tenderness to palpation of the right buttock and a "very large right gluteal hematoma." X-rays showed no fracture. Claimant was diagnosed with a contusion and a gluteal hematoma. He was given lidocaine patches and a note excusing him from work "for one or two days until better."

11. Claimant notified Employer that he had gone to the emergency room and would need further evaluation and treatment. He also advised he would be off work until cleared by a physician. He asked Employer to submit the claim to its carrier and provide him with the adjuster's contact information.

12. On November 29, 2022, Employer advised Claimant his accident was not covered by workers' compensation, and he would need to pursue recovery from the animal hospital "if he chooses to seek liability from the fall." Employer did not refer Claimant to a physician.

13. On December 6, 2022, Claimant asked Employer if it could accommodate a return to work with limited standing. Employer declined the request "due to walking being a required function."

14. Claimant saw Dr. Robert McLaughlin, an occupational medicine physician, on December 12, 2022. Claimant reported that "he slipped in the parking lot when it was icy and he fell on the curb with his buttocks. Immediately painful." He was still having difficulty walking and sitting in certain positions. The Lidoderm patches were helpful, but he stopped taking ibuprofen because it caused gastrointestinal distress. Examination showed tenderness over the right SI joint and the lumbar paraspinal muscles. Lumbar range of motion was limited and painful. There were no concerning neurological findings, and straight leg raise was negative bilaterally. Dr. McLaughlin diagnosed a lumbar strain and right SI joint dysfunction. He opined "based upon the history, physical examination and data reviewed, the presenting injury is work-related." He recommended Claimant continue using the Lidoderm patches, and prescribed meloxicam, which he hoped would minimize the GI issues. Dr. McLaughlin referred Claimant to physical therapy and imposed work restrictions of no lifting over 5 pounds and changing positions as needed.

15. Claimant returned to Dr. McLaughlin on January 9, 2023. The PT and the Lidoderm patches were helping, but his right SI joint area was still painful. Examination showed tenderness over and lateral to the right SI joint, a positive Gaenslen's[1] test, and a positive shear test for the right SI joint. Straight leg raise was negative bilaterally. Dr. McLaughlin recommended a lumbar MRI and additional PT. He liberalized Claimant's lifting restriction to a maximum of 25 pounds but no lifting from below knee level.

16. Claimant followed up with Dr. McLaughlin on January 23, 2023. He had been unable to obtain the lumbar MRI. He was continuing to improve with therapy and felt ready to return to full duty. The examination findings were similar to Claimant's previous visit. Dr. McLaughlin explained that if Claimant remained symptomatic, the next step would be an SI joint injection for diagnostic and therapeutic purposes. He ordered additional therapy.

17. On February 13, 2023, Dr. McLaughlin documented that Claimant had a minor flare when he returned to work, particularly with prolonged standing and walking. Physical examination showed continued tenderness around the right SI joint and positive provocative maneuvers. Dr. McLaughlin reiterated that Claimant's symptoms and limitations were "consistent with the mechanism of injury of falling on the ice and ongoing right SI pain." He referred Claimant to Dr. Samuel Chan for consideration of an SI joint injection and ordered six additional PT sessions.

18. The physical therapist repeatedly documented tenderness to palpation around the Claimant's SI and tightness with FABER testing.

19. Claimant had a telephone consultation with Dr. McLaughlin on April 18, 2023. He had not returned to Dr. McLaughlin's office because "the insurance company

[1] Gaenslen's test is also referred to as the FABER test and Patrick's test.

will not authorize the imaging study or the physical therapy or any further care." Dr. McLaughlin indicated he would try to get ahold of the adjuster and obtain a written denial so he could submit a formal appeal on Claimant's behalf.

20. Claimant followed up with Dr. McLaughlin on June 1, 2023. He reported continued pain in his right lower back and his right SI joint. Examination showed tenderness over the right SI joint, positive FABER test, and positive shear test. The Respondents had denied the lumbar MRI, additional PT, and the SI joint injection. Although Dr. McLaughlin thought additional treatment was appropriate, "given [Claimant's] preference to move on, I will place him at MMI today and recommend that this be done under post-MMI maintenance care as well as follow-up here and PT." Dr. McLaughlin assigned a 15% whole person lumbar spine rating, based on a 5% rating under Table 53.II.B. for six months of medically documented pain and rigidity, and 10% for lumbar range of motion deficits.

21. Dr. Lawrence Lesnak performed an IME for Respondents on July 6, 2023. Claimant reported intermittent right buttock pain with occasional radiation to the sacral area. Dr. Lesnak reviewed Claimant's pre-injury medical records and noted complaints of "sporadic morning back stiffness" in May 2011 and "some nagging low back pain" in December 2011. He also cited a reference in 2020 to "back pain and myalgias," although Claimant did not receive a diagnosis or treatment related to his low back at that time. Dr. Lesnak concluded that Claimant suffered no injury to his low back or right SI joint from the November 23, 2022 accident. He opined, "there is absolutely no medical evidence to support that he has any type of symptomatic SI joint pathology at this point in time, based on my exam findings." He indicated that bilateral FABER testing and bilateral straight leg testing reproduced the same right mid-buttock "tightness." Therefore, he concluded that Claimant's symptoms are not stemming from his right SI joint. Dr. Lesnak acknowledged the right buttock hematoma documented by the emergency department, but opined "there is absolutely no medical evidence at this point in time that he has any residual pathology from a right buttock contusion/small right gluteal hematoma." Instead, Dr. Lesnak instead opined that Claimant's reported ongoing symptoms are related to an "underlying chronic anxiety disorder." Dr. Lesnak indicated Claimant was at maximum medical improvement and required "absolutely no further medical care whatsoever." He opined Claimant did not qualify for an impairment rating because "he has absolutely no reproducible objective findings on examination whatsoever. . . . He merely has intermittent subjective complaints." As a result, he stated that Dr. McLaughlin's rating is "completely inconsistent with the level two accreditation teachings."

22. Dr. McLaughlin issued a narrative report on July 18, 2023, in response to Dr. Lesnak's IME. Dr. McLaughlin disagreed that there was no evidence of SI joint pathology, pointing to repeated examination findings of SI joint tenderness, positive FABER test, and positive shear test. Dr. McLaughlin disagreed that chronic anxiety disorder was responsible for Claimant's right SI joint symptoms. With respect to his impairment rating, Dr. McLaughlin referred to the DOWC Impairment Rating Tips, which instructs physicians to rate ongoing SI joint symptoms under Table 53 II(B). Dr. McLaughlin opined Claimant's symptoms are related to the work accident. He pointed out that Claimant had an appropriate mechanism of injury ("the fall on ice") and documented

evidence by the emergency room physician of an abnormality in the right buttock "just after the injury." Accordingly, he concluded the 15% rating is consistent with the Level II training and the DOWC guidance.

23. Dr. Mark Winslow performed a Division IME on September 14, 2023. Claimant reported improvement since the original injury although he still has right SI joint pain. The ongoing symptoms impact his ability to tolerate prolonged standing at work, as well as recreational activities such as cycling. Dr. Winslow noted Claimant's pre-injury records documented only "mild nonspecific back pain not requiring treatment." Dr. Wilson reviewed the emergency room records which documented "an obvious right gluteal contusion and hematoma" within days of the accident. Examination showed pain with palpation over the right gluteal area, iliac crest, and the right SI joint. FABER testing was positive, while other provocative testing was somewhat equivocal. Forward flexion revealed restrictions in the lower spine and right SI joint. Dr. Wilson diagnosed a low back strain and SI joint dysfunction.

24. Dr. Wilson noted that Claimant appeared "reliable, consistent in his history and his examination findings . . . and very consistent in his presentation. . . . [M]y examination was consistent with sacroiliac joint dysfunction." He found "no evidence that the patient has any significant level of anxiety contributing to or as a causative factor for his current clinical symptoms." He agreed with Dr. McLaughlin regarding the appropriate impairment rating methodology for persistent SI joint symptoms, as outlined in the Impairment Rating Tips. Dr. Wilson assigned a 14% whole person rating, based on a 5% specific disorder rating under Table 53 II(B), and 9% for range of motion deficits.

25. Dr. McLaughlin and Dr. Lesnak testified at hearing consistent with their reports.

26. Claimant encountered billing issues for the visits to Dr. McLaughlin and physical therapy, with his health insurance initially denying coverage for work-related treatment before finally accepting the charges after multiple phone calls. After Claimant left Employer, Claimant did not pursue further treatment because he feared he would have the same problems with his new health carrier. Once he became eligible for Medicare, Claimant saw Dr. Chen and Dr. Wakeshima. at Mile High Sports and Rehabilitation Medicine. Although Dr. Chan and Dr. Wakeshima's records were not submitted at hearing, Dr. McLaughlin reviewed their reports and summarized them in his deposition testimony. Dr. Chen and Dr. Wakeshima documented positive provocative maneuvers consistent with right SI joint dysfunction. Dr. Wakeshima recommended a right SI joint injection.

27. Claimant's testimony is credible.

28. Dr. McLaughlin and Dr. Wilson's opinions are credible and more persuasive than opinions offered by Dr. Lesnak.

29. Claimant proved he suffered a compensable injury arising out of and in the course of his employment.

30. Respondents failed to overcome the DIME's rating by clear and convincing evidence.

31. Claimant proved treatment from the North Suburban Medical Center emergency department and Dr. McLaughlin was reasonably needed to cure and relieve the effects of his injury and authorized.

32. Claimant earned $24,383.71 in the 14 weeks immediately preceding the accident. This results in an average weekly wage of $1,741.69, with a corresponding TTD rate of $1,161.13 ($24,383.71 ÷ 14 = $1,741.69 x 2/3 = $1,161.13).

33. Claimant proved entitlement to a general award of medical benefits after MMI.

CONCLUSIONS OF LAW

A. Compensability

To establish a compensable claim, a claimant must prove he suffered an injury arising out of and in the course of employment. Section 8-41-301(1)(b); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). An activity arises out of employment if it is reasonably incidental to the conditions and circumstances under which the claimant usually performs the work, even if it is not a strict employment requirement and confers no express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996).

Respondents argue that Claimant's injury is not compensable because he had already clocked out after his shift, and Employer does not own or control the parking lot. But a claimant need not be "on the clock" to suffer a compensable injury. The "time and place limits" of employment include a reasonable period before and after a shift, and activities such as collecting pay, retrieving work clothes or materials, and entering or exiting the premises are considered "normal incidents of the employment relation." *Ventura v. Albertson's, Inc*., 856 P.2d 35, 38 (Colo. App. 1992).

Under the "going and coming rule," injuries sustained while commuting to and from work are not compensable unless "special circumstances" create a sufficient nexus to the employment beyond the mere fact of the employee's arrival at work. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). However, it is well established that accidents "occurring in or *en route* to parking lots maintained on its premises or provided by the employer for the benefit of employees, are compensable." *State Compensation Insurance Fund v. Walter*, 354 P.2d 591 (Colo. 1960). This rule is not confined to parking lots owned or controlled by the employer. *Woodruff World Travel, Inc. v. Industrial*

Commission, 554 P.2d 705 (Colo. App. 1976). In *Azaltovic v. Crop Production Services*, W.C. No. 4-846-566 (ICAO, January 31, 2012), the Panel held that "it is now practically universally accepted that a parking lot adjacent to the employer's business is a part of the employer's premises." The Panel cited Larson's treatise, which provides:

> As to parking lots owned by the employer, or maintained by the employer for its employees, all jurisdictions now consider them part of the "premises" whether within the main Company premises or separate from it. *This rule is by no means confined to parking lots owned, controlled, or maintained by the employer.* The doctrine has been applied when the lot, although not owned by the employer, was exclusively used, or used with the owner's permission, or just used, by the employees of the employer. Thus, if the owner of the building in which the employee works provides a parking lot for the convenience of all tenants, or if a shopping center parking lot is used by employees of businesses located in the center, the rule is applicable. *Larson's Workers' Compensation Law*, § 13.04[2][a]. (Emphasis added).

As found, Claimant proved his injury arose out of and occurred in the course of his employment. The persuasive evidence establishes that the parking lot in which Claimant was injured was part of Employer's "premises," even though Employer did not own or control it. The parking lot is associated with the building in which Employer leases space. Absent an explicit prohibition, it is naturally expected that employees of lessee tenants will use adjacent parking lots and other common areas such as sidewalks and hallways. That was certainly the case here, as Claimant and his co-workers routinely used the parking lot. Claimant considered access to the parking lot to be an important workplace amenity. Employer knew its employees parked in the lot, and made allowances in its tardiness policy to accommodate delays employees occasionally experienced finding a parking space. The parking lot was a fringe benefit of Claimant's employment, and thus, his injury is compensable.

B. Overcoming the DIME

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

Respondents failed to overcome the DIME's 14% whole person rating by clear and convincing evidence. Dr. Wilson and Dr. McLaughlin's opinions regarding diagnosis,

causation, and impairment are credible and more persuasive than the contrary opinions of Dr. Lesnak. The argument that Claimant's ongoing symptoms are attributable to an anxiety disorder or other pre-existing condition is unpersuasive and unsupported by the record. Claimant's slip and fall on his right buttock and lower back is a reasonable mechanism for an SI joint injury. The emergency room physician observed a large hematoma on Claimant's right buttock, which provides objective corroboration of an injury. Dr. McLaughlin, Dr. Wilson, and the physical therapist repeatedly documented examination findings consistent with SI joint dysfunction. The persuasive evidence shows Claimant injured his right SI joint and remained symptomatic more than six months after the accident. As such, he qualifies for a lumbar rating. Dr. Wilson and Dr. McLaughlin applied identical rating methodology, which is consistent with the instructions from the Division as reflected in the Impairment Rating Tips.

C. Medical benefits

The respondents are liable for authorized medical treatment reasonably needed to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a). The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is authorized, reasonably needed, and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The employer has the right to select a treating physician in the first instance. Section 8-43-404(5)(a)(I)(A). However, treatment received on an emergency basis is deemed authorized without a referral or prior approval from the employer. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not limited to life-threatening situations, and the existence of a "bona fide emergency" is a question of fact for the ALJ. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). Once the emergency ends, the employer must refer the claimant to a physician "forthwith," or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

Claimant proved treatment at the North Suburban Medical Center emergency department on November 28, 2022, was reasonably needed emergency treatment for the compensable injury. Thereafter, Claimant advised Employer he required additional treatment and Employer declined to refer him to a physician. As a result, the right of selection passed to Claimant, and he selected Dr. McLaughlin as the ATP. Claimant proved the treatment rendered by Dr. McLaughlin was reasonably needed, causally related, and authorized.

D. Average weekly wage

Section 8-42-102(2) provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW

in any manner that is most appropriate under the circumstances. *Avalanche Industries v. Clark*, 198 P.3d 589 (Colo. 2008).

Claimant earned $24, 383.71 in the 14 weeks immediately preceding the accident, which equates to an average weekly wage of $1,741.69. Claimant's proposed calculation methodology is reasonable, and Respondents offered no competing computation.

E. Medical benefits after MMI

Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, they are entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved a probable need for future treatment to relieve the effects of his injury and prevent deterioration of his condition. Both Dr. McLaughlin and Dr. Wilson persuasively recommended additional evaluations and treatment as maintenance care. Dr. Lesnak's contrary opinion is premised on the discredited argument that Claimant does not have SI joint dysfunction and his ongoing symptoms are unrelated to the work accident.

ORDER

It is therefore ordered that:

1. Claimant's claim for an injury on November 23, 2022 is compensable.

2. Claimant's average weekly wage is $1,741.69.

3. Respondents' request to overcome the DIME's whole person impairment rating is denied and dismissed.

4. Insurer shall pay Claimant PPD benefits based on the DIME's 14% whole person impairment rating.

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

6. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of claimant's compensable injury, including, but not limited to, charges from Dr. McLaughlin and the North Suburban Medical Center emergency department.

7. Insurer shall cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of Claimant's injury and prevent deterioration of his condition.

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

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

DATED: November 20, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that Respondents' assertion of a subrogation lien against Claimant's workers' compensation benefits was lawful and whether she is entitled to repayment of benefits withheld on the basis of that offset.

FINDINGS OF FACT

1. Claimant sustained an admitted work injury on October 23, 2020, as a result of a slip and fall on ice.

2. As a result of her work injury, Claimant sustained a fracture of her right tibia and fibula and underwent a surgery consisting of an open reduction with internal fixation.

3. Claimant eventually had the hardware removed from her ankle and was placed at maximum medical improvement on October 5, 2022. Claimant's authorized treating physician assigned Claimant an impairment rating, and Respondents filed a final admission of liability (FAL) on November 2, 2022, admitting for the assigned impairment. The FAL admitted for permanent partial disability (PPD) benefits totaling $43,473.70.

4. Claimant filed an application for hearing (AFH) on July 27, 2024, endorsing several issues, including:

> "After having received workmen's comp for two years, I filed a lawsuit and won. On receiving funding I was told [Redacted, hereinafter PL] would receive a portion of my funds. I asked why since they were receiving monthly payment from [Redacted, hereinafter CN]."

5. The Court finds that this was an endorsement of the issue of a challenge to Respondents' withholding of workers' compensation benefits as part of their subrogation offset.

6. At hearing, Claimant proceeded only on the issue of challenging Respondents' subrogation offset.

7. Claimant testified on her own behalf. She testified that she sustained injuries to each ankle and had a shoulder displacement. She also testified that she filed a

lawsuit against a third party. Last, she testified that the basis for the settlement was for pain and suffering.

8. The Court finds Claimant's testimony credible, except that the Court makes no finding as to the credibility of Claimant's testimony that the basis for the settlement was pain and suffering.

9. There was no testimony or other evidence presented at hearing regarding the amount of Claimant's third-party settlement, the amount of Respondents' subrogation offset, whether there had been a determination by any court or an agreement regarding apportionment of the settlement proceeds between economic and non-economic damages, or whether any action is pending in district court for such apportionment.

10. The Court infers that Respondents asserted the subrogation offset against PPD benefits.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in 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).

Subrogation Offset

Claimant seeks an order compelling Respondents to discontinue their application of a subrogation offset against Claimant's ongoing benefits and for Respondents to pay Claimant the benefits that have been withheld as part of that subrogation offset.

The Colorado Workers' Compensation Act creates subrogation rights of an insurer where an injured worker receives a settlement or award from a liable third party in tort for the same injury. *See* § 8-41-203, C.R.S. (2023)(the "subrogation statute").

The purpose of the subrogation statute is to adjust rights between the insurer and the employee by requiring that the insurer be reimbursed out of the employee's recovery against the third-party tortfeasor for workers' compensation benefits paid by the insurer, leaving the employee with the excess. *Cont'l Cas. Co. v. Gate City Steel*, 650 P.2d 1336 (Colo.App.1982); *Rocky Mtn. Gen. v. Simon*, 827 P.2d 629 (Colo.App.1992); *Jordan v. Fonken & Stevens*, P.C., 914 P.2d 394 (Colo.App.1995); *Andrews v. Indus. Claim Appeals Office*, 952 P.2d 853 (Colo.App.1997).

If a claimant recovers from the tortfeasor, the claimant must reimburse the insurer for any benefits paid, and then the insurer may also offset any portion of the recovery not used to reimburse the insurer for past benefit payments against any future benefits the insurer may have to pay. Thus, the claimant receives interim workers' compensation benefits, recovers from the tortfeasor, reimburses the insurer for the interim benefits, credits the insurer for potential future benefits, and keeps the remainder as excess. *Jorgensen v. Colo. Comp. Ins. Auth.*, 967 P.2d 172 (Colo.App.1998), *aff'd on other grounds*, 992 P.2d 1156 (Colo. 2000). *See also, State Comp. Ins. Fund v. Commercial Union Ins. Co.*, 631 P.2d 1168 (Colo.App.1981).

As soon as an insurer asserts its right to apply an offset against workers' compensation benefits based on a claimant's recovery in tort, the claimant, if wishing to avoid harm arising from the offset applying to that portion of the recovery alleged to be due to non-economic damages, must commence an action for declaratory judgment in district court apportioning the recovery in tort between economic and non-economic damages. *Harrison v. Pinnacol Assur.*, 107 P.3d 969, 973 (Colo.App.2004).

In *Jordan v. Fonken & Stevens*, P.C., 914 P.2d 394 (Colo.App.1995), the Colorado Court of Appeals upheld an ALJ's order permitting respondents to claim an offset against

workers' compensation benefits based on a claimant's entire recovery from a third party. In *Jordan*, both the respondents and the claimant were parties to a settlement agreement with the third-party tortfeasor. However, the settlement agreement did not apportion the settlement proceeds between economic and non-economic damages, nor did the parties obtain a district court order or reach any separate agreement regarding apportionment of the proceeds. The ALJ concluded that the respondents were entitled to offset workers' compensation benefits by the claimant's entire recovery against the third party. The claimant appealed, arguing that at least some of the proceeds were compensation representing noneconomic damages, which would not be subject to the respondents' subrogation offset. The Court of Appeals affirmed the ALJ's order, reasoning that there had been "no independent apportionment of the proceeds between economic and noneconomic losses, and there is no evidence that respondents acquiesced in any distinction asserted by claimant. Further, respondents' mere participation in the settlement of the third-party action and their execution of a release does not constitute a waiver of their statutory right to claim an offset against future workers' compensation benefits."

In *Schuster v. High Country Transportation*, W.C. No. 4-431-875 (2005), the Colorado Industrial Claims Appeal Office (ICAO) reviewed a decision by an ALJ to permit an insurer to offset third-party settlement proceeds against workers' compensation benefits under the subrogation statute. The claimant in *Schuster* filed a civil suit against the third-party tortfeasor and settled that tort claim, receiving $20,000 after payment of costs, fees, and other expenses, which the respondents sought to offset against their liability for workers' compensation benefits. The ALJ found that no evidence had been presented at hearing that the claimant had obtained an apportionment of the settlement proceeds between economic and non-economic damages by the district court. She concluded, therefore, that the respondents were entitled to offset the entire tort settlement amount against workers' compensation benefits.

The claimant in *Schuster* appealed, arguing in part that the ALJ misapplied the burden of proof in requiring the claimant to show that she had obtained an order or agreement that the settlement proceeds be apportioned between damages that should be offset and those that should not. The ICAO rejected the argument, reasoning that "[t]he ALJ could plausibly infer that the absence of an apportionment reached either by agreement or by the district court should properly result in the respondents' offset of the entire amount." The ICAO panel, citing *Jordan*, held, "Although the ALJ lacks jurisdiction to attempt apportionment of the settlement proceeds, . . . where the claimant fails to provide a basis for apportionment it is appropriate for the ALJ to permit offset of the entire settlement amount."

The ICAO addressed a similar case in 2012 in the matter of *Ross v. Colo. Cab Co.*, W.C. No. 4-836-203-01 (2012). In *Ross*, the claimant settled his tort claim against the third party without an agreement or an order from the district court regarding the allocation of the settlement proceeds. The ALJ in that case concluded that it was appropriate to permit the insurer to offset against workers' compensation benefits the entire amount of the tort settlement, reasoning that the claimant had failed to prove that

the tort settlement had been apportioned between economic and non-economic damages by agreement or order. The claimant appealed, and the ICAO panel held that, despite the ALJ's lack of jurisdiction to apportion benefits, the ALJ "may nevertheless determine and enforce the [insurer's] subrogation claim pursuant to [the subrogation statute] based on the evidence presented." The ICAO panel, citing *Jordan*, held that "we are required to affirm the ALJ's decision which ordered that the respondents were entitled to a full offset . . . against any future obligation to provide benefits to the claimant under the Workers' Compensation Act."

The ICAO took a different tack in *Robinson v. Jack Fisher Group*, W.C. No. 5-036-231-001 (February 4, 2021), setting aside an order by an ALJ permitting a subrogation offset based on the entire third-party recovery in the absence of an apportionment.

The claimant in *Robinson* settled a tort claim with a third party in district court. Meanwhile, the parties requested a hearing before the OAC in part on the issue of whether the claimant's recovery against the third-party in district court could be credited against his future workers' compensation benefits.[1] The claimant sought a prehearing order holding the hearing in abeyance pending apportionment by the district court in the anticipated *Jorgensen* action, but that request was denied. The day before the hearing, the claimant filed an action in district court seeking declaratory judgment apportioning the settlement proceeds between economic and non-economic damages pursuant to *Jorgensen v. Colo. Comp. Ins. Auth*.

The ALJ in *Robinson* allowed the respondent-insurer to offset the full net settlement amount without apportionment. The ALJ reasoned that the district court did not yet have jurisdiction over the matter as the complaint had not yet been served and the case was not yet at issue.[2] The ALJ determined that since no allocation had yet occurred, he had authority to enforce the insurer's subrogation claim without apportionment.

The claimant appealed the ALJ's order, arguing that because an FAL had been filed, and because no further benefits were owed, the issue of a subrogation offset had been rendered moot. The ICAO agreed with the claimant and set aside the ALJ's order insofar as it permitted a total offset of the net third-party recovery.

Although the subrogation offset issue had been fully resolved on mootness grounds, the ICAO panel in *Robinson* nevertheless proceeded to address the ALJ's conclusion that he had authority to enforce the insurer's subrogation claim against the proceeds of the settlement without apportionment.[3] The ICAO panel noted that even after a claim in district court is dismissed with prejudice, the district court retains jurisdiction to give effect to the settlement. Furthermore, the ICAO panel cited legal authority for the proposition that a court obtains subject matter jurisdiction upon the filing of the complaint. Therefore, the ICAO panel observed that the ALJ's conclusion that he had authority to

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[1] It is not clear from the ICAO order which party requested the determination.
[2] *See* Colo. R. Civ. P., 16(b)(1).
[3] The ICAO decision did not indicate that this was an argument presented by the claimant.

enforce the insurer's subrogation claim against the entire net proceeds of the settlement, without apportionment, was not supported by applicable law.

Respondents argue that if an insurer improperly offsets benefits against settlement proceeds that a district court has apportioned to noneconomic damages, only then would the claimant's remedy be under the Act. This Court agrees.

Reconciling the holdings in *Schuster* and *Ross* with the dicta in *Robinson*, this Court concludes that while an ALJ may not disturb an insurer's subrogation offset against the entire net proceeds of a third-party recovery absent evidence of an agreement or district court order apportioning the proceeds, an ALJ also may not make a determination as to the appropriateness of such an offset so long as the district court retains jurisdiction over the apportionment.

Here, Claimant argues that her settlement award with the third party was for pain and suffering only, and that Respondents are therefore not entitled to assert a workers' compensation subrogation lien against that award. However, that argument essentially requests a *Jorgensen*-styled determination by this Court regarding what portion of Claimant's settlement proceeds are encumbered by Respondents' subrogation lien. Based on *Jorgensen*, this Court finds and concludes that it does not have jurisdiction to apportion the personal injury settlement proceeds between the parties. That jurisdiction remains with the Colorado District Court.

No party presented evidence in this case that the parties have obtained judgment from district court apportioning benefits and reducing Respondents' lien on Claimant's settlement proceeds nor that the parties have entered an agreement achieving the same effect.

Applying the holdings of *Jordan, Schuster,* and *Ross* and the dicta in *Robinson*, this Court concludes that there exists no basis for this Court at this time to order Respondents to terminate their subrogation offset or to pay Claimant any benefits withheld as part of that offset.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by a preponderance of the evidence that Respondents' subrogation offset should be terminated and that benefits withheld as part of the offset should be paid to her.

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: November 20, 2024.

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

ISSUES

1. Has Claimant overcome, by clear and convincing evidence, the opinions of the Division sponsored independent medical evaluation (DIME) physician Dr. Robert Wallach on the issue of permanent impairment?

2. Has Claimant demonstrated, by a preponderance of the evidence, that he is permanently and totally disabled and is therefore entitled to an award of permanent total disability (PTD) benefits?

3. Has Respondent demonstrated, by a preponderance of the evidence, that an overpayment exists in this matter, and if so, what is the amount of the overpayment?

FINDINGS OF FACT

1. Claimant was employed with Respondent as a heavy equipment mechanic. On October 22, 2020, Claimant suffered a work related injury when he was tightening an exhaust bolt and felt a sharp pain between his shoulder blades at the base of his neck. Claimant is 61 years old and lives in Durango, Colorado.

2. Following his injury, Claimant began treatment with his authorized treating physician (ATP) Dr. Peter Davenport[1]. Initial conservative treatment included physical therapy, injections, and use of anti-inflammatory medications. When this treatment did not improve Claimant's condition, he was referred to Spine Colorado and began treating with Dr. Douglas Orndorff.

3. Dr. Orndorff performed two surgeries on Claimant's cervical spine. The first was on July 29, 2021 which included anterior discectomy, fusion, and decompression at the C6-C7 level. Dr. Orndorff performed the second surgery on April 14, 2022. That surgery included C6 laminectomy and foraminal decompression, and arthrodesis at the C6-C7 level.

4. Despite undergoing these two surgeries, Claimant continued to experience pain in his neck. As a result, Dr. Davenport continued to prescribe pain medications, including opiates.

5. Claimant also underwent two separate electromyography (EMG) tests. The first was performed by Dr. James Santos on December 1, 2021. That EMG was performed on Claimant's left upper extremity. Dr. Santos concluded that it was a normal examination, with no evidence of the following: left cervical radiculopathy; left median or

[1] This matter involves four years of medical treatment since Claimant's date of injury. Therefore, the ALJ does not recite every treatment Claimant has undergone.

radial neuropathy of the wrist; left ulnar neuropathy; or peripheral neuropathy. Claimant underwent additional EMG testing with Dr. Santos on October 12, 2022. At that time, the study was performed on Claimant's bilateral upper extremities. Dr. Santos concluded that this was a normal EMG study, with no evidence of cervical radiculopathy, brachia! plexopathy, or peripheral nerve entrapment.

6. In September 2022, Dr. Davenport opined that Claimant was unable to lift, carry, push or pull any amount of weight.[2]

7. On November 22, 2022, Claimant was seen by Dr. Davenport. At that time, Claimant reported continued issues with performing his activities of daily Jiving (ADLs). Claimant requested a referral for a second opinion, a referral for pain management, and a referral for acupuncture.

8. On November 23, 2022, Dr. Davenport completed a questionnaire in which he opined Claimant was unable to perform full-time sedentary physical demand occupations. In support of this opinion, Dr. Davenport stated "[p]ersistent pain, unable to lift, weakness and numbness of hands, unable to use regularly without pain."

9. Claimant was scheduled to return to Dr. Davenport on January 16, 2023. However, based upon the medical records admitted into evidence November 22, 2022 appears to be Claimant's last visit with Dr. Davenport. Claimant testified that Dr. Davenport discontinued his treatment around this time.

10. On January 31, 2023, Claimant underwent computed tomography (CT) of his cervical spine. The CT results showed the prior surgical changes including fusion and hardware. The fusion was noted to be "partially mature".

11. On February 8, 2023, Claimant was seen by Dr. Orndorff. At that time, Dr. Orndorff discussed the recent EMG study that showed no evidence of active nerve root radiculopathy. Dr. Orndorff stated that further surgery would not improve Claimant's symptoms. As a treatment option, Dr. Orndorff recommended an epidural steroid injection at the C7-T1 level. However, this injection was not pursued due to the hardware present in Claimant's cervical spine.

UNUM Reports

12. At some point after his injury, Claimant filed a long term disability claim with UNUM. In connection with that claim, UNUM prepared a file related to Claimant's condition. Included in this file is a vocational review performed by Jessica Schoch, MS,

[2] Multiple references are made in other physician reports, the vocational reports, and in Claimant's testimony to this "zero pound" work restriction from Or. Davenport. Specifically, Dr. Jamie lewis identifies a September 21, 2022 "work status form" However, the ALJ is unable to locate the September 21, 2022 statement from Dr. Davenport. Based upon the multiple references elsewhere in the record, the ALJ infers that such a statement was in fact made by Dr. Davenport in September 2022.

CRC[3]. In a report dated September 21, 2022, Ms. Schoch summarized various skills that Claimant performed while employed with Respondent. These **skills** included daily computer use that involved data entry, emailing, and knowledge of Microsoft Office Suite. Claimant also reported his **skills** included mechanical and electrical **work,** and public speaking. Ms Schoch opined that Claimant has a variety of transferable skills that would allow him to obtain employment in a position that was "[m]ostly sitting, may involve standing or walking for brief periods"; involved lifting, carrying, pushing, and pulling up to 1O pounds, occasionally; and allowed for "frequent bilateral handling, fingering and reaching primarily at desk level."

13. Within that same UNUM file, Dr. Steward Russell authored a report dated November 11, 2022. Dr. Russell noted that he had reviewed Claimant's medical records as well as the report prepared by Ms. Schoch. Dr. Russell opined that Claimant "is not precluded from the performance of full-time sedentary physical demand occupations." In support of this opinion, Dr. Russell noted that Claimant was documented to have normal strength in his upper extremities. Dr. Russell further opined that Dr. Davenport's assignment of a zero pound work restriction was inconsistent with the EMG tests.

14. A second vocational assessment is included in the UNUM file. This November 15, 2022 report was authored by Nancy Munroe, MS, CRC. Ms. Monroe determined that Claimant possessed transferable skills that would enable him to work as a dispatcher, and such jobs exist in the area where Claimant lives.

15. UNUM asked another physician, Dr. Jamie Lewis, to opine whether Claimant could perform full-time sedentary work. In a November 16, 2022 report, Dr. Lewis opined that Claimant's subjective complaints do not correlate with the diagnostic studies. Dr. Lewis stated agreement with the opinions of Dr. Russell that Claimant was able to perform full-time sedentary work. Dr. Lewis also noted that Dr. Ordorff had released Claimant without restrictions.

16. Ultimately, UNUM denied Claimant's claim for long term disability benefits. In a February 2, 2023 letter, UNUM notified Claimant that (after appeal), UNUM had continued to determine that he "could perform the duties of gainful employment."

Social Security Disability

17. Claimant also applied for disability benefits with the Social Security Administration (SSA). On December 15, 2023, Claimant was notified that he must meet both the medical and non-medical criteria to receive SSA disability benefits. Claimant was also notified that he met the medical requirements for disability as of February 1, 2022. However, a determination had not yet been made with regard to the non-medical requirements.

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[3] The ALJ infers that CRC Indicates that Ms. Schoch is a certified rehabilitation counselor.

18. As part of the analysis performed by the SSA, Dr. Virginia D. Thommen conducted a "physical residual functional capacity evaluation" and opined that Claimant has the ability to work in the light category of work.

Independent Medical Examination with Dr. Fall

19. On May 31, 2023, Claimant attended an independent medical examination (IME) with Dr. Allison Fall. In connection with the IME, Dr. Fall reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In the IME report, Dr. Fall opined that Claimant suffered an acute work related injury on September 8, 2020. Dr. Fall further opined that Claimant reached MMI as of February 8, 2023. With regard to permanent work restrictions, Dr. Fall opined that Claimant "should be able to work at least the light work duty category and possibly greater." Dr. Fall clarified that this would include lifting up to 20 pounds occasionally. In support of this opinion, Dr. Fall noted that the imaging studies showed a stable fusion, with intact hardware, and the EMG showed no radiculopathy.

20. On November 15, 2023, Claimant returned to Dr. Fall for an impairment rating. Dr. Fall assessed a whole person impairment rating of 25 percent. Dr. Fall calculated this rating as follows: nine percent for the first operation; an additional two percent for the second operation (totalling 11 percent); and 16 percent for cervical spine range of motion. Combining the 11 percent with the 16 percent for a total rating of 25 percent.

Division Sponsored Independent Medical Examination with Dr. Wallach

21. On April 3, 2024, Claimant attended a Division sponsored independent medical examination (DIME) with Dr. Robert Wallach. In connection with the DIME, Dr. Wallach reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his April 23, 2024 DIME report, Dr. Wallach determined Claimant's MMI date to be November 7, 2023. In reaching this date of MMI, Dr. Wallach noted that although Dr. Fall had determined MMI as of February 8, 2023, after that date, Dr. Orndoff recommended additional treatment involving an injection and a referral for a spinal cord stimulator trial. Dr. Wallach further noted that Claimant attended a consultation for a spinal cord stimulator on November 7, 2023, but no further care was pursued after that date.

22. In the DIME report, Dr. Wallach also assigned a whole person impairment rating of 25 percent. Dr. Wallach calculated this rating in the same manner as Dr. Fall. Specifically, nine percent for the first operation; an additional two percent for the second operation (totalling 11 percent); and 16 percent for cervical spine range of motion. Combining the 11 percent with the 16 percent for a total rating of 25 percent. Dr. Wallach specifically opined that there was no rating for Claimant's thoracic spine.

23. Dr. Wallach opined that further impairment should be calculated for a mental impairment. However, Dr. Wallach declined to assess such an impairment. Specifically, Dr. Wallach stated "[g]iven the complexities of this case, I do not feel I am qualified, nor am I comfortable attempting what may be a difficult and complicated mental impairment evaluation. It would be more accurate and appropriate for the claimant to have an evaluation and rating, if applicable, by a qualified mental health professional."

24. With regard to permanent work restrictions, Dr. Wallach referenced the varied opinions among providers in this case. Dr. Wallach stated that in his opinion that Claimant is "not realistically employable, other than he potentially could work maybe two or [three] hours a day, from home, in a very sedentary position."

Final Admission of Liability

25. On April 25, 2024, Respondent filed a Final Admission of Liability (FAL) admitting for the MMI date of November 7, 2023 and a whole person impairment rating of 25 percent. Respondent admitted for temporary total disability (TTD) benefits for the period of October 26, 2020 through November 6, 2023 totaling $155,192.30. In addition, it was noted the cap of $99,094.93 applied, so no permanent partial disability (PPD) benefits were owed. Finally, Respondent included an overpayment in the amount of $4,296.41 in the FAL.

26. The indemnity payment log demonstrates that Respondent paid Claimant TTD benefits in the total amount $159,642.17. Respondent argues that this results in an actual overpayment amount of $4,449.87; ($159,642.17 paid, less the $155,192.30 owed, equals $4,449.87).

27. Claimant was approved for PERA retirement benefits effective February 1, 2023 in the amount of $1,913.84 per month.

Vocational Reports

28. On June 10, 2024, Robert Van Iderstine, Vocational Rehabilitation Specialist, interviewed Claimant by telephone for purposes of preparing a vocational evaluation. In his June 10, 2024 report, Mr. Van Iderstine opined that Claimant is unable to return to competitive employment. Mr. Van Iderstine also opined that Claimant is unable to return to jobs he performed in the past due to the physical requirements of those jobs. In addition, Claimant lacks the necessary transferable skills to work in a light or sedentary occupation. In support of his opinions, Mr. Van Iderstine referenced the various work restrictions discussed by Claimant's medical providers.

29. On July 17, 2024, Katie Montoya, Vocational Consultant, interviewed Claimant via Zoom for purposes of a vocational assessment. In her August 8, 2024 report, Ms. Montoya noted that there are a number of opinions regarding Claimant's permanent work restrictions. Ms. Montoya described this variation as "range from a full release from the surgeon [Dr. Orndorff] to an ability to work more than a few hours a few

days per week from home from the DIME physician." Ms. Montoya noted that she had considered these various opinions and stated that in her opinion, Claimant would be capable of performing unskilled to semi-skilled employment in the light level of work. Ms. Montoya noted that potential jobs meeting this criteria would include crew member, parts counter, delivery, shuttle driver, and parts advisor. Ms. Montoya also noted that based upon her review of the UNUM file, she would consider a position of dispatcher for Claimant as part of her ongoing analysis of his case.

Facebook and surveillance

30. Respondent submitted into evidence posts from Claimant's personal Facebook account. These posts included various statements and videos.

31. On March 27, 2024, Claimant posted that he was opening a "hostel" or "bunk house" with photographs of the property. The post states that a one bed, one bath apartment was available for rent for $500.00 per month.

32. In May 2024, Claimant posted two videos showing him driving his 1966 Chevrolet Nova. This vehicle has manual steering and an automatic transmission. In these videos Claimant is seen driving the vehicle and making tight turns or "donuts". Each video is approximately one minute and thirty five seconds in length, showing Claimant driving his vehicle at low-to-moderate speeds while forcing the vehicle to spin repeatedly.

33. An August 14, 2024 Facebook post shows a picture of a 1972 Chevrolet El Camino that the post describes as "a new project". The post also states "It's pretty rough. I have my work cut out for me".

34. Surveillance video of Claimant engaging in various activities outside of his residence was also admitted into evidence. This surveillance was conducted in August 2024. The ALJ has reviewed the surveillance video and summarizes Claimant's activities here. Claimant shakes out a rug using both arms. Claimant opens the back door of a truck, and then firmly shuts the driver's door while standing outside of the truck. Claimant walks around his property while holding up his head in a normal manner. Claimant lifts and carries an empty fuel container, opens the tailgate of a jeep, and places the fuel container in the back of the jeep without difficulty. Claimant removes and lifts the windows from the same jeep. Claimant then drives the jeep away from the property on a dirt road. Upon his return, Claimant exits the jeep and carries a 12 pack of soda with his right hand and arm while holding his cell phone in his left hand. Claimant again enters and drives the jeep, this time to another location on the property. Claimant stands and walks around the property without apparent issues. Claimant waves with his left arm, raising his hand above his head. Claimant works with other individuals on vehicles. This includes bending at the waist, squatting, moving his arms, and entering and exiting a vehicle.

Claimant Testimony

35. Claimant provided extensive testimony regarding his current symptoms and activity levels. Claimant testified that he spends approximately 70 percent of his day seated in his recliner because of his pain. Claimant also testified that he can stand for more than 15 minutes only if he is taking medications. In addition, he can walk 20 to 30 minutes, and carry light objects, but is unable to hold his head up for more than 20 minutes. Claimant further testified that he experiences pain when using his arms and hands.

36. When he is more active, Claimant then "pays for it" and has to recover the next day. Claimant explained that if he was employed, and had to take such a "recovery" day he would be unable to commute to a workplace, sit at a desk, interact with customers, or accomplish tasks under time pressure. Claimant also testified he would not be allowed to work while on hydrocodone. Claimant further testified that the prescription medications he takes for his symptoms make it difficult for him to focus.

37. Claimant testified regarding the Facebook videos of him driving and "doing donuts" in his Chevrolet Nova. Claimant testified that he had just fixed an overheating problem in his Nova and wanted to test the vehicle. Claimant testified that during those maneuvers "the car is doing all the work" and he is simply holding the steering wheel and stepping on the gas. Claimant further testified that these "donuts" caused a strain on his neck and arms that he also experienced when he drives through town. Claimant testified that because of the pain caused by the driving shown in the videos, he has not driven like that again. Claimant also testified that he had to recover after the "donuts" because he was "sore and hurting."

38. With regard to normal stop and go driving, Claimant testified that is able to drive 30 to 45 minutes at a time if the vehicle is on cruise control. However, such driving causes pain because he has to engage in more shoulder work, and so even just 15 minutes of driving intown is "strenuous."

39. With regard to the August 14, 2024 Facebook posting involving a new project, Claimant testified that this is one of his project vehicles. Claimant testified that he enjoys tinkering with vehicles, but receives help from friends and his roommates with these projects.

40. With regard to his roommates, Claimant explained that these individuals assist him with household chores that he is unable to perform. Claimant further testified that he does not collect rent from these individuals, but accepts "donationsn to assist with his house payment.

[Redacted, hereinafter IE] Testimony

41. IE[Redacted] testimony was consistent with his written report. IE[Redacted] reiterated his opinion that Claimant is unable to return to competitive employment. IE[Redacted] testified that there were a variety of work restrictions

applied to Claimant in this claim. IE[Redacted]explained that earlier in the claim some physicians placed Claimant in the light duty or sedentary work classifications. IE[Redacted] also testified that the most recent restrictions were assessed by Dr. Wallach, who opined that Claimant was not realistically employable. IE[Redacted] further testified that the light category jobs he found to be available in the Durango, Colorado were the same jobs listed by Ms. Montoya in her report. IE[Redacted] explained that he eliminated these jobs from consideration, because each was beyond Claimant's physical capabilities and work experience. It is his opinion that Claimant would be unable to perform the requirements of these positions. IE[Redacted] testified that given Claimant's inability to maintain a position and his need for breaks he could not maintain a reliable work schedule and could not adhere to production requirements. IE[Redacted] further testified that Claimant would not be able to sustain competitive employment because he would have difficulty maintaining a sustainable work schedule. IE[Redacted] testified Claimant was likewise unable to work from home because such positions also involve production expectations, and knowledge of technology that would be beyond Claimant's transferable skills. IE[Redacted] was asked whether Claimant could work in a "gig economy" type job (such as [Redacted, hereinafter LT] or [Redacted, hereinafter UR]). IE[Redacted] testified that Claimant would not be able to work in such a position because of the demands of prolonged driving beyond Claimant's physical capabilities.

Katie Montoya Testimony

42. Ms. Montoya's testimony was consistent with her written report. Like IE[Redacted], Ms. Montoya testified regarding the wide range of work restrictions from various providers. It continues to be Ms. Montoya's opinion that Claimant is capable of unskilled to semi-skilled employment in the light work classification. Such positions include shuttle driver, parts advisor, parts counter, crew member, and delivery. Ms. Montoya testified that in her interview with Claimant he reported having some computer skills, but that he did not do much typing. However, when she learned that Claimant was utilizing Facebook Marketplace and the UNUM report that he had other computer skills, she determined that he does have transferable computer skills. Ms. Montoya further testified that based upon her review of the records, no physician has opined that Claimant requires the need to change positions. Ms. Montoya testified there are light duty positions available in the Durango, Colorado areas.

Dr. Allison Fall Testimony

43. Dr. Fall's testimony was consistent with her reports. Dr. Fall testified that at the May 2023 IME appointment, Claimant appeared to be self-limiting his range of motion due to reports of pain. However, when she palpated the muscle, she did not note any spasming or specific trigger points. Dr. Fall also testified that when she examined Claimant, she did not find any signs of radiculopathy. Dr. Fall testified that Claimant reported difficulty using his upper extremities, but on exam he had no neurological issues and showed normal muscle strength. With regard to her recommendation for "at

least" light work, Dr. Fall testified that this was based upon Claimant's stable post-surgical condition.

44. Dr. Fall also testified that at the November 2023 examination, she observed Claimant engaging in pain behaviors that he had also shown at the IME, including self-limited movements. Dr. Fall further testified that, on exam, Claimant did not have dermatomal sensation loss in the C6-C7 distribution. She also testified that Claimant's intrinsic hand strength was intact without muscle tissue loss in his hands.

45. Dr. Fall also testified that the DIME's assessment of a 25 percent whole person impairment rating was consistent with the medical treatment guidelines. Dr. Fall further testified that Dr. Wallach did not commit any errors in finding Claimant was at MMI or in determining permanent impairment. Dr. Fall testified that Claimant has no ratable psychological impairment related to his claim as there was no diagnosed work-related mental disorder for which he is receiving ongoing treatment or evaluation.

46. With regard to permanent disability, the ALJ credits the medical records and the opinions of Ms. Montoya over those of Mr. Van lderstine. The ALJ also credits the opinions of Drs. Fall, Russell, Lewis, and Thommen. The ALJ specifically credits the physicians' opinions that Claimant's subjective complaints do not correlate with the objective findings on imaging and EMG testing. The ALJ does not find Claimant's testimony regarding the nature and severity of his symptoms to be neither credible nor persuasive. Additionally, the ALJ has considered the surveillance and Facebook videos and finds Claimant's testimony regarding the same to be unreliable. The ALJ is Claimant is able to work in sedentary to light duty type work, and that such positions are available to him in the Durango, Colorado area.

47. With regard to overcoming the opinions of the DIME physician, the ALJ credits the medical records and the testimony of Dr. Fall. The ALJ finds that Claimant has failed to demonstrate that the DIME physician erred in not including an impairment rating for a work related medical disorder. The ALJ is persuaded by Dr. Fall's testimony (which is supported by the medical records) that Claimant has no diagnosed work-related mental disorder for which he received ongoing treatment and evaluation.

48. On the issue of overpayment, the ALJ credits the indemnity payment log and finds that Respondent paid Claimant TTD benefits in the total amount $159,642.17. Therefore, the ALJ finds that Respondent has successfully demonstrated that it is more likely than not that Claimant was overpaid $4,449.87. The ALJ finds the overpayment resulted from TTD benefits paid to Claimant past the date of MMI. The ALJ finds that Claimant has monthly income from PERA. In addition, Claimant receives regular "donations" from his roommates.

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).

Overcoming the DIME

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving* & *Storage* Co. *v.* Gussert, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving* & *Storage, supra.* A mere difference of opinion between physicians fails to constitute error. *Gonzales v. Browning Ferris Industries of Colorado,* W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred In their opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines (MTG) and the AMA Guides in issuing their opinions.

5. When a DIME physician issues conflicting or ambiguous opinions concerning whether or not the claimant has reached MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *Magnetic Eng'g, Inc. v. /CAO,* 5 P.3d 385 (Colo. App. 2000).

6. As found, Claimant has failed to overcome, by clear and convmcmg evidence, the opinions of the DIME physician on the issue of permanent impairment. As found, Dr. Wallach's failure to assess a permanent impairment rating for a work related medical disorder was not in error. As found, Claimant has no diagnosed work-related mental disorder for which he received ongoing treatment and evaluation. As found, the medical records and Dr. Fall's opinions and testimony are credible and persuasive on this issue.

Permanent Total Disability Benefits

7. In order to prove permanent total disability, a claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. Section 8-40-201(16.S)(a), C.R.S. (2016). A claimant therefore cannot receive PTD benefits if he is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer,* 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. *Lobb v. /CAO,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. /CAO,* 894 P.2d 42 (Colo. App. 1995). In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer,* 955 P.2d at 550, 556, 557 (Colo. 1998). The critical test is whether employment exists that is reasonably available to a claimant under his particular circumstances.

8. A claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages. Rather the claimant must demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Under this standard, it is not sufficient that an industrial injury create some disability which ultimately contributes to permanent total disability. Rather, *Seifried* requires the claimant to prove a direct causal relationship between the precipitating event and the disability for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), *rev'd on other grounds, Askew v. Industrial Claim* Appeals Office, 927 P.2d 1333 (Colo. 1996).

9. Respondents are not required to prove the existence of a job offer to refute a claim for permanent total disability benefits. *Black v. City of La Junta Housing Authority,* W.C. No. 4-210-925 (ICAO, December 1998) (claimant is not permanently totally disabled even though respondents' vocational expert was unable to identify a single job opening available to claimant); *Beavers v. Liberty Mutual Fire Ins.* Co., (Colo. App. No. 96 CA0275, September 5, 1996) (not selected for publication); *Gomez v. Mei Regis,* W.C. No. 4-199-007 (September 21, 1998). Rather, a claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that the claimant is capable of earning wages. *Duran v. MG Concrete Inc.,* W.C. No. 4-222-069 (September 17, 1998).

10. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that he is incapable of earning wages in the same or other employment in Durango, Colorado. As found the medical records, and the opinions of Ms. Montoya and Drs. Fall, Russell, Lewis, and Thommen are credible and persuasive on this issue.

Overpayment

11. Section 8-43-207(1)(q), C.R.S., empowers an ALJ to require repayments of overpayments made in a workers' compensation claim.

12. On January 1, 2022, the Colorado General Assembly enacted legislation that changed the statutory definition of "overpayment." HB 21-1207[4]. Under Colorado law, however, "[a] statute is presumed to be prospective in its operation." Section 2-4-202, C.R.S.; *Marlin Marietta Corp. v. Lorenz,* 823 P.2d 100 (Colo. 1992). The Industrial Claims Appeals Office (ICAO) clarified this issue in workers' compensation proceedings in *Barnes v. City and County of Denver,* W.C. No. 5-063-493, (ICAO March 27, 2023). In that case, ICAO noted that the General Assembly did not express an intent for HB 21-1207 to have retroactive effect. *Id.* at 6. Therefore, because the claimant in *Barnes* sustained their injury prior to January 1, 2022, the definition of "overpayment" in effect before the enactment of HB 21-1207 governed.

13. In the present matter, Claimant's date of injury is October 22, 2020. As Claimant's injury is prior to the statutory change, HB 21-1207 does not apply. Therefore, the ALJ must apply the definition of "overpayment" prior to the enactment of HB 21-1207.

14. On October 13, 2020, the date of injury for this claim, "overpayment" under Section 8-40-201(15.5), C.R.S., was defined as:

> "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.

15. Section 8-42-105(3)(a), C.R.S. provides, in pertinent part, that "[t]emporary disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement.ft

[4] Specifically, the General Assembly amended section 8-40-201(15.S)'s definition of "overpayment" to exclude TTD benefits paid after the date of MMI. HB 21-1207.

16. As found, Respondent has demonstrated, by a preponderance of the evidence, that an overpayment exists in this matter in the amount of $4,449.87. As found, the indemnity log is credible and persuasive on this issue.

17. As found, Claimant has income from PERA. In addition, he receives regular "donations" from his roommates. Claimant shall repay the overpayment in monthly installments of $100.00 per month, beginning January 1, 2025 and ongoing until the overpayment is paid in full. No interest shall accrue on the amount of the overpayment. Alternatively, Respondent may offset the overpayment against liability for any unpaid disfigurement benefits awarded to Claimant.

ORDER

It is therefore ordered:

1. Claimant has failed to overcome the opinions of the DIME physician.

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

3. An overpayment of $4,449.87 shall be repaid by Claimant at the rate of $100.00 per month, beginning January 1, 2025 and ongoing until the overpayment is paid in full.

4. No interest shall accrue on the amount of the overpayment.

5. Alternatively, Respondent may offset the overpayment against liability for any unpaid disfigurement benefits awarded to Claimant.

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

Dated November 21, 2024.

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

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-259-862-001

ISSUES

1. Did Claimant overcome the Division's Independent Medical Examination (DIME) determination of maximum medical improvement (MMI) by clear and convincing evidence?

2. If Claimant failed to overcome the DIME, did he prove entitlement to a general award of maintenance medical care after MMI by a preponderance of the evidence?

FINDINGS OF FACT

1. Claimant is a sorting associate at Employer's [Redacated, hereinafter DF] in Denver.

2. Claimant sustained an admitted injury to his head on December 15, 2023, after a pole fell and struck him in the back of the head while he was sorting packages. Ex. C; *see* Ex. A (final admission of liability listing the admitted injury as a "contusion to the head"); Ex. 1 – 3 (photos of Employer's facility).

3. On December 15, 2023, Claimant was sent to PeakMedIQ Occupation Medicine for the work injury and saw Dr. Paul Ogden. Ex. C. Claimant reported symptoms of head ache, neck pain, disorientation, and low oxygen. *Id.* Claimant received an x-ray of his cervical spine, which showed no fractures. *Id.*

4. Dr. Ogden diagnosed Claimant with "contusion of other part of head, dizziness and giddiness, and cervicalgia." Ex. C. Dr. Ogden noted that Claimant was "determined to go the ER. He does seem angry about the event, and if this initial work up is fine we can address other concerns and persisting symptoms on follow up." *Id.*

5. Claimant had a CT scan of his head and neck UC Health Green Valley Ranch Emergency Room (ER) on December 15, 2023. Ex. C. The CT scan results were normal. *See* Ex. B.

6. Claimant had a follow-up appointment with Dr. Brenden T. Matus of PeakMedIQ on December 18, 2023. Ex. B. Dr. Matus reviewed Claimant's symptoms and completed testing that was within normal range. *Id.*

7. Claimant had an additional follow-up appointment with Dr. Matus on December 21, 2023. Ex. C. Claimant reported being "overall better" with "some headaches and some sense of imbalance." *Id.* Based on testing and his observations, Dr. Matus placed Claimant at MMI without restriction or impairment rating as of that date.

8. Claimant disagreed with Dr. Matus' decision to place him at MMI and requested a DIME. *See* Ex. B.

9. Claimant was seen by Dr. Mark Wisthoff of UC Health Primary Care at Northfield on February 28, 2024. Ex. B. Claimant presented with generalized complaints of neuromuscular weakness, neck and back pain, balance issues, light sensitivity, and extremity weakness. *Id.* Claimant was referred to physical therapy. *Id.*

10. Dr. David Yamamoto performed the DIME on May 21, 2024. Ex. B. Dr. Yamamoto concluded Claimant suffered a head contusion, headache, and dizziness as a result of being struck by a pole on December 15, 2023. *Id.* Dr. Yamamoto agreed with Dr. Matus that Claimant reached MMI for his December 15, 2023 injury on December 21, 2023 with no need for maintenance care and no ratable condition. *Id.*

11. The DIME report notes Claimant's February 28, 2024 visit with Dr. Wisthoff, but does not relate Claimant's complaints at that visit to his December 15, 2023 industrial injury. Ex. B.

12. Dr. Yamamoto authored his DIME report on May 30, 2024. Ex. B. Respondents filed a Final Admission of Liability on June 18, 2024, and did not admit for maintenance medical care. Ex. A.

13. Claimant filed an application for hearing with the Office of Administrative Courts on August 2, 2024. Claimant endorsed the following issues for hearing: compensability, medical benefits, and temporary total benefits from December 15, 2023 to July 31, 2024 and ongoing. Under other issues Claimant wrote "compensation benefits offered by Sedgwick is very little. I am still receiving physical therapy for my injury."

14. Claimant testified at hearing that he told Dr. Yamamoto of his lower back pain and neck pain and that he was attending physical therapy for those symptoms. According to Claimant, Dr. Yamamoto's DIME is incomplete because it does not contain information concerning his ongoing physical therapy.

15. Claimant testified that he disagreed with Dr. Yamamoto's opinion that he reached MMI on December 21, 2023. Claimant did not present any credible testimony or a report from a medical professional contradicting Dr. Yamamoto's opinion.

16. There is no credible evidence by which the ALJ could conclude Claimant's complaints of lower back pain and neck pain are causally related to his December 15, 2023 industrial injury.

17. The objective medical evidence establishes that Claimant suffered a minor head contusion with concomitant headache and dizziness on December 15, 2023, which completely resolved by December 21, 2023.

18. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Yamamoto that he reached MMI on December 21, 2023 for his December 15, 2023 injury. Claimant presented no credible evidence challenging Dr. Yamamoto's opinions concerning the type of injury he sustained on December 15, 2023 (head contusion, headache, dizziness) and the conclusion that he reached MMI on December 21, 2023 for that injury with no impairment. The fact that Claimant later sought

medical care for lower back and neck pain does not establish that Claimant did not reach MMI for the admitted injury on December 15, 2023.

19. Claimant has also failed to prove it is more likely than not that his need for physical therapy constitutes a reasonable, necessary and causally related medical treatment to relieve the effects of his December 15, 2023 injury or to prevent further deterioration of his work injury. Claimant presented no credible evidence that the current complaints for which he is receiving physical therapy are related to the head contusion he received on December 15, 2023. A review of the medical records indicates that Claimant had a variety of complaints prior to his work injury, including a history of chronic pain, and that those complaints are unrelated to the head contusion, headache, and dizziness he suffered on December 15, 2023. As a result, Claimant failed to prove that it is more likely than not that he is in need of any medical treatment to relieve him from the effects of his work injury or to prevent further deterioration of his work injury.

CONCLUSIONS OF LAW

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 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).

DIME

A DIME's determination of whether a claimant has reached MMI is binding unless overcome by "clear and convincing evidence." § 8-42-107(8)(c). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Off.*, 62 P.3d 1015, 1019 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the DIME is incorrect. *Qual-Med v. Indus. Claim Appeals Off.*, 961 P.2d 590, 592 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995).

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of the industrial injury. § 8-42-101, C.R.S. MMI is defined as the point

"when no further treatment is reasonably expected to improve the [injury-related] condition." § 8-40-201(11.5), C.R.S. MMI "represents the optimal point at which the permanency of a disability can be discerned and the extent of any resulting impairment can be measured." *Paint Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429, 432 (Colo. App. 2010).

The DIME's opinion regarding the cause of a claimant's condition is an "inherent" part of the diagnostic assessment that comprises the DIME process of determining MMI and rating permanent impairment. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664, 665 (Colo. App. 1988). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight and the DIME's finding that a particular condition is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Id*.

Here, Claimant failed to establish by a clear and convincing evidence that Dr. Yamamoto was incorrect in his conclusion that Claimant's industrial injury caused a head contusion, headache, and dizziness, and that those conditions fully resolved by December 21, 2023, placing Claimant at MMI on that date with no need for maintenance care and no impairment rating. Claimant provided no credible evidence connecting his lower back and neck pain, for which he is currently receiving physical therapy, to his industrial injury on December 15, 2023.

Ultimately, the ALJ finds and concludes that Claimant has failed to establish by clear and convincing evidence that Dr. Yamamoto's determination that he reached MMI on December 21, 2023 was incorrect.

MAINTENANCE MEDICAL CARE

The need for medical treatment may extend beyond the point of MMI where a 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. Industrial Comm'n*, 759 P.2d 705, 711 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). "[A]n award for *Grover* medical benefits is not contingent upon a finding that a specific course of treatment has been recommended, nor on a finding that the claimant is actually receiving medical treatment." *Hastings v. Excel Electric*, W.C. No. 4-471-818 (ICAO, May 16, 2002) (citing *Holly Nursing Care Ctr. v. Indus. Claim Appeals Off.*, 992 P.2d 701 (Colo. App. 1999)). Thus, an award of *Grover* medical benefits should be general in nature. *Hanna*, 77 P.3d at 865; *Anderson v. SOS Staffing Servs.*, W.C. No. 4-543-730 (ICAO, July 14, 2006). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *See Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915, 918 (Colo. App. 1993).

Claimant's treating physician Dr. Matus did not recommend Claimant receive maintenance medical care for his December 15, 2023 injury. Similarly, Dr. Yamamoto also did not recommend Claimant receive maintenance medical care, despite that Dr. Yamamoto was aware Claimant had been referred to physical therapy based on his February 28, 2024 visit with Dr. Wisthoff. The objective medical evidence establishes

that Claimant suffered a minor head contusion with concomitant headache and dizziness on December 15, 2023, which completely resolved by December 21, 2023.

Claimant failed to establish by a preponderance of the evidence that he is entitled to a general award of maintenance medical care after MMI.

ORDER

It is therefore ordered that:

1. Claimant reached MMI on December 21, 2023 for his December 15, 2023 work injury.

2. Claimant's request for maintenance medical care after MMI for his December 15, 2023 work injury is denied and dismissed.

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

SIGNED: November 21, 2024.

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

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his cervical spine on or about January 5, 2023.

II. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his cervical spine on January 9, 2024.

III. If Claimant established that he sustained a compensable injury to his cervical spine, whether he also established, by a preponderance of the evidence, that he is entitled to all reasonable, necessary and related medical care, including a C6-7 ACDF surgery as performed by Dr. Hammers on March 13, 2024, to cure and relieve him of the effects of this compensable injury.

IV. If Claimant established that he suffered a compensable injury to his cervical spine, whether he also established, by a preponderance of the evidence, that he is entitled to Temporary Total Disability ("TTD") benefits beginning March 13, 2024 through the present and ongoing.

V. A determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

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

Background

1. Claimant is a long-term employee of [Redacted, hereinafter PO] with more than 24 years of service to Employer. His date of hire is noted as 10/26/2004. (RHE A, at 2). He works as a custodian at [Redacted, hereinafter RE] in Rye, Colorado. His job duties vary and include, among other things, trash collection and removal, mopping floors, folding heavy lunch tables and pushing them to storage and snow removal. Many of the tasks required for successful completion of Claimant's duties involve lifting over 10 pounds and a significant amount of pushing/pulling in excess of 10 pounds.

2. Claimant testified that RE[Redacted] is located in the Wet Mountains west of Colorado City and that the area routinely receives a foot or more of snow when it storms. After a storm, Claimant testified he would have to clear accumulated snow from 12 sidewalks around the school, a long bus loop and the stairs leading from it to the parent-teacher drop off and the other stairways leading to the doors of the school. After clearing the snow, Claimant would spread ice melt over the exposed areas to help prevent falls.

3. Claimant testified that Employer provided a snow blower for use in clearing the snow around the school, but the majority of his snow removal duties were done by hand because the snow blower did not work well to remove wet heavy snow and was too big and heavy to use on the stairs.

4. Based upon the evidence presented, the ALJ finds that Claimant's snow removal duties could be physically demanding when the volume of snow that typically falls around the area of the school when it storms is combined with the amount of shoveling necessary to remove it.

Claimant's Alleged Injuries and the Medical Record Evidence

5. Claimant alleges he injured his neck shoveling snow at the school in late December, 2022 and again on January 9, 2024. Regarding the December 2022 date of injury, Claimant testified he was shoveling snow when he developed pain in his neck left shoulder and lower back. He reportedly did not have any symptoms down his arm at the time. However, he testified that he did have tingling 7-8/10 pain like "millions of needles" going through the left hand. Claimant presented to his chiropractor, Wayne Carter for treatment on December 28, 2022.

6. Review of Dr. Carter's December 28, 2022, treatment record indicates that Claimant reported "dull and aching" discomfort in his "mid-thoracic, posterior cervical (neck) left mid thoracic and right sacroiliac" regions of the spine and intermittent tingling of the left hand of two weeks duration. (CHE 1, p. 16). No report of injury or trauma was given. *Id*. Indeed, no mechanism of injury appears in this treatment record. Claimant demonstrated a positive Bakody and cervical compression test result prompting Dr. Carter to document that it was possible that Claimant had a cervical disc herniation. *Id.* Claimant was treated with chiropractic manipulation and referred to his primary care physician (PCP) for further evaluation. *Id*.

7. Claimant returned to Dr. Carter on January 4, 2023, with similar symptoms. The content of this treatment record is essentially the same as the December 28, 2022 report with the addition of the following information: "[Claimant's] pain began after shoveling a lot of snow" and "he states that he has an appointment with his primary on 1/5/23". (CHE 1, p. 18).

8. Claimant presented to the offices of his PCP (James Wesley McCullough) on January 5, 2023, where he was evaluated by Nurse Practitioner (NP) Lindsey Dazzo. NP Dazzo obtained the following history:

> [Claimant] is a 56 y.o. male presenting to clinic for left posterior shoulder pain. Onset of symptoms was at least one month ago. Denies any known injury. Pain is better when he lifts his arm. He has associated numbness/tingling down his arm and across his left chest. Has some associated neck pain and shoulder blade. No

associated abdominal pain. Takes naproxen and gabapentin which doesn't seem to help at all.

(CHE 2, p. 35).[1]

9. Physical examination revealed a "positive left Bakody sign and left cervical compression test, 2+ deep tendon reflexes and a negative straight leg test. NP Dazzo raised concern for a cervical radiculopathy based on Claimant's positive provocative physical examination testing results. *Id*. at 36. She ordered x-rays and an MRI of the cervical spine without contrast. *Id.*

10. The x-rays obtained on January 5, 2023, revealed, "[m]oderate DJD (degenerative joint disease) at C6-7" with "[l]ess severe evidence for such a (sic) C5-6" along with a "[w]ell–corticated density lying about the nuchal ligament posteriorly which may represent evidence of old trauma". (CHE 3, p. 44).

11. MR imaging of the cervical spine was completed on January 20, 2023. (CHE 3, p. 45). This imaging revealed, "[m]ild endplate spurring and small osteophyte complexes C4-C5, C5-C6, and C6-C7". *Id*. There was no evidence of "significant spinal canal stenosis" and no abnormal cord signal. *Id.* However, there was "[f]oraminal stenosis at C4-C5 on the right and to a lesser extent C5-C6 on the left and C6-C7 on the right" along with "[m]ild mid to lower cervical facet arthropathy. *Id*.

12. Claimant presented to Dr. Mary Lundgren at Maple Leaf Orthopedics and Spine on March 8, 2023. Dr. Lundgren noted that Claimant was a "new" patient to their practice and was being evaluated for neck pain with left upper extremity numbness and tingling. (CHE 4, p. 47). According to the history obtained by Dr. Lundgren, Claimant reported that his neck pain stems from his years of work for Employer along with wrestling and weight lifting when he was younger. Similar to NP Dazzo's 1/5/2023 note, there is nothing in the history obtained by Dr. Lundgren indicating that Claimant's neck pain and upper extremity symptoms were attributable to shoveling snow.[2] Dr. Lundgren reviewed the MRI films and opined that there was mild to moderate left foraminal stenosis at the C6-C7 level. She recommended an EMG study of the left upper extremity to "evaluate for specific nerve root distribution" and referred Claimant to Dr. Andrew Roberts, M.D. for consideration of a C6-C7 epidural steroid injection. (CHE 4, pp. 47-50).

13. Claimant was seen on March 15, 2023, by Dr. Roberts. Dr. Robert's note reflects that Claimant had a 6-month history of significant neck pain with numbness and

[1] During his direct testimony, Claimant asserted that he believed he told NP Dazzo that his symptoms were caused by shoveling snow and that he did not know why that history did not appear in her report. He went on to suggest that NP Dazzo's did not take a history, which was instead completed by her assistant (nurse).

[2] Similar to the 1/5/2023 report of NP Dazzo, Claimant challenged the history documented by Dr. Lundgren on 3/8/2023, contending that he specifically told her that he was shoveling snow right before Christmas break and that he started "hurting real bad". He also denied ever suffering any injuries while wrestling and testified that he was not involved in any other sports while in high school.

tingling down his left arm in a multi-dermatomal pattern, which tends to affect his thumb and first finger the most. There is no history of any trauma noted in this report. Dr. Roberts' physical examination revealed tenderness in the paracervical area with normal muscle tone in the paraspinous muscles. Strength was noted to be 5/5 right and 5/5 left in the biceps, triceps and deltoids. Dr. Robert's diagnoses were cervical disc degeneration at C5-C6 and C6-C7. A left sided C6-C7 epidural steroid injection (ESI) and physical therapy (PT) were recommended. (CHE 4, pp. 51-53).

14. Claimant underwent a left C6-C7 interlaminar ESI for cervical radiculitis on March 29, 2023. (CHE 4, p. 54).

15. Claimant returned to Dr. Lundgren on April 19, 2023. (CHE 4, p. 55). Dr. Lundgren noted that Claimant was status post C6-7 left epidural steroid injection (ESI) as administered by Dr. Roberts on March 29, 2023, which gave him "possibly" 4-5 days of pain relief after which his pain returned at his pre-injection baseline. *Id.* Dr. Lundgren noted that Claimant's EMG had not been completed. Accordingly, she reissued a referral to Dr. Caughfield's office. She also provided Claimant with Dr. Caughfield's office number and encouraged him to contact them to set an appointment to complete the recommended EMG/NCV testing. *Id*. at 56. Claimant was instructed to follow-up after completion of his EMG/NCV testing. *Id.*

16. Claimant underwent EMG testing on April 27, 2023 with Dr. Dwight Caughfield. (RHE K, pp. 226-228). Testing revealed left median neuropathy at the wrist consistent with moderate left carpal tunnel syndrome. *Id*. at 226. There was no EDX evidence of "ulnar neuropathy, radial neuropathy, brachial plexopathy, or cervical axonal loss radiculopathy". *Id.*

17. While Claimant contends that he suffered a work-related injury to his neck on January 5, 2023, stemming from his shoveling duties in December 2022, he did not file a Worker's Claim for Compensation consistent with this date. Instead, the evidence presented supports a finding that Claimant asserted he suffered a work related injury associated with his snow removal duties on March 2, 2023 rather than late December 2022 or early January 2023. (See RHE B, p. 7). The handwritten Worker's Claim for Compensation claiming a March 2, 2023 date of injury (DOI) is unsigned and undated. Accordingly, it is unclear when it was filed.

18. Based upon the evidence presented, it appears that Claimant did not seek treatment for his neck after his April 27, 2023 EMG. Indeed, the record supports a finding that there is a break in Claimant's treatment lasting approximately 9 months to January 12, 2024, when he returned to Dr. Roberts with complaints that his neck/arm pain had returned. (CHE 4, p. 58).

19. Review of Dr. Roberts 1/12/2024 medical record notes the following history: "Would like to discuss more injections -This is a gentleman who we saw last year for a cervical epidural steroid injection. This worked for about 10 months and he is

now starting to have some of that pain returned (sic).[3] It is going down his left arm primarily in a C7 and C8 dermatomal pattern". (CHE 4, p. 58). The history is devoid of any suggestion that Claimant's symptoms were related to shoveling snow. Based upon the content of Dr. Roberts 1/12/2024 note, it appears that a repeat left C6-7 epidural steroid injection was administered. *Id.* at 58, 60.

20. Claimant testified that prior to seeing Dr. Roberts on January 12, 2024, he had been shoveling snow on January 9, 2024 and that this activity precipitated his neck and arm pain. Claimant testified that he reported his injury to [Redacted, hereinafter AY], the school principal on January 10, 2024. According to Claimant, he waited to January 10, 2024, to report his injury because January 9, 2024 was a snow day. Consequently, AY[Redacted] was not at the school on the alleged injury date. Claimant testified that after informing AY[Redacted] of his injury on January 10, 2024, she referred him to Dr. Thomas Centi later that same day. Claimant testified that because he already had an appointment with Dr. Roberts' office on 1/12/2024, he kept that appointment and went to his initial appointment with Dr. Centi on January 15, 2024.

21. Claimant presented to Dr. Centi on January 15, 2024. (CHE 5, pp. 63-66). Dr. Centi documented the following history of present illness (HPI): RE[Redacted] employee reports straining his neck and left shoulder while snow shoveling on 1/9/2024, reports feeling tight into neck and upper back and radiating into left shoulder, feels numbness into left hand at times, history of similar event 1 year ago and required an ESI". *Id*. at 65. Work restrictions (no lifting/carrying, pushing /pulling over 2 pounds, and no overhead lifting) were imposed and updated imaging (x-rays/MRI) was ordered.

22. X-rays of the cervical spine obtained 1/15/2024 revealed "mild multilevel degenerative disc disease" and multilevel bilateral degenerative facet hypertrophy" without evidence of "significant neural foraminal narrowing; however, there was evidence of "posterior ligamentous calcification". (CHE 5, p. 67).

23. An employer's First Report of Injury or Illness (FROI) was filed March 15, 2024. (RHE A, p. 2). This FROI lists the date of injury as 1/9/2024 and Claimant's notification of injury to Employer as 1/10/2024. *Id.*

24. Claimant returned to Dr. Centi on January 17, 2024. Dr. Centi liberalized Claimant's work restrictions so as to allow lifting/carrying and pushing/pulling up to 10 pounds. (CHE 5, pp. 69-70). Employer accommodated Claimant's restrictions and he continued to work for Employer.

25. A MRI of the cervical spine obtained 1/24/2024 and compared to the 1/20/2023 MRI revealed multilevel degenerative changes with progressive worsening since the 1/20/2023 MRI. (CHE 6, p. 107). While some changes were noted at the C4-5 level, the levels below were most involved. Indeed, at C5-6 there was "mild loss of

[3] The ALJ finds this statement inconsistent with the content of Dr. Lundgren's 4/19/2023 report wherein Claimant reported that the injection provided "possibly" 4-5 days of pain relief before his pain returned to its baseline level.

normal disc height" and the presence of a "mild posterior disc osteophyte complex", greatest in the right lateral recess. While there was no narrowing of the spinal canal, there was evidence of "moderate bilateral neuoforaminal narrowing and mild bilateral degenerative facet hypertrophy, left greater than right at this level. At C6-7, there was noted moderate loss of disc height and a moderate sized posterior disc osteophyte complex, again greatest in the lateral recess, but extending into the neural foramen resulting in severe neural foraminal narrowing. There was impingement on the exiting nerve rootlets and mild bilateral facet hypertrophy, left greater than right noted at this spinal level. *Id*. at 106.

26. Given Claimant's persistent symptoms, Dr. Centi referred him to Dr. Scott Primack for a repeat EMG. (CHE 5, pp. 74-75, 78). Dr. Primack completed the requested nerve conduction study on February 7, 2024. (CHE 7, p. 113). As part of this consultation, Dr. Primack obtained the following pertinent history:

> [Redacted, hereinafter SH] (sic) is a 57-year-old right-handed male who presents for a comprehensive electrodiagnostic consultation of his persistent cervical spine and left upper extremity discomfort. It sounds like as though he has had previous problems at his cervical spine. He has been through an injection at this level. That data is not available for my review. He and his wife described that he had been working "too many hours at the elementary school". He was shoveling an incredible amount of snow. On 1/9/2024, for the first time, he described pain shooting into his left arm.[4] It would go into digits 2 through 5.

Id. at 113.

27. Dr. Primack's physical examination revealed 4/5 grade strength in the left rotator cuff musculature and diminished sensation within the C6-7 dermatomes on the left when compared to the right. (CHE 7, 115). EMG test results revealed clinical and electrophysiologic evidence of a "left C5 greater than C4 or C6 radiculopathy" along with "moderate non-work related left carpal tunnel syndrome" prompting Dr. Primack to opine:

> This patient does exhibit double crush syndrome. At the cervical spine, given his history, this would be considered work-related. However, he does have a history of carpal tunnel syndrome. This would be considered a recurrence but would not be considered work-related.

(CHE 7, p. 117).

[4] During his hearing testimony, Claimant described the pain he felt on 1/9/2024 as being 8 times "stronger" than his 2022/2023 pain, noting further that he had some weakness associated with his 1/9/2024 pain and his left arm/hand was totally numb whereas he only had some numbing in 2022/2023.

28. On February 9, 2024, Dr. Centi referred Claimant to Dr. Ronald Hammers for a neurosurgical consultation. (CHE 5, pp. 90-91).

29. Claimant presented to Dr. Hammers for evaluation on February 29, 2024. (CHE 9, p. 131). Dr. Hammers obtained the following history: "[Claimant] reports that he was in his usual state of high functioning health but sustained a work injury on 1/9/2024. He was helping clear snow for an extended period of time, he estimates 8-9 hours, and he developed left upper extremity pain. The pain has been persistent since that injury. Pain radiates into the scapula, shoulder, triceps region [of] the arm, forearm and 1-3 fingers. He does not have right-sided symptoms". *Id.* Physical examination was positive for 4/5 grade strength in the left triceps.

30. Dr. Hammers opined that Claimant's symptoms were "attributable to left C6-7 spondylosis and nerve root compression. (CHE 9, p. 134). He recommended a C6-7 ACDF (Anterior Cervical Decompression/Fusion) surgery based upon the degree of spondylosis present. *Id.* Claimant expressed a desire to proceed with surgery. Accordingly, Dr. Hammers reached out to Dr. Centi and the process of obtaining authorization was initiated. *Id.* at 133-134. Claimant surgery was scheduled for March 13, 2024. *Id*. at 133.

The Physician Advisor Opinion of Dr. Marjori Eskay-Auerbach

31. Respondents sought a pre-authorization opinion pursuant to WCRP, Rule 16, which was completed by Dr. Marjori Eskay-Auerbach on March 6, 2024. (RHE P, pp. 349-352). Dr. Eskay-Auerbach recommended denial of the proposed surgery on the basis that Claimant's medical and chiropractic records dating back to January 24, 2020, reflect similar symptoms to what he has experienced since January 9, 2024. Indeed, Claimant's pre-injury records demonstrated a prior history of neck and left upper extremity symptoms radiating into the triceps. *Id.* She did not believe that there was evidence of an acute injury noting further that no specific mechanism of injury to the c-spine was described. *Id.* Because the objective findings at the proposed surgical level were degenerative in nature and unrelated to work-activities, Dr. Eskay-Auerbach recommended denial of the C6-7 ACDF. *Id.*

Claimant's Prior Cervical Spine Complaints

32. As noted, by Dr. Eskay-Auerbach, Claimant has a history of treatment directed to his cervical spine. His first documented cervical spine complaints in the medical record dates back to 2016 when he started receiving treatment with Dr. Wayne Carter for posterior cervical, left trapezius, upper thoracic, and right posterior trapezius dull aching discomfort. (RHE G, p. 27). During his chiropractic visit on December 14, 2016, Claimant complained of 6/10 pain with mild to moderate muscle spasms in his posterior cervical spine, right posterior trapezius, and right side of his neck. *Id.* His cervical right and left rotation and flexion was recorded as moderately reduced with pain. He noted no new injury or trauma. *Id*. These complaints were echoed on May

31, 2017 when claimant again complained of 6/10 pain and had mild to moderate muscle spasms noted. (RHE G, pp. 28-29).

33. On June 16, 2017, Claimant returned to Dr. Carter with complaints of 6/10 pain in his posterior neck, left trapezius, upper thoracic, right posterior trapezius, and lumbar spine. (RHE G, p. 30). Claimant had slipped and lost his balance on the June 13th and was again noting mild-moderate muscle spasms. *Id.* Claimant's cervical and thoracic spine were manipulated and Claimant was to return as needed. *Id.* Claimant continued to sporadically treat with Dr. Carter into 2021 and 2022 noting continued cervical spine complaints with mild to moderate muscle spasms. *Id.* at 31-40.

34. On April 15, 2022, Claimant's apparent spinal issues required a return to Dr. Carter where he complained of 5/10 cervical and lumbar spine pain. He now had some tinging and dull aching pain that extended into his left hand. (RHE G, p. 40). He reported no recent trauma or injury, still had mild muscles spasms in his neck, and now had a positive Bakody sign on the left. *Id.* As noted at paragraphs 5-6 above, Claimant returned to Dr. Carter for chiropractic care on December 28, 2022 after which he initiated his current claims.

Claimant's C6-7 ACDF Surgery and the Independent Medical Examination (IME) of Dr. Qing-Min Chen

35. As noted, Claimant's authorized provider imposed work restrictions and he continued to work in a modified capacity until March 13, 2024, when he underwent a C6-C7 ACDF on March 13, 2024 with Dr. Hammers. (CHE 10). Claimant has not worked anywhere since undergoing surgery. He is unable to perform his usual job duties as a custodian and Employer has not offered modified work consistent with the work restrictions last imposed on March 8, 2024. (See CHE 5, p. 100).

36. An April 5, 2024 post-operative appointment revealed that Claimant's pre-surgical left upper extremity pain, numbness, and paresthesia had "essentially" resolved. (CHE 9, p. 134). Claimant was referred to physical therapy (PT) and scheduled for a follow-up evaluation in 4 weeks. *Id*. at 135.

37. During a May 10, 2024 appointment with Dr. Hammers, Claimant reported pain when completing certain household chores, such as mopping or raking leaves. (CHE 9, p. 136). Although deemed "crucial" to optimal recovery, Claimant reported that his referral to PT had been denied. *Id.* Dr. Hammers reiterated the need for PT. *Id.*

38. Claimant returned to Dr. Hammers' office for follow-up on June 21, 2024. (CHE 9, p. 137). Physician Assistant (PA-C) Megan Ann Wetherbee evaluated Claimant on this date. During this appointment, Claimant reported starting and completing 3 sessions of PT. *Id*. While Claimant was progressing, he was deemed not ready to return to work. *Id.* Because Claimant had to be released to full duties, it was felt that he would require another month of therapy before returning to his position with Employer. *Id.*

39. Dr. Qing-Min Chen, M.D., conducted an independent medical examination (IME) of Claimant at Respondents' request on August 2, 2024. (RHE T). As part of his IME, Dr. Chen obtained a history from Claimant, reviewed medical records and conducted a physical examination. *Id*. Claimant told Dr. Chen that while shoveling snow for 8-10 hours on January 9, 2024, he noticed neck pain going into his left arm. He also reported a prior snow-shoveling incident on March 2, 2023, which Claimant asserts he reported to the employer[5]. *Id.* at 408. In conjunction with this claimed injury date, an Employer's FROI was completed April 19, 2024. (RHE B).

40. Concerning his claimed 2023 injury, Claimant told Dr. Chen that he received injections under his personal insurance sometime in 2023 and those relieved approximately 70% of his symptoms for 6 months. *Id.* As noted, Claimant underwent a left C6-C7 interlaminar ESI for cervical radiculitis on March 29, 2023. (See FOF ¶ 14). He then returned to Dr. Lundgren on April 19, 2023 reporting that his injection only provided "possibly" 4-5 days of pain relief before his pain returned to his pre-injection baseline. (See FOF ¶ 15). Based upon the evidence presented, the ALJ finds Claimant's report regarding the efficacy of his injection to Dr. Chen, approximately 16 months after seeing Dr. Lundgren, unpersuasive. (See also, FN 3 above).

41. Following his review of Claimant's medical records and his examination, Dr. Chen opined that while the surgery performed by Dr. Hammers was reasonable and necessary, it was not related to any injury that may have occurred on January 9, 2024. Indeed, Dr. Chen concluded, similarly to Dr. Eskay-Auerbach that Claimant's neck complaints and need for surgery were "more than likely related to the December 2022 episode of subjective complaints." In support of his opinion, Dr. Chen relied, in part, on the history in Dr. Robert's record of January 15, 2024, which does not mention anything about shoveling snow on January 9, 2024. This led Dr. Chen to conclude that Claimant's cervical spine problems are the manifestation of an ongoing degenerative process dating back to December 2022. (RHE T, pp. 415-417).

42. Dr. Chen opined that at the time of Claimant's initial presentation regarding his neck pain, it was mostly coming from the C6-7 level. (RHE T, p. 416). According to Dr. Chen, Claimant then had a natural recurrence of the pain on January 9, 2024. In support of his opinion, Dr. Chen noted that just 3 days after the alleged incident, Claimant made no mention of a work-injury and instead simply requested more treatment to the same spinal area as he had in 2023. *Id.* Dr. Chen then opined that the cortisone injection Claimant received in 2023 might have blunted his recovery and actually accelerated the natural progression of his pre-existing condition. Dr. Chen stated that there was no evidence of an aggravation of Claimant's pre-existing condition and Claimant's experience of a reoccurrence of pain was completely in line with the natural progression of his underlying degenerative disc disease.

The Deposition Testimony of Dr. Ronald Hammers

[5] As noted at FOF ¶ 17, an undated/unsigned Worker's Claim for was admitted into evidence asserting a March 2, 2023 date of injury while shoveling snow for Employer. (See RHE C).

43. Dr. Ronald Hammers testified via evidentiary deposition on October 4, 2024. Dr. Hammers testified as a Board Certified expert in neurosurgery. Dr. Hammers opined that Claimant's neck condition, which necessitated his surgery, was caused by shoveling a substantial amount of snow on January 9, 2024. In support of his opinion, Dr. Hammer's noted that the MRIs from 2023 and 2024 revealed such minor changes that he can "only historically gather that the snow shoveling incident was indeed the trauma that pushed him over the edge to develop these symptoms in the most profound way that brought him to my clinic where I heard his history and measured his weakness." (Depo. Tr. P.10, ll. 5-15; P.54, ll. 10-25).

44. Dr. Hammers testified that he reviewed medical records dating back to December 2016, and did not feel there was any information in them, which would lead him to conclude that Claimant needed cervical spine surgery any time prior to January 9, 2024. Dr. Hammers explained that while the Claimant had problems with his neck prior to January 9, 2024, as evidenced by the medical records, it was the trauma of shoveling snow on January 9, 2024, which exacerbated his stable pre-existing degenerative changes in his cervical spine such that he required surgery. (Depo Tr. P.21, l.13-21; P.33, l. 11- P.34, l. 12; P.59, ll. 1-25).

45. Dr. Hammers testified that he was aware that some of the histories in the medical records do not support the fact that Claimant injured himself shoveling snow. However, Dr. Hammers explained that Claimant advised him that he was doing well enough prior to shoveling snow on January 9, 2024 and that he had a certain degree of wellness such that he was able to perform his job.

46. Dr. Hammers further testified that some providers have templates or "cut-and-paste" notes to bring history forward to the next note and in doing so there may be disparities such as what is seen on Dr. Carter's record of December 28, 2022, and January 4, 2023. Dr. Hammers also testified that patients of differing levels of sophistication might affect the giving of a history in an accurate fashion and the understanding of medical recommendations differently. (Depo. Tr. P.74, l. 22- P.76, l. 6; P.82, l. 17- P.83, l. 2; P.84, l. 21- P.85, l. 6)

47. Dr. Hammers educated the parties on the notion of "history drift," the concept that an injured individuals' account of events will change with the passing of time. (Depo. Tr. P.27-28). However, he agreed with Respondent's counsel that money can be a motivating factor and that the most accurate depiction of Claimant's onset of alleged neck pain would be from the January 12, 2024 report, where Claimant notes a natural recurrence of prior pain. (Depo. Tr. P.47-50).

48. Dr. Hammers testified that two factors influenced his opinion that Claimant's shoveling duties aggravated a pre-existing degenerative condition in his cervical spine. (Depo. Tr. P.50, l. 13-18). First, Dr. Hammers testified that he, unlike anyone prior, noted the most distinctive symptomology in a C7 pattern, which included pain extending beyond the triceps and elbow into the forearm, hand and fingers in a C7

pattern. *Id*. at l. 20-25. Secondly, Dr. Hammers testified that no other provider prior to his involvement documented weakness in the triceps. *Id*. at l. 25; P.51, l. 1-3). Based upon the evidence presented, the suggestion that no prior provider documented symptoms in a C7 dermatomal pattern is unpersuasive. However, careful review of Claimant's medical records prior to January 12, 2024, supports Dr. Hammers' contention that there was no medically documented weakness in Claimant's left triceps. Indeed, the medical record evidence prior to Claimant's alleged January 9, 2024 injury supports a finding that triceps strength testing was either not performed or documented as 5/5.

49. Dr. Hammers agreed with counsel for Respondent's that he was unable to make the statement "but for shoveling" Claimant would not have needed treatment when he did nor could he point to any macroscopic or microscopic changes which he could associated with snow shoveling. (Depo. Tr. P.63-64). He admitted that the history Claimant provided in combination with the symptoms he described in combination with the weakness in the left triceps led him to conclude that the reported January 9, 2024 snow-shoveling incident aggravated a pre-existing condition in Claimant's cervical spine necessitating his need for surgery. Indeed, Dr. Hammers summarized his opinion as follows:

> [Claimant] had an underlying degenerative cervical spine as evidenced by all this data that I'm seeing today of him seeing many providers. And that he reports an injury on . . . January 9th, that took him . . . to a new level of symptoms, including weakness requiring surgery. And thus, the injury he reported seems to be the exacerbating factor.

(Depo. Tr. P.88, l. 8-16).

The Testimony of Dr. Qing-Min Chen

50. Dr. Chen testified as an expert in orthopedic surgery. He testified consistently with his report of August 2, 2024, that Claimant did not sustain an injury to his cervical spine either late December 2022, early January 2023 or January 9, 2024 based on a lack of objective examination findings and discrepancies in the medical records of a history of sustaining an injury while shoveling snow. Dr. Chen testified that he put the most weight on the medical records, which are closest to the claimed injury date to conclude whether or not it was work related. Specifically, Dr. Chen relied upon a January 5, 2023, note by Ms. Dazzo and a January 12, 2024, note from Dr. Roberts, neither of which mentions any incidents involving shoveling snow, in support of his opinion that Claimant did not sustain a work injury in December 2022 or on January 9, 2024. According to Dr. Chen, the documentation "closest to whatever questionable event occurred is probably the most accurate."

51. Dr. Chen further testified that coupling the historical discrepancies in the medical records with the lack of evidence of an acute injury on the diagnostic

imaging that was performed, lead him to conclude that Claimant's cervical spine condition and need for surgery is related to a chronic ongoing degenerative condition dating back years prior to any alleged injury. Indeed, Dr. Chen was certain that if Claimant injured himself acutely on January 9, 2024, the MRI would have shown evidence of at least edema indicating the body was pooling blood to an injured area; however, there was no evidence of any such trauma. Dr. Chen did not agree with Dr. Hammers regarding the presence of weakness. He described to the court how the test was rather subjective and unreliable. Dr. Chen also noted how the records reflected prior weakness in Claimant's upper left extremity, which conflicted with Dr. Hammers' opinion of the new finding. He believed Claimant's progression and clinical course was in line with medical expectations of how degenerative conditions behave. According to Dr. Chen, the fact that Claimant experienced pain in 2024 was likely the result of the effects of the steroids wearing off with return of his prior symptoms. Despite Claimant's testimony that he experienced an immediate "pop' with associated pain and weakness, the records did not reflect this allegation.

52. On cross examination, Dr. Chen further testified that degenerative changes in the cervical spine as shown on Claimant's MRI does not necessarily mean that treatment is needed or that a person is symptomatic.

The Testimony of [Redacted, hereinafter SR]

53. SR[Redacted] testified that he worked for Employer as Dean of Students for the 2022-2023 school year. As part of his job duties, SR[Redacted] testified that he was tasked with completing reports when there was an on-the-job injury. SR[Redacted] testified that Claimant never mentioned having injured his back in late 2022 or early 2023 and that he would have filed a first report of injury if Claimant had reported an on-the-job injury.

54. SR[Redacted] testified that he would help Claimant shovel snow, specifically the steps leading up to the entrance of the school, while Claimant would clear the sidewalks and other areas. On cross-examination, SR[Redacted] agreed that Claimant would shovel the steps if he were unavailable.

55. SR[Redacted] testified that he has not worked for Employer since the fall of 2023.

Claimant's Average Weekly Wage

56. At the time of his asserted January 9, 2024 injury, Claimant had a base salary of $5,414.93 per month. However, for the time period of July 1, 2023 through December 31, 2023, Claimant earned overtime pay every month in an amount from $11.72 up to $1,019.25. (CHE 12, p. 153). Even after his alleged January 9, 2024 injury, the admitted wage records demonstrate that Claimant earned $5,606.28 in wages, which included his base salary and $191.35 in extra duty and overtime pay. Adding the gross wages for the months of July 2023 through January 2024, yields a

total $39,466.53. Divide this figure by the 215 days in the above time period and multiplying by 7 days gives an AWW of $1,284.96. (CHE 12, p. 153).

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

C. Assessing the weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). 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. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). 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).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's

injury must have occurred “in the course of” and “arise out of” employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of” and “in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant’s alleged injuries occurred within the time and place limits of his employment and during an activity connected with his duties as a custodian for Employer, namely the removal of abundant amounts of snow after a typical snow storm for the area. Indeed, Respondents seemingly do not contest that Claimant would have been in the course and scope of his employment when the alleged injuries occurred. Instead, Respondents contend that Claimant’s alleged injuries and need for treatment did not “arise out of” his employment related duties on December 2022, January 5, 2023, March 2, 2023 or January 9, 2024.. Thus, while there is substantial evidence to support a conclusion that Claimant’s alleged injury occurred in the course of his employment, the question of whether his injury and need for medical treatment “arose out of” his employment must be resolved before the injury can be deemed compensable.

E. The “arising out of” element required to prove a compensable injury is narrow and requires a claimant to show a causal connection between his/her employment and the injury such that the injury has its origins in work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term “arising out of” calls for examination of the causal connection or nexus between the conditions and obligations of employment and the claimant’s injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

F. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claimed injury is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). In this case, the persuasive evidence demonstrates that

Claimant sought treatment for “dull and aching” discomfort in his “mid-thoracic, posterior cervical (neck) left mid thoracic and right sacroiliac” regions of the spine and intermittent tingling of the left hand of two weeks duration. No report of injury or trauma was given. Indeed, no mechanism of injury appears in this treatment record. As the time, Claimant demonstrated a positive Bakody and cervical compression test. Claimant has known pre-existing degenerative changes in his cervical spine and the record reflects that he had sought treatment for neck pain prior to December 28, 2022. Based upon the evidence presented, the ALJ is not convinced that Claimant’s neck pain, as reported to Dr. Carter on January 4, 2023, was related to shoveling snow in December 2022. Rather, the ALJ is convinced that Claimant’s neck and left shoulder/arm/hand symptoms in 2022/2023 were related to the natural progression of his pre-existing degenerative disc disease.

G. The evidence presented persuades the ALJ that late 2022 early 2023 symptoms were temporary in nature and required limited care. The evidence is uncontroverted that while undergoing care from NP Dazzo, Dr. Lundgren and Dr. Roberts, Claimant was able to perform his usual duties as custodian for Employer. Furthermore, the ALJ is convinced that after Claimant received his injection and returning to his base-line level of pain shortly after, there is no persuasive medical evidence to establish that Claimant was experiencing any neck/left arm problems/symptoms, which required medical treatment in the weeks and months leading up to the January 9, 2024, incident. Because the ALJ is convinced that Claimant’s neck and left arm/hand symptoms during the late 2022 and early 2023 time period were related to the natural progression of his underlying pre-existing degenerative disc disease, his claim for workers compensation benefits under W.C. No. 5-270-216-001 for a January 5, 2023 date of injury is denied and dismissed.

H. Regarding the January 9, 2024, incident, Claimant testified that he injured his neck and left shoulder while shoveling snow. At first blush, the lack of history reflecting any trauma in Dr. Robert’s January 12, 2024 record causes some concern as to whether Claimant sustained an injury. However, the First Report filed by Employer reflects that on January 10, 2024, Claimant reported to Employer he injured himself while shoveling snow on January 9, 2024. The First Report is supported by Claimant’s testimony. Dr. Chen posits that Claimant did not sustain an injury on January 9, 2024, based, in part, on a lack of a documented history of such an occurrence in Dr. Robert’s January 12, 2024 office note. It is unclear why Dr. Robert’s note does not reflect an injury. However, Dr. Centi’s office note reflects a history similar to that contained in the First Report. Dr. Chen did not have the First Report when formulating his opinions concerning causation, which leads the ALJ to question the strength of Dr. Chen’s causality opinions.

I. While the ALJ is persuaded that Claimant suffers from pre-existing degenerative disc disease (DDD) in the cervical spine, which has caused symptoms and the need for treatment in the past, the presence of a pre-existing condition “does not disqualify a claimant from receiving workers compensation benefits.” *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a

claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

J. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing his job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent, as asserted by Respondents in this case, the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Based upon the evidence presented, the ALJ is convinced that the onset of symptoms and the subsequent disability Claimant experienced on and after January 9, 2024, arose as a consequence of an industrially based aggravation of his underlying DDD caused by 8-10 hours of snow removal duties for Employer. Here, the evidence presented supports a conclusion that Claimant's symptoms prior to January 9, 2024, were less severe as evidenced by the facts that Claimant performed his usual job duties and received no significant care after his injection on March 29, 2023. There are over nine months between the date of the injection and the January 9, 2024 incident. Furthermore, Dr. Hammers testified that Claimant's symptoms had changed after January 9, 2024 to include weakness in the left triceps, which had not been documented previously. When combining the January 9, 2024 MOI, which could be expected to exacerbate Claimant's underlying DDD condition with the change in Claimant's triceps strength, Dr. Hammers concluded that Claimant' symptoms and need for treatment were related to snow shoveling. Then ALJ finds/concludes that Dr. Hammer's opinions are more credible and persuasive than those to the contrary. Based upon a totality of the evidence, it is concluded that Claimant has proven, by a preponderance of the evidence, that he sustained a compensable aggravation of his pre-existing DDD on January 9, 2024, as a result of shoveling snow.

Claimant's Entitlement to Medical Benefits and the Relatedness of the C6-7 ACDF Procedure Performed by Dr. Hammers

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

as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970*);* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

L. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, a Claimant must not only establish that the proposed treatment he/she is seeking is related to his industrial injury, but is also that it is reasonable and necessary. *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)*. In this case, Claimant has proven, by a preponderance of the evidence, that he sustained a compensable aggravation of his pre-existing DDD and that this aggravation is the proximate cause of Claimant's need for medical treatment, including his need for a C6-7 ACDF procedure. The aforementioned care, as rendered by Dr. Centi, was necessary to assess and treat, i.e. relieve Claimant from the acute effects of his injury. The specialist referral to Dr. Hammers and the subsequent C6-7 surgery were reasonable and necessary to decompress Claimant's demonstrated spinal nerve impingement in light of his ongoing pain and functional decline despite conservative efforts to improve both.[6] Accordingly, the ALJ concludes that the treatment Claimant obtained to cure and relieve him of the effects his injury, including the treatment obtained through Drs. Centi and Hammers, in addition to their referrals, was reasonable, necessary and related to the January 9, 2024 compensable aggravation of Claimant's pre-existing DDD.

Claimant's Entitlement to Temporary Disability Benefits

M. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P. 3d 872 (Colo. App. 2001).

N. The term disability connotes two elements: (1) Medical incapacity

[6] Both Dr. Chen and Dr. Hammers agreed that the C6-7 ACDF procedure was reasonable and necessary.

evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions, which impair the Claimant's ability effectively, and properly to perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co*., 964 P.2d 595 (Colo. App. 1998).

O. Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with *C.R.S. § 8-42-105(3)(d)(I)* which states: "The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

P. In this case, the evidence presented persuades the ALJ that the imposition of work restrictions precluded Claimant from returning to work in his usual capacity and that Respondents have not elected to accommodate Claimant's restrictions by offering modified duty after his March 13, 2024 ACDF surgery. Claimant has proven that his inability to resume his prior work was a direct consequence of the January 9, 2024 industrial aggravation of his pre-existing DDD. However, Claimant failed to present sufficient evidence to answer the question regarding the extent of his actual wage loss as a result to entitle him to temporary total disability. Indeed, the wage records reveal that while Claimant may have lost any extra duty hours or overtime pay after March 13, 2024, he appears to have been paid pursuant to his contract of employment with the School District. (See CHE 12, p. 153). Accordingly, while the ALJ is convinced that Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. he may only be entitled, at best, to temporary partial disability benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). It is therefore concluded that Claimant has failed to prove, by a preponderance of the evidence, that he is entitled to temporary total disability benefits beginning March 13, 2024 and ongoing.

Claimant's Average Weekly Wage

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

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

S. As found, the best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity at the time of his industrial injury

comes from the wage records admitted into evidence. Careful review of the wage records from July 1, 2023, through January 31, 2024 reveals Claimant earned wages totaling $39,466.53. Dividing this figure by the 215 days in the above time period and multiplying by 7 days gives an AWW of $1,284.96. (CHE 12, p. 153).

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on January 9, 2024. Claimant's request for benefits under W.C. 5-270-216-001 for a January 5, 2023 date of injury is denied and dismissed.

2. Respondents are liable for Claimant's treatment by and under Dr. Centi and Dr. Hammers, including the March 13, 2024 C6-7 ACDF surgery performed by Dr. Hammers. Payment for all medical treatment shall be in accordance with the Colorado workers' compensation medical benefits fee schedule.

3. Claimant's request for temporary total disability benefits extending from March 13, 2024 and ongoing is denied and dismissed.

4. Claimant's average weekly wage (AWW) is $1,284.96.

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

DATED: November 25, 2024.

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80920

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

Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on June 15, 2023.

2. Whether Claimant established by a preponderance of the evidence entitlement to reasonable and necessary medical benefits.

3. Whether Claimant established by a preponderance of the evidence entitlement to temporary disability benefits.

4. Determination of Claimant's average weekly wage.

5. Whether Respondents established by a preponderance of the evidence that Claimant was responsible for termination of his employment on or about February 9, 2024 and the resulting wage loss from termination.

FINDINGS OF FACT

1. Claimant, a 37-year-old attorney, began working for Employer on December 19, 2022. At the time he was hired, Claimant had been an attorney for approximately five years.

2. On June 15, 2023, Claimant, in the course of his employment with Employer, was scheduled to defend a deposition at the office of a plaintiff's attorney in downtown Denver. For various reasons, the deposition did not occur, and Claimant and the plaintiff's attorney got into an altercation. Claimant testified and later informed others that the plaintiff's attorney placed his hands on Claimant's head and shoulder and shoved Claimant into a door. Claimant testified that he lost his balance when he was pushed, twisting his right knee. He also claimed his head, neck and shoulders struck the door. Claimant alleges he sustained injuries to his head, neck, upper back, shoulders, and right knee, as well as significant mental injuries, including post-traumatic stress disorder (PTSD) and depression.

3. After the altercation, Claimant left the office and walked to his car, which he testified was parked two miles away. En route, he called his supervisor to report the incident. Claimant then drove to the Denver Police Department, and gave a written statement regarding the incident, which Claimant completed at 2:12 p.m., on June 15, 2023. (Ex. 6). Claimant reported that he pulled out his phone before being pushed, and recorded the altercation. Claimant reported to the police that his left shoulder, head, and neck struck the door. (Ex. 6).

4. Approximately two hours later, Claimant sought medical treatment at Concentra, where he saw Thomas Corson, D.O., at 4:11 p.m. (Ex. 10, p. 118). At this initial appointment on June 15, 2023, Claimant reported sustaining injuries to his neck, head, shoulders, and knee. He indicated that during the altercation, his head was forcefully rotated to the side, he struck his head on the door, and that he stepped awkwardly causing him to injure his right knee. Claimant reported pain in his right lateral neck and trapezius, and requested a referral to speak with a psychological counselor regarding the event. On examination, Dr. Corson noted that Claimant's right knee appeared to have some swelling, but noted no other objective signs of an injury. On examination of Claimant's cervical spine, Claimant reported tenderness, and Dr. Corson noted a right sided muscle spasms, but no other objective signs of an injury. No examination or specific complaints regarding Claimant's right shoulder were documented. Dr. Corson recommended work restrictions, including working from home, and remaining seated 95% of the day. (Ex. 10). At the time, Claimant was already working from home full-time.

5. On July 6, 2023, Claimant filed a claim for workers' compensation, reporting injuries to his head, neck, upper back, and shoulders. Although the report does not mention Claimant's knee, it appears a portion of the form where injuries are listed was cut-off. As such, the ALJ makes no findings as to whether Claimant reported his alleged knee injury at that time. (Ex. 10).

6. Between July 20, 2023, and March 6, 2024, Claimant saw Dr. Corson twelve times. During this time, Claimant continued to report neck and upper back issues with little improvement. Dr. Corson periodically documented examinations of Claimant's cervical spine, thoracic spine, and right knee. With the exception of February 7, 2023, when he documented right sided cervical and thoracic spasms, the only findings on Claimant's cervical and thoracic examinations were subjective reports of tenderness. During this approximately seven-month period, Dr. Corson did not document any subjective complaints, examinations, diagnoses, or recommend treatment for Claimant's right shoulder. By August 7, 2023, Claimant reported that his right knee was nearly resolved, and Dr. Corson noted that Claimant had a normal gait. Claimant began reporting knee pain again in October 2023, after driving for work. On November 15, 2023, Dr. Corson recommended an MRI of Claimant's right knee, although this was not performed. (Ex. 10).

7. Claimant also reported having ongoing anxiety from the altercation, which included difficulty sleeping, nightmares, difficulty concentrating, and memory loss. Dr. Corson diagnosed Claimant with PTSD, acute cervical strain, back strain, and right knee sprain. He referred Claimant for physical therapy, massage, a psychological consultation, chiropractic care, and started Claimant on cyclobenzaprine (a muscle relaxant). In August 2023, Claimant reported to Dr. Corson that Employer had started doubling his caseload in retaliation against him, leading Dr. Corson to restricting Claimant's work to no more than 8 hours per day. (Ex. 10).

8. Based on Dr. Corson's recommendations, Claimant attended six sessions of massage therapy at Concentra from August 1, 2023, through October 25, 2023. He attended nine chiropractic visits between December 12, 2023, and March 7, 2024, and

twenty-two physical therapy visits between July 20, 2023 and December 20, 2023. (Ex. 12, 13, 14 and F). None of these modalities provided significant reported relief.

9. On August 2, 2023, Claimant saw Brent Van Dorsten, Ph.D., a clinical psychologist for evaluation on referral from Dr. Corson. Claimant reported to Dr. Van Dorsten that his right knee had healed, but that he continued to experience pain in his neck and shoulder area. Claimant also reported significant emotional issues that he attributed to the incident, including difficulty sleeping, difficulty focusing, being worried that Employer was "mad at him," and having anxiety in public. Dr. Van Dorsten diagnosed Claimant with adjustment disorder with anxiety and depression, and recommended six sessions of psychotherapy. (Ex. G).

10. On October 2, 2023, Respondents sent Claimant to Stephen Moe, M.D., for a psychiatric independent medical examination (IME). Claimant reported to Dr. Moe that he believed the plaintiff's attorney physically attacked him because he turned on his camera. Claimant reported that the attorney pushed his left shoulder and head, causing him to be off balance, twisting his *left* knee, and falling back into a glass door, striking his head, neck, and shoulders. Claimant reported to Dr. Moe that he initially had weakness in his arms and could not lift them above his head. Claimant also reported experiencing crying episodes for days after the altercation. Claimant indicated to Dr. Moe that Employer had increased his case load, until he complained to human resources which resulted in his case load being reduced. (Ex. C).

11. Based on his evaluation, Dr. Moe opined that the June 15, 2023 altercation "falls exceedingly short of the type of trauma necessary for the diagnosis of PTSD, which requires exposure to death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence." Dr. Moe opined that the severity and duration of Claimant's reported psychological symptoms was disproportionate to what Claimant described occurring on June 15, 2023, and that his condition was likely the result of Claimant's pre-existing mental make-up, rather than the incident itself. (Ex. C). Dr. Moe's opinions are credible and persuasive.

12. Claimant returned to Dr. Van Dorsten on December 12, 2023, reporting a general escalation of his psychological symptoms. Dr. Van Dorsten opined that Claimant's most probable diagnosis was adjustment disorder with anxiety and depression. He indicated that he would defer to Dr. Corson's decision with respect to psychological counseling. (Ex. 11).

13. On December 28, 2023, Claimant underwent an IME with Mark Paz, M.D., at Respondents' request. Following the IME, Dr. Paz obtained Claimant's medical records, and ultimately issued a report on February 27, 2024. During the IME, Dr. Paz examined Claimant's shoulders, neck, cervical and thoracic spine, and right knee. Based on his review of records and examination, he opined that it was not likely that Claimant had a medical diagnosis causally related to the June 15, 2023 incident. He noted that Claimant's reported symptoms were subjective, and not correlated to Claimant's reported mechanism of injury. (Ex. D).

14. On February 6, 2024, Claimant began psychological counseling with Jennifer Jo Kim, Ph.D., at Colorado Center for Clinical Excellence. Claimant reported to Dr. Kim that he was experiencing the same psychological symptoms he reported to Dr. Moe. Claimant also reported to Dr. Kim that he felt that some of his injuries were the result of him wearing a backpack at the time of the altercation, the first time this detail was documented by any health care provider. Dr. Kim diagnosed Claimant with PTSD, which she attributed to the June 15, 2023 altercation. As part of her evaluation, Dr. Kim administered the Posttraumatic Stress Disorder Checklist-Specific (PCL-S) test, on which Claimant endorsed a total score of 75, which she characterized as "significantly worse than the cut-off score of 44 considered to be PTSD positive for the general population." (Ex. 11).

15. Claimant continued to see Dr. Kim through April 2024. On April 24, 2024, Dr. Kim assigned Claimant an 11% permanent psychological impairment rating. The impairment worksheet completed by Dr. Kim includes assessments of Claimant's function in nineteen different areas under the categories of activities of daily living; social functioning; thinking, concentration, and judgment; and adaptation to stress. Dr. Kim determined that Claimant's function in every area was minimally to moderately impaired, and that no area of his functioning was unimpaired. (Ex. 11). Of note, Dr. Kim is not level II accredited for Workers' Compensation, and her impairment rating is considered advisory. Dr. Kim's assessment and diagnosis, which are based on Claimant's subjective self-report, is not credible or persuasive.

16. Claimant returned to Dr. Corson on April 3, 2024, primarily to review the IME reports of Dr. Moe and Dr. Paz. Dr. Corson disagreed with Dr. Paz's opinions, implying that Dr. Paz misunderstood the mechanism of injury. For the first time, Dr. Corson documented that Claimant was wearing a full backpack and that he stumbled backward four to five feet, into a wall causing Claimant's neck and upper back to "snap back" at an angle, and twisting his right knee in the process. On examination, Dr. Corson noted diffuse tenderness in the right knee, cervical spine, and left rhomboid. Despite the relatively benign examinations, and no documented examination of Claimant's right shoulder, Dr. Corson ordered MRIs of Claimant's cervical spine, thoracic spine, right knee, and right shoulder. (Ex. 10). At hearing, Dr. Corson testified that he ordered the MRIs in response to Dr. Paz's opinions, but did not articulate a cogent medical basis for the studies.

17. On May 22, 2024, the MRIs Dr. Corson ordered were performed. The cervical MRI showed severe bilateral foraminal narrowing caused by joint arthropathy (*i.e.*, arthritis). In the thoracic spine, Claimant also has diffuse narrowing of the spinal canal due to congenitally short pedicles, and epidural lipomatosis. (Ex. 19). In the right knee, Claimant has mild chondral fissuring over the patella, and distal quadriceps tendinosis. (Ex. 19). The right shoulder MRI showed an articular surface partial tear of the supraspinatus tendon. (Ex. 19).

18. Claimant returned to Dr. Corson on May 29, 2024. At that time, Dr. Corson documented his first examination of Claimant's right shoulder, indicating that Claimant had tenderness in the shoulder, and no muscle weakness. Examination of Claimant's cervical and thoracic spine was normal. Claimant's right knee was diffusely tender over the anterolateral and anteromedial aspects. Based on his examination and the MRI

findings, Dr. Corson referred Claimant to an orthopedic specialist for his shoulder. (Ex. 10). Dr. Corson continued to recommend Claimant's work restrictions, to include working only 8 hours per day.

19. On July 4, 2024, Claimant saw John Sacha, D.O., at Concentra on referral from Dr. Corson. Dr. Sacha noted that Claimant had seen a Dr. Delarosa for a shoulder surgery consult, although no record from Dr. Delarosa was offered or admitted into evidence. Dr. Sacha indicated that Claimant reported that on June 15, 2023 Claimant fell backward and fell down hitting his right hand, right side of his head, and left shoulder. As part of his review of systems, Dr. Sacha indicated that Claimant denied depression, nervousness, mood swings, or sleep disturbances. Dr. Sacha opined that Claimant sustained injuries to his cervical spine, right knee, and right shoulder as a result of the June 15, 2023 altercation. He recommended a right C3-C6 facet joint injection, and a right knee viscosupplementation injection. (Ex. 18). Dr. Sacha's report contains no credible explanation as to how Claimant sustained the alleged injuries, and is not persuasive.

Witness Testimony

Claimant

20. Claimant testified that the June 15, 2023 deposition took place in downtown Denver, and that due to a downtown Denver parade, he was forced to park two miles away and walk to the deposition. He testified that the deposition was ultimately postponed leading the opposing attorney to insult him, tell him to leave, and later physically assault him.

21. Claimant stated that during the June 15, 2023, incident, he felt insulted. He testified that the attorney wore athletic attire, which he interpreted as preparation for a fight, and he believed there was an immediate threat to his safety. Instead of defending himself, he chose to record the incident on his phone held near his right thigh. He stated the attorney lunged at him, made contact with his shoulder and head, and pushed him into a glass and metal door. Claimant indicated he was wearing a 30-to-50-pound backpack containing a mobile hotspot, laptop, and evidence book. Claimant is six feet tall, 200 pounds, while the attorney is of similar height and weighs 160-170 pounds.

22. Claimant then walked to his car, filed a police report at the Denver Police Department, and sought medical attention from Dr. Corson at Concentra. He reported experiencing shoulder and knee pain after the adrenaline wore off. Additionally, Claimant testified that he immediately began crying, and had crying episodes for days after the event. Claimant testified that he continues to experience symptoms in his neck, upper back, knee, and shoulder, as well as PTSD issues.

23. Claimant began working for Employer in December 2022 with a $96,000 annual salary, later receiving a merit raise. He was terminated in February 2024. Claimant believes the termination was retaliation for the June 15, 2023 altercation and his workers' compensation claim. He testified that prior to June 15, 2023, he exceeded expectations in an evaluation and managed a caseload of about ninety cases. After that date, his

workload increased due to staffing shortages. He was later placed on probation for performance issues and terminated in February 2024.

24. In July 2024, Claimant obtained new employment at a higher salary. Although he remains under work restrictions (*i.e.*, 8-hour days and work-from-home approval), he now works in an office five days per week and is able to perform his job duties.

25. Claimant testified that before the June 15, 2023, altercation, he enjoyed skiing, snowboarding, cycling, and weightlifting but has not returned to these activities.

[Redacted, hereinafter MH]

26. MH[Redacted] was a colleague of Claimant's at Employer, and became his supervisor in July 2023. MH[Redacted] testified that she did not become aware of the June 15, 2023 altercation, or Claimant's work restrictions until December 2023, when Claimant requested 30 days leave without sufficient notice. Throughout Claimant's tenure with Employer, Employer's office was "100 percent remote," so MH[Redacted] had not met Claimant in person.

27. MH[Redacted] described Claimant's work performance as problematic, noting quality issues and complaints from colleagues, clients, and mediators. These issues included poor case handling, failure to meet company metrics, and unprofessional behavior. She testified that Claimant was placed on probation in October 2023 due to these performance issues and inappropriate billing practices. Despite weekly guidance meetings, his performance did not improve.

28. MH[Redacted] testified that entry-level attorneys, such as Claimant, typically are assigned smaller, less complicated cases, and a case load of 60 to 70 cases or more. She testified that in late September or October 2023, Claimant's case load was reduced and he was not assigned any new cases through his termination in February 2024. During his probationary term, MH[Redacted] testified that Claimant's case load was reduced to about thirty cases. After being placed on probation, Claimant lodged multiple complaints, but did not indicate that any of the issues he was having were the result of his alleged work injuries.

29. In conjunction with Claimant's probation, MH[Redacted] prepared a job performance evaluation on October 26, 2023. The report details issues with Claimant's job performance both before and after June 15, 2023, including failure to perform work on assigned cases for months after being assigned, failure to prepare required reports, internal complaints from the claims department, and failure to properly post time. (Ex. 4). MH[Redacted] testified that Claimant's job performance did not improve after being placed on probation, and he was eventually terminated in February 2024.

Thomas Corson, M.D.

30. Dr. Corson testified at hearing and was admitted as an expert in emergency and occupational medicine. Dr. Corson attributes multiple injuries to the incident, including Claimant's neck, back, shoulder, right knee, and PTSD. He initially recommended Claimant work from home because of Claimant's perception that there was tension in his workplace, and that Claimant indicated he was being "targeted" at work for filing a workers' compensation claim. Dr. Corson later imposed a work restriction of 8 hours per day, based on Claimant's report that his work load was doubling, and that work was detracting from his ability to attend treatment sessions. (No credible evidence was admitted indicating that Claimant's ability to attend treatment sessions was affected by his work). Dr. Corson attributed Claimant's psychological issues to the June 15, 2023 altercation, but indicated his diagnosis of PTSD was based on Dr. Kim's diagnosis.

31. Dr. Corson testified that at the April 3, 2024 visit, he and Claimant re-enacted the June 15, 2023 altercation based on Claimant's description of the event. He testified that Claimant reported wearing a full backpack and that he stumbled backward and "slammed" into a wall four to five feet behind him. Dr. Corson also indicated that he believed there were chairs or other objects that caused Claimant to twist and pivot on his right knee. Dr. Corson did not provide a credible explanation as to why these details were not documented prior to April 3, 2024. Based on Claimant's explanation of the mechanism of injury, Dr. Corson opined that the backpack contributed to Claimant's neck, upper back, and shoulder conditions.

32. Dr. Corson testified that Claimant's right shoulder MRI showed a 50% tear of the supraspinatus tendon, which Dr. Corson attributed to the June 15, 2023 incident based on Claimant's description of the injury (including wearing a large backpack) and his report of no prior shoulder issues. Dr. Corson stated he saw no alternative cause for the tendon tear, but did not offer a credible explanation for how the injury could have occurred during the June 15, 2023 incident, even accepting Claimant's account.

33. He indicated that the findings on Claimant's cervical and thoracic MRI were due to degenerative and congenital changes, and not related to the June 15, 2023 incident, although he testified that the conditions could have been aggravated. He also indicated that the right knee MRI findings, including interstitial tearing of the quadriceps tendon, was more likely a chronic degenerative condition, although the June 15, 2023 incident could have aggravated it. Dr. Corson's opinions regarding Claimant's cervical, thoracic, and knee conditions were not persuasive.

34. Dr. Corson testified that he reviewed the video of the June 15, 2023 incident, and found it difficult to get any assessment of the Claimant's movement during the video. As a result, Dr. Corson's opinions regarding the cause of Claimant's alleged injuries are based on the Claimant's reports to him of how the incident occurred. Dr. Corson's opinions regarding the mechanisms for Claimant's alleged injuries were not persuasive.

Stephen Moe, M.D.

35. Dr. Moe testified at hearing and was admitted as an expert witness in psychiatry. Dr. Moe testified consistent with the written report of his November 2, 2023 IME with Claimant. Dr. Moe testified that PTSD is a set of psychiatric symptoms that arises from unusually severe trauma. According to the Diagnostic and Statistical Manual (5th Edition) ("DSM-5"), qualifying trauma for PTSD includes an event that causes severe physical harm, involves sexual assault, kidnapping, torture, and other similar events. He testified that in his opinion, the June 15, 2023 altercation Claimant experienced would not meet the criteria for PTSD. Dr. Moe testified that in his view, Claimant "sees himself as subject to maltreatment by a world that is not hospitable to him."

36. In discussing Dr. Kim's evaluations, Dr. Moe indicated that Claimant's PCL-S test score of 75 out of eighty was uncommonly high, even for a severely injured veteran, and noted that the test is conducted through an interview and based on the patient's self-report of symptoms. He found the high score to be evidence of maladaptive personality traits, rather than PTSD. In discussing the impairment rating assigned by Dr. Kim, Dr. Moe noted that the impairment worksheet is also based on patient self-reporting, and is not objective.

37. Dr. Moe opined that the June 15, 2023 incident did not cause PTSD and that it did not cause Claimant any psychiatric symptoms. He indicated "If you're attributing psychiatric symptoms to this event, you – there's another reason for that attribution. It is not truly causal." The implication of Dr. Moe's testimony is that the June 15, 2023 was not sufficiently traumatic to cause psychiatric/psychological symptoms of the severity and duration Claimant alleges. He indicated that while Claimant's reported functional impairment may be genuine, the cause is not the June 15, 2023 event, and that he did not believe Claimant had any psychiatric work injury. He further indicated that Claimant's struggles with work would be a more probable cause of symptoms than the June 15, 2023 event. Dr. Moe's opinions were credible and persuasive.

Mark Paz, M.D.

38. Dr. Paz was admitted as an expert in internal medicine and testified at hearing consistent with his February 27, 2024 report. In addition, Dr. Paz reviewed the May 2022 MRI studies of Claimant's right shoulder, cervical spine, thoracic spine, and right knee.

39. Regarding Claimant's right shoulder, Dr. Paz testified that the MRI demonstrated evidence of fraying of the supraspinatus tendon and not a complete or acute tear. He further indicated that a supraspinatus tear typically results from a lifting injury, and is not consistent with the described mechanism of the June 15, 2023 incident.

40. With respect to Claimant's right knee, the MRI showed a degenerative change on the backside of Claimant's knee cap where chondral tissue has worn away, and distal quadriceps tendinosis. He opined that the chondral condition is typically the result of a direct trauma to the knee cap, which is inconsistent with Claimant's reported mechanism of twisting his right knee. The MRI showed that Claimant's quadriceps tendinosis is

located above the knee cap, but on examination, Claimant's reported symptoms were below the patella. This indicated to Dr. Paz that Claimant's reported knee symptoms are not from the quadriceps tendinosis, which he characterized as an incidental finding unrelated to the June 15, 2023 altercation. He further indicated that if Claimant had sustained a knee injury during the altercation, it would be unlikely he could have walked two miles back to his vehicle.

41. The MRI of Claimant's cervical spine showed left-sided nerve root impingement caused by degenerative changes. Dr. Paz testified that he saw no evidence of an acute injury, or aggravation of the degenerative condition. Claimant's thoracic MRI showed narrowing of the canal that is the result of congenitally short pedicles and epidural lipomatosis, neither of which are causally related to the June 15, 2023 altercation. Dr. Paz indicated that his examination demonstrated no objective findings in either the cervical or thoracic spine, and only subjective complaints of diffuse pain. Dr. Paz's opinions were credible and persuasive.

Video of the June 15, 2023 Altercation

42. As noted above, Claimant recorded a portion of the altercation on his cell phone with audio. (Ex. 15). Claimant testified, and reported to various providers, and the Denver Police, that plaintiff's attorney physically assaulted him after he began recording their interaction on his cell phone, and that the majority of the altercation was recorded.[1] From which, the ALJ concludes that any physical contact was captured in the recording of the altercation. Claimant held the phone such the parties were not completely visible, although it is apparent that Claimant is standing on a doormat next to a glass door. The video demonstrates that during the altercation, the attorneys exchanged words, and plaintiff's attorney may have touched Claimant in some way. At no point in the video does it appear that Claimant was pushed into a wall or door, or contacted with any significant force. Nothing in the video is consistent with Claimant's report to Dr. Corson that he was shoved four-to-five feet into a wall, that he stumbled, or lost his balance. (During the video, Claimant appears to be standing within one-foot of the door). Similarly, in the video, Claimant did not react as if he was injured or that forcible contact occurred. At one point in the video, Claimant stated to the other attorney "you already touched me once," and threatened to sue the plaintiff's attorney, but did not indicate he was injured in any way. The video is inconsistent with Claimant's testimony, and his reports to health care providers that he was pushed into a door with force significant enough to cause the physical injuries Claimant alleges he sustained.

43. Claimant's account of the incident is also internally inconsistent. Claimant reported to Dr. Corson and others that his neck, shoulders, and head came into contact with the door. At hearing, Claimant testified he was wearing a 30 to 50-pound backpack at the time of the incident. However, Claimant did not report to any provider that he was wearing a backpack until February 6, 2024, when he first saw Dr. Kim. The ALJ does not find credible Dr. Corson's testimony that Claimant reported wearing a large backpack at his

[1] See Ex. 10, p. 119 (Corson Report); Ex. 6, p. 68 (Police Report); Ex. C, p. BGAM 00225 (Moe Report); Ex. 11, p. 290 (Kim Report); Ex. D, p. BGMA614 (Paz Report)

initial visit, because it is not documented in any of Dr. Corson's records until April 3, 2024. Moreover, if Claimant were, in fact, wearing such a backpack, more likely than not, it would have prevented at least his shoulders and neck from contacting the door. The ALJ finds, more likely than not, that Claimant was not pushed with sufficient force to cause any injury, and that his account of the altercation is inconsistent with the video evidence.

44. Similarly, Claimant's claims of a severe emotional trauma as a result of the altercation are not credible. Claimant began requesting psychological counseling less than three hours after the altercation. Claimant's testimony that he was crying immediately after the altercation and for days after is similarly not credible. Claimant did not report any episodes of crying to Dr. Corson or Dr. Van Dorsten, and his first report was to Dr. Moe on November 2, 2023. Moreover, much of Claimant's reports of psychological trauma are related to his perceived work load, rather than the altercation on June 15, 2023. The ALJ finds credible Dr. Moe's opinion that Claimant does not meet the diagnostic criteria for PTSD, and that Claimant sustained no psychiatric or psychological 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 proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals Off*., 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 Off.*, 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 Off.*, 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 Off.*, 5 P.3d 385 (Colo. App. 2000).

Compensability

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

"Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co.*, 812 P.2d at 641; *Hubbard v. City Market*, W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). Whether the claimant has sustained his burden to prove the requisite nexus between the injury and the employment is one of fact for resolution by the ALJ. *Triad Painting Co.,* 812 P.2d at 641.

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury as a result of the June 15, 2023 altercation. Although an altercation did occur, Claimant's account of the incident is inconsistent with the video he recorded. Claimant's contemporaneous reaction to the altercation, as evidenced by the video, does not demonstrate that the other attorney struck or pushed Claimant with sufficient force to cause the physical injuries Claimant alleges. Moreover, Claimant's recorded reaction to the altercation is inconsistent with sustaining injuries to his neck, back, shoulder, and knee.

Dr. Corson's opinions regarding causation are based primarily on Claimant's account of the altercation, which the ALJ does not find credible. Moreover, although he saw Claimant approximately twelve times, Dr. Corson's examinations did not reflect objective evidence consistent with the injuries Claimant claims to have sustained. The

ALJ credits the opinion of Dr. Paz that Claimant did not sustain a physical injury as a result of the altercation. The ALJ also finds credible Dr. Moe's opinion that Claimant did not sustain a psychiatric injury as a result of the altercation. The ALJ does not find credible Dr. Kim's diagnosis of PTSD, which is again based on Claimant's self-report of symptoms, rather than objective evidence. Accordingly, the ALJ concludes that Claimant has failed to meet his burden to prove that, more likely than not, the June 15, 2023 altercation resulted in a compensable injury.

Medical Benefits

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

Because Claimant has failed to establish that he sustained a compensable injury, Claimant has failed to establish an entitlement to medical benefits.

Temporary Total Disability and Average Weekly Wage

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* §§ 8-42-103 (1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004). 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).

Because Claimant has failed to establish that he sustained a compensable injury, Claimant has failed to establish an entitlement to temporary total disability benefits. The issue of average weekly wage is moot.

Responsibility for Termination

The Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Indus.*

Claim Appeals Off., 187 P.3d 1129 (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re Davis*, W.C. No. 4-631-681 (ICAO Apr. 24, 2006). "Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment." *Gilmore*, 187 P.3d at 1132. "Generally, the question of whether the claimant acted volitionally, and therefore is 'responsible' for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances." *Gonzales v. Indus. Comm'n*, 740 P.2d 999 (Colo. 1987); *In re Olaes*, W.C. No. 4-782-977 (ICAO Apr. 12, 2011).

Because Claimant has failed to establish that he sustained a compensable injury or entitlement to temporary total disability benefits, the issue of responsibility for termination is moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer.

2. Claimant's claim for workers' compensation benefits is DENIED and DISMISSED.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 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: November 25, 2024

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