OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-206-617-003

STIPULATIONS

1. Claimant is not at Maximum Medical Improvement for her left knee injury.

2. Dr. Simpson, an ATP, has recommended a second series of PRP (Platelet Rich Plasma) injections which has been denied based on an opinion of physician advisor, Dr. Hewitt.

3. Dr. Simpson has requested a repeat series of physical therapy, but [Redacted, hereinafter PL] has denied that medical care based on a report from its physician advisor, Dr. Hewitt.

4. After appeal by Dr. Simpson's office, PL[Redacted] again denied authorization for repeat PRP injections based on Dr. Ciccone's record review as well as Dr. Hewitt's report.

5. PL[Redacted] denied Dr. Simpson's request for prior authorization of additional physical therapy sessions based on the opinions of Drs. Ciccone and Hewitt.

ISSUES

- Did Claimant prove by a preponderance of the evidence that a PRP knee injection was causally related to her admitted February 8, 2022 industrial accident?

- If Claimant proved the requisite causal nexus, was the treatment reasonably necessary?

- Whether the physical therapy prescribed by Dr. Simpson is reasonable, necessary and related?

FINDINGS OF FACT

1. Claimant worked for Employer as an LPN (Licensed Practical Nurse) on February 8, 2022. On that date, she was in an exam room preparing the room for the next patient. As she was doing that, her shoe caught the bottom of a wheelchair scale. She fell forward to the floor, striking her left knee and scraping her right shoulder. She felt pain in her left knee and right shoulder. She reported the injury to her employer on the same day. The claim was admitted.

2. Claimant sought treatment with Concentra in Colorado Springs. She was seen by Dr. George Johnson on February 10, 2022. In her history, she described her fall and injuring her left knee and right shoulder. Claimant also gave a history of bilateral arthritis in both knees and that she received injections as needed. The last injection prior to this initial visit was 1 year prior. Claimant also indicated that she took meloxicam 15 mg. one time per day for pain. In his examination of the Claimant, Dr. Johnson noted that she was tender around the left knee and right shoulder and had bruising on her right shoulder. His diagnoses were contusion of her left knee and sprain of her right shoulder. He also wrote, "This appears to be a fairly minor injury". Dr. Johnson provided restrictions of no lifting greater than 5 pounds, pushing and pulling up to 10 pounds and up to 1 hour of walking or standing.

3. When she returned to work, she was doing sedentary work using the telephone. When she did the sedentary work, the pain lessened since she was not on her feet 8 hours per day. During this time, she was also receiving physical therapy which helped with pain and swelling.

4. With respect to the meloxicam, Claimant testified that Dr. Johnson prescribed this medication. This is contrary to Dr. Johnson's note on the following visit on February 11, 2022 that Mobic (meloxicam) was prescribed by Claimant's PCM[1]. Based on this information, I find that the need for meloxicam was related to Claimant's preexisting arthritis.

5. The Claimant did have previous radiologic evidence of arthritis in the left knee, but did not have treatment or symptoms in the left knee. Claimant testified that it did not affect her ability to work for her previous employer, Kaiser Permanente. She did not have any treatment for her left knee prior to this work injury. Claimant did have treatment for her right knee prior to this incident, including injections to the right knee.

6. On March 11, 2022, Claimant requested that she be allowed to return to work full duty to see if she had improved enough to work her regular duty job and that the claim be closed. However, she testified that she was not able to do her full duty without pain. So, she sought treatment with P.A. Sheunk via telemedicine on May 5, 2022. She was again prescribed physical therapy. Claimant was also given restrictions of 5 pounds lifting, 10 pounds pushing and pulling and alternating sitting and standing/walking every 15 minutes. P.A. Sheunk ordered an MRI of Claimant's knee.

7. Claimant saw Dr. Peterson on May 27, 2022. He restricted Claimant from working on that date. Claimant has not worked since then. Dr. Peterson recommended an MRI of the knee.

8. Claimant began treating with Dr. Simpson on May 16, 2022. Claimant was referred to him by P.A. Gottus at Concentra. Dr. Simpson recommended a steroid injection at this visit.

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[1] Presumably, the abbreviation "PCM" refers to patient care management in this context.

9. Claimant testified that she had three PRP (Platelet Rich Plasma) injections that reduced the pain from an 8 out of 10 to 3 out of 10. The interval between the shots were months apart instead of 2 weeks apart. Even though the shots were not properly/timely administered, Claimant said they did help. Based on this, Dr. Simpson recommended another series of 3 PRP injections to be done weeks apart instead of months apart as previously done for the initial series. Dr. Simpson also recommended physical therapy (PT). Claimant testified that the prior PT improved her symptoms.

10. Claimant prefers the PRP injections in order to avoid a 6th surgery in the span of around 15 months. She would also like to prolong the need for a total knee replacement, which has been recommended.

11. Claimant was seen by Dr. Failinger for an IME on July 13, 2023 at the request of Respondents. Dr. Failinger issued an initial report on July 13, 2023 and an addendum on August 6, 2023.

12. The Claimant disputed some on the statements that Dr. Failinger included in his report. Specifically, he recited a statement attributed to Dr. Ciccone that Claimant admitted to having symptomatic arthritis in the left knee that required injections. The Claimant specifically denied this statement from Dr. Ciccone. She also denied some of Dr. Failinger's direct statements including a statement that Claimant had pain in the left knee over the years.

13. It is Dr. Failinger's opinion that the need for PRP injections and physical therapy is due to the Claimant's preexisting osteoarthritis and not due to the incident on February 8, 2022. Exhibit A, pp. 34 – 35.

14. Although Claimant initially denied any treatment or symptoms in her left knee, the Kaiser Permanente records do indicate that she was seen on September 22, 2017 for various conditions including left knee pain. Exhibit H, p. 300. Claimant continued to deny pain in left knee despite the medical evidence to the contrary. Additionally, Kaiser documented pain in left knee requiring a cane due to overcompensating for right knee pain. Exhibit H, p. 309.

15. Another inconsistency between the medical records and Claimant's testimony is with respect to Dr. Johnson's initial encounter with the Claimant. He states in his report that "She has a past medical history of bilateral arthritis in both knees. She gets injections in her knees when needed. The last was 1 year ago. She take meloxicam 15 mg 1 time per day for pain". Exhibit D, p. 46.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v.*

City of Aurora, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a).

The existence of a preexisting condition does not disqualify a claim for compensation if an industrial accident aggravates, accelerates, or combines with the preexisting condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

The claimant must prove entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

After reviewing the evidence presented, the ALJ concludes need for PRP injections and physical therapy is not causally related to the work injury and is due to Claimant's preexisting arthritis in the left knee. Having determined that Claimant did not prove the requisite causal nexus, the question of reasonableness and necessity is moot. With respect to the inconsistencies between the medical records from Kaiser and Dr. Johnson and the testimony of the Claimant, I credit the medical records as accurate over the testimony of the Claimant to the contrary.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits for PRP and physical therapy 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 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 2, 2023

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant was an "employee" of Respondent within the meaning of § 8-40-202(a)(2), C.R.S., on August 13, 2022.

2. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of employment with Respondent on August 13, 2022.

3. If compensable, whether Claimant established by a preponderance of the evidence entitlement to reasonable and necessary medical benefits causally related to a work-related injury.

4. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability (TTD) benefits due to a work-related injury from August 13, 2022 until terminated pursuant to statute, rule, or further order. .

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

6. If Claimant proves a compensable injury, whether Claimant established by a preponderance of the evidence the penalties should be imposed pursuant to 7 CCR 1101-3, Rule 3-6, for Respondent's alleged failure obtain and maintain workers' compensation insurance.

7. Whether Claimant has established by a preponderance of the evidence that penalties should be imposed against Respondent for alleged violation of § 8-72-114, C.R.S.

FINDINGS OF FACT

1. Claimant is a 71-year-old woman who has been a dog groomer for more than thirty years. Respondent operates a dog grooming business (the "[Redacted, hereinafter DS]"). In June 2022, Claimant approached [Redacted, hereinafter PB] – Respondent's owner – about working at the DS[Redacted] to supplement her income. On or about June 25, 2022, Claimant and PB[Redacted] agreed Claimant would work at the DS[Redacted] on days Claimant was available, and that Claimant would only groom small dogs. Claimant began working at the DS[Redacted] on August 4, 2022. At the time, Claimant was also working for a different dog grooming business but stopped that position at the beginning of August 2022. Neither party presented evidence that they executed a written contract or other written document setting forth the terms of Claimant's employment status.

2. On August 13, 2022, Claimant was grooming a dog at an adjustable-height grooming table, using a foot pedal that raised and lowered the table. Claimant was sitting on a stool with her knees and feet under the table. While lowering the grooming table,

Claimant's foot became stuck, and the tabletop lowered onto the top of her right knee, trapping it. As a result, Claimant sustained injuries to her knee and right ankle. With the assistance of the other groomers at the DS[Redacted], Claimant freed herself from the table, and rolled off the stool to the floor, landing on her left side. In the process, Claimant sustained a laceration to her left elbow.

3. Respondent was aware of Claimant's injury when it occurred. Respondent did not initiate a workers' compensation claim, and did not provide Claimant with a list of designated providers as required by § 8-43-404 (5)(a)(I)(A), C.R.S. Because Respondent did not provide the required list of designated providers, the right of selection of authorized treating provider (ATP), passed to Claimant.

4. On August 13, 2022, Claimant saw Elizabeth Rosenberg, M.D., at Care Now Urgent Care for an injury to her right knee, right quadriceps muscle, and laceration of her left elbow. Claimant reported the incident as it occurred, including reporting falling to her left side to extricate herself from the table. Claimant reported no other injured body parts. Dr. Rosenberg diagnosed Claimant with a right knee sprain. She noted Claimant had undergone knee replacement surgery in August 2021, and referred Claimant to Robert Thomas, M.D., at Panorama Orthopedics for further evaluation. Dr. Rosenberg recommended a temporary work restriction, limiting Claimant to "primarily seated work." (Ex. 9). Claimant, by her actions, selected Care Now and Dr. Rosenberg as her ATP.

5. On August 22, 2022, Claimant returned to Care Now, and saw Ramon Fernandez-Valle, M.D. Claimant reported her right ankle was also injured, after being forced into dorsiflexion by the grooming table. Dr. Fernandez-Valle noted swelling and slight bruising of the right ankle, and added a diagnosis of right ankle sprain. Dr. Fernandez-Valle indicated Claimant was able to ambulate without the need for a cane, and continued Claimant's temporary work restriction of "primarily seated work" until September 6, 2022. (Ex. 10).

6. On August 24, 2022, Claimant saw Robert Thomas, M.D., at Panorama Orthopedics. Dr. Thomas performed Claimant's total right knee replacement in August 2021. Claimant reported the injury to her right knee and left elbow. Dr. Thomas noted swelling and ecchymosis of the right knee, and the contusion to Claimant's left elbow. Claimant's right knee range of motion was 0-100 degrees. He indicated Claimant sustained no structural damage to the right knee or surrounding structures. He recommended "activities as tolerated" and low-impact exercises, but did not recommend work restrictions. (Ex. 14). By virtue of Dr. Rosenberg's referral, Dr. Thomas was also an ATP.

7. Claimant's next documented medical examination was on January 25, 2023, when she returned to Dr. Thomas. Claimant reported her right knee pain was unchanged, and described it as occurring intermittently, rating a 4/10 in severity, and exacerbated by standing and stretching. Claimant also reported pain while walking. On examination, Dr. Thomas noted an indentation in Claimant's right knee, a "divot in the soft tissue;" tenderness over the joint adjacent to the patella and quadriceps tendon, and a mildly antalgic gait. Claimant's right knee range of motion was noted to be 1-130 degrees. Dr.

Thomas opined Claimant's right knee indentation was likely permanent, and would likely remain painful, but would not cause a true functional deficit. He placed Claimant at maximum medical improvement (MMI), and encouraged Claimant to maintain leg strength. (Ex. 14).

8. On February 3, 2023, Claimant saw Celia Elias, M.D., for an annual wellness examination, at Optima Medical, in Tucson Arizona. Claimant reported her right knee injury. Claimant also reported, for the first time, experiencing left hip and lower back pain. On examination, Dr. Elias noted Claimant's spine was non-tender, and that she had normal range of motion and strength of the upper and lower extremities, with no joint enlargement or tenderness. She noted a large 3-4 cm linear area of indentation on Claimant's right knee, above the patella, with no swelling and good range of motion. Dr. Elias ordered x-rays of Claimant's left hip and lumbar spine, and prescribed ciprofloxacin (an antibiotic) for lower back pain. (Ex. 12). No credible evidence was admitted indicating Claimant's ATPs referred Claimant to Dr. Elias for treatment of her work-related injuries.

9. Claimant underwent a left hip x-ray as ordered by Dr. Elias on February 17, 2023. The x-ray did not show fractures or dislocations, and demonstrated the hip joint spaces were well-preserved. (Ex. 16).

10. On April 27, 2023, Claimant apparently saw Stephen L. Curtin, M.D., at Tucson Orthopaedic Institute. No narrative medical records from this date were offered or admitted into evidence. The exhibits submitted by Claimant indicate a lumbar MRI was ordered for a suspected diagnosis of lumbar radiculopathy. Although two images which appear to be from an MRI were included in Claimant's Exhibit 18, no radiologist report or other interpretation of the images was offered or admitted into evidence. Claimant was apparently then referred for physical therapy for a diagnosis of lumbar spondylosis without myelopathy or radiculopathy. (Ex. 18). No credible evidence was admitted indicating Claimant's ATPs referred her to Dr. Curtin for treatment of her work-related injuries.

11. The record contains no credible evidence that Claimant's complaints of lower back pain or left hip pain, or any treatment or evaluation for those conditions, are causally related to her August 13, 2022 injuries.

12. The treatment Claimant received from ATPs at Care Now Urgent Care and Panorama Orthopedics was reasonable and necessary to cure or relieve the effects of her industrial injury.

13. The treatment Claimant received from Dr. Elias and Dr. Curtain was not authorized, and was not reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

14. As the result of her injuries, Claimant incurred the following medical expenses for treatment that was authorized, reasonable, and necessary to cure or relieve the effects of her industrial injury:

Provider	Date of Treatment	Expenses	Exhibit
Care Now Urgent Care	8/13/22	$456.00	Ex. 11
Care Now Urgent Care	8/22/22	$336.00	Ex. 11
Panorama Orthopedics	8/24/22	$204.00	Ex. 15
Panorama Orthopedics	1/25/23	$204.00	Ex. 15
TOTAL		**$1,200.00**	

Claimant's Employment Status and Wages

15. Claimant worked a total of eight days for Respondent from August 4, 2022 to August 20, 2022. During this time, Claimant performed dog grooming services for Respondent's clients, who were booked and scheduled through Respondent. On the days Claimant was scheduled to work, Respondent required her to be at the dog spa at 9:00 a.m., and to provide services for the times scheduled by Respondent.

16. Respondent employed three people, including PB[Redacted] and two dog groomers (other than Claimant). Respondent considered Claimant an independent contractor. Respondent paid the employed groomers 50% of the amount charged for services, plus tips, and provided the grooming tools necessary to perform their duties. Claimant was paid 55% of the of the amount charged by Respondent for services she performed, plus tips. Respondent provided some equipment necessary for Claimant to work as a dog groomer, including a grooming table, tubs for bathing, towels, shampoo, and blow dryers. Claimant supplied her own grooming tools, including combs, clippers, and blades.

17. Claimant received two paychecks from Respondent. On August 18, 2022, Respondent paid Claimant $376.75 for work performed from August 4 to August 6, 2022. On September 1, 2022, Respondent paid Claimant $665.75 for the period of August 11, 2022 through August 20, 2022. The September 1, 2022 paycheck included tips Claimant received totaling $181.75, and was paid through Respondent's payroll system. (Ex. 20). In total, Claimant received gross wages and tips of $1,042.50 during her 17 days of working for Respondent. Claimant's average weekly wage (AWW) during this time was $429.24 per week (*i.e.*, $1,042.50 ÷ 17 days = $61.32 per day x 7 days = $429.24 per week).

Claimant's Return to Work

18. Claimant worked two days for Respondent the week after her injuries, but did not return after August 20, 2022. Claimant testified she could not continue working due to her pain, and that she remains unable to work.

19. After the August 13, 2022 incident, Claimant consulted with an attorney regarding a possible lawsuit against the table manufacturer. Thereafter, on advice of her attorney, Claimant elected not to return to work for Respondent. PB[Redacted] credibly testified that Claimant told her she was advised not to return to work by her attorney. Claimant testified she did not return to work based on the advice of her physicians and her attorney. However, the admitted medical records demonstrate that Claimant's treating providers provided work restrictions limiting her to "primarily seated work," but did not impose a total work restriction. It was unclear from Claimant's testimony whether she believes she is currently unable to work due to her work-related knee, ankle, and elbow injuries, or whether her inability to return is due to her non-work-related lower back and hip complaints. Notwithstanding, Claimant's testimony that she was and is unable to work as a dog groomer is not credible.

20. No credible evidence was admitted indicating Claimant's treating health care providers have expressed the opinion that Claimant is unable to work as a result of the injuries she sustained on August 13, 2022.

21. At the time of Claimant's injury, Respondent did not have workers' compensation insurance. PB[Redacted] testified that Respondent has since obtained workers' compensation insurance, but did not know if Claimant's claim was covered under that insurance. No insurer entered an appearance, and none of Claimant's medical expenses have been paid by either Respondent or a workers' compensation insurance carrier. The ALJ finds that Respondent did not have the required workers' compensation insurance for coverage of Claimant's 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 must prove 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 ALJ's exclusive domain. *Univ. Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The 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).

Employee vs. Independent Contractor Status

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 trade, occupation, profession or business related to the service performed." Claimant has established by a preponderance of the evidence that she provided services to Respondent and was paid for her services. Thus, Claimant is a presumptive employee under § 8-40-202 (2)(a), C.R.S.

A putative employer may establish a presumed employee is an independent contractor by proving the presence of some or all of the nine criteria enumerated in § 8-40-202(2)(b)(II), C.R.S., to prove independence. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). These nine criteria are that the putative employer must 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.

§ 8-40-202(2)(b)(II), C.R.S.

If the parties have executed a written document that demonstrates by a preponderance of the evidence the existence of these factors, the document creates a rebuttable presumption of an independent contractor relationship between the parties. § 8-40-202 (2)(b)(III) and (IV), C.R.S. Neither party presented evidence that the parties executed such written document.

Because the evidence establishes Claimant was performing services for pay, and there is no written document establishing Claimant's independent contractor status, the burden of proof rests upon Respondent to rebut the presumption that Claimant was an employee. *Baker v.* BV *Properties, LLC,* W.C. No. 4-618-214 (ICAO, Aug. 25, 2006). The question of whether respondent has overcome the presumption is one of fact for the ALJ. *Nelson v. Indus. Claim Appeals Office, supra; Indus. Claim Appeals Office v. Softrock Geological Servs., Inc*., 325 P.3d 560 (Colo. 2015)

The statute creates a "balancing test," but does not establish a precise number or combination of factors that must be established to rebut the presumption of employment. *Allen v. America's Best Carpet Cleaning Serv.*, W.C. No. 4-776-542 (ICAO Dec. 1, 2009). C.R.S. *Donahue v. Danley Investigations*, W.C. No. 4-698-600 (ICAO Feb. 5, 2008). The ALJ must determine "as a matter of fact whether or not particular factors are present, and ultimately, whether the claimant is an employee or independent contractor based on the totality of the evidence concerning the statutory factors." *Allen, supra*.

Respondent has failed to prove by a preponderance of the evidence that Claimant was not an "employee" within the meaning of the Colorado Workers' Compensation Act. Respondent did not establish that the parties maintained separate and distinct business operations. Instead, Claimant's services were incorporated into Respondent's business operations in several respects. Claimant provided grooming services for Respondent's clients, and was assigned clients by Respondent. Respondent dictated the time of performance, by requiring Claimant on the days she worked to be at the DS[Redacted] at 9:00 a.m., and working at the time clients were scheduled by Respondent. Respondent provided some tools, and supplies, such as blow dryers, towels, and shampoo. Respondent paid Claimant in the same manner as her other employees, although at a higher percentage of revenues generated. Respondent also paid Claimant personally,

and at least once through Respondent's payroll system. Finally, no credible evidence was admitted indicating that Respondent could only terminate Claimant for violating the terms of a contract, or failed to meet results specified in a contract.

Several factors weigh in favor of independent contractor status, such as Claimant's long history as a professional dog groomer, providing her own grooming tools, requiring no training or supervision in dog grooming. These factors, however, are more indicative of Claimant's experience in the field than her employment status. The ALJ finds these factors outweighed by the other factors discussed above. Based on the totality of the evidence, the ALJ concludes that Claimant was an "employee" and not an independent contractor.

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

Claimant has established by the preponderance of the evidence that she sustained compensable injuries to her right knee, right ankle, and left elbow arising out of the course of her employment with Respondent, while grooming a dog. Respondent admitted the August 13, 2022 incident occurred, and that Claimant sustained some injury. Claimant immediately sought treatment for her knee and elbow, and had objective evidence of injury to her right ankle at her August 22, 2022 visit at Care Now.

Claimant has failed to establish by a preponderance of the evidence that she sustained compensable injuries to her lower back or left hip arising out of the course of her employment with Respondent. Claimant did not report injuries to her hip or lower back in her four visits with her ATPs. The first documented complaints of lower back and hip pain were to Claimant's primary care doctor, Dr. Elias, on February 3, 2023, nearly six months after her initial injuries. Notwithstanding the delay in reporting symptoms, none of Claimant's treating providers have credibly opined that Claimant's hip and lower back conditions are causally-related to the August 13, 2022 incident.

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).

Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits to cure or relieve the effects of her industrial injury. Specifically, Claimant is entitled to medical benefits directed toward her right knee, right ankle, and left elbow injuries. Respondent is responsible for and shall pay general medical benefits that are reasonable and necessary to cure or relieve the effects of Claimant's August 13, 2022 industrial injuries to her right knee, right ankle, and left elbow. Because Claimant has been placed at MMI, these expenses are limited to the authorized, reasonable, and necessary treatment rendered to date.

Claimant's Medical Expenses to Date

Claimant's post-MMI treatment is not compensable because the treatment was not "authorized." Compensable medical treatment must be reasonable, necessary, and provided by an "authorized" treating physician. "Authorization" is a physician's legal status to treat an industrial injury at the respondents' expense. *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Indus. Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997).

The Act requires respondents to provide injured workers with a list of at least four designated treatment providers. § 8-43-404(5)(a)(I)(A), C.R.S. WCRP 8-2 (A)(2) clarifies that the designated provider list must be provided within seven (7) business days after the employer has notice of the injury. If the employer does not timely designate an ATP, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987), *see also* W.C.R.P. 8-2 (E). An employer is notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

Once an ATP is established, a claimant may not seek treatment from other physicians without obtaining permission from respondents or an ALJ, unless the new physician is in the chain of referral from an ATP. If a claimant does change physicians, respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999)

Respondent had knowledge of Claimant's injury on August 13, 2022, and did not provide a designated provider list. Consequently, the right of selection passed to Claimant. Claimant pursued treatment from Dr. Rosenberg and Care Now Urgent Care.

Therefore, Dr. Rosenberg was Claimant's ATP. Dr. Thomas was also an ATP by virtue of Dr. Rosenberg's referral. Claimant's treatment at Care Now on August 13, 2022, and August 22, 2022, and from Dr. Thomas on August 24, 2022 and January 25, 2023 was "authorized" under the Act. The care was also reasonable and necessary to cure or relieve the effects of her industrial injury.

No credible evidence was admitted showing that Dr. Rosenberg or Dr. Thomas referred Claimant to Dr. Elias or Dr. Curtin, or recommended additional medical care or diagnostic studies after Claimant reached MMI on January 25, 2023. There is no evidence that Claimant sought or obtained permission to change ATP, or to designate Dr. Elias or Dr. Curtin authorized as an ATP. Consequently, any care Claimant received after January 25, 2023, was not "authorized," or compensable.

Respondent shall pay for medical treatment Claimant received from Care Now on August 13, 2022, and August 22, 2022, and from Panorama Orthopedics on August 24, 2022 and January 25, 2023.

Temporary Total Disability

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* Sections 8-42-103 (1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by 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).

The Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006).

"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. Industrial Commission*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Construction Co.*, W.C. No. 4-487-966 (November 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAP, April 12, 2011). Implicit in the termination statutes is a requirement that Respondents prove Claimant committed an "act" which formed the basis for his termination. Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Claimant has failed to establish by a preponderance of the evidence an entitlement to TTD benefits. Claimant returned to work for Employer for one week after the August 13, 2022 injuries, and did not return after August 20, 2022. No evidence was presented that Respondent terminated Claimant. Claimant testified she did not return based on the recommendations of her physicians, and because she could not physically perform the job. However, that testimony is not credible, and Claimant offered no cogent explanation as to why she could not perform her job as a dog groomer due to her knee, ankle, or elbow. The medical evidence indicates that none of Claimant's treating physicians placed work restrictions upon her that would prevent her from performing her work as a dog groomer. The only restriction was that Claimant should work from a seated position. Claimant offered no evidence that she Claimant has failed to establish that she sustained a disability which prevented her from performing or returning to her employment as a dog groomer after August 20, 2022.

The ALJ also finds that Claimant voluntarily terminated her employment on August 20, 2022 for reasons other than the physical limitations placed upon her by the work-related injury. Specifically, Claimant did not return to work based on the advice of her attorneys because she intended to pursue a civil suit against the manufacturer of the dog grooming table. Claimant was, therefore, responsible for her own termination, and the resulting loss in income after August 20, 2022.

Average Weekly Wage

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

As found, Claimant's average weekly wage at the time of injury was $429.24.

Penalties

Failure to Maintain Insurance

Claimant seeks penalties for Respondents' failure to maintain workers' compensation insurance but has not specified the statute for those penalties. The references in Claimant's Application for Hearing and Position Statement to "7 CCR 1101-3-6," are presumed to refer to 7 CCR 1101-3, Rule 3-6. WCRP Rule 3-6 provides guidance to Director of the Division of Workers' Compensation (DOWC) on imposing fines after determining an employer failed to obtain or maintain workers' compensation insurance under § 8-43-409, C.R.S. While this section allows the Director to impose fines, it does not grant a claimant the right to assert a penalty claim.

Section 8-43-409 (1) outlines the Director's role in investigating and notifying employers about their default in insurance obligations, and it authorizes the Director to set the issue for a hearing according to established procedures. Under the statute, "it is the role of the director to conduct a preliminary investigation and determine whether the matter should be set for a hearing before an ALJ on the issue of whether to impose a fine for an employer's failure to maintain workers' compensation insurance." *Gant v. Etcetera*, W.C. No. 4-586-030 (ICAO Sep. 17, 2004). It is the Directors' prerogative to decide if a hearing is "necessary." Therefore, the actions authorized by § 8-43-409 (1), are for the Director, and not an ALJ at the request of a claimant. *Id.*

Furthermore, fines imposed under § 8-43-409 (or 7 CCR 1101-3, Rule 3-6) "are not intended as a remedy to injured claimants whose employer is uninsured." *Gant, supra*. Instead, fines collected by the Director are go to the state treasurer, who credits the "total amount of the fine to the Colorado uninsured employer fund…." § 8-43-409 (7), C.R.S. Because neither 7-CCR 1101-3, Rule 3-6, nor § 8-43-409, C.R.S., authorize a claimant to seek penalties for a respondent's failure to maintain workers' compensation insurance, Claimant's request for penalties is denied.

Alleged Violation of § 8-72-114, C.R.S.

Claimant has not shown a basis for imposing of penalties for an alleged violation of § 8-72-114, C.R.S. The "penalty" Claimant asserts does not arise under the Workers' Compensation Act, and may not be imposed by ALJ or the DOWC.

ALJs are limited to the "jurisdiction, powers, duties, and authority" provided by the Workers' Compensation Act. *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905, 908 (Colo. App. 1995). The Act confines that authority to issues arising under articles 40 to 47 of title 8. § 8-43-207 (1), C.R.S. Section 8-43-304 (1), C.R.S., authorizes penalties in cases involving violations of articles 40 to 47 of title 8; failure to perform lawfully imposed duties within the time prescribed the director[1], and failure to obey lawful orders, judgments, or decrees. Because an ALJ lacks authority to create a "penalty" where none exists, penalties not enumerated in the Act may not be imposed. *See Baker v. Weld County School Dist.*, W.C. No. 4-993-326-004 (ICAO April 20, 2021).

[1] The "director" is the director of the DOWC. See § 8-40-201 (5), C.R.S.

Claimant does not seek a penalty under the Workers' Compensation Act. Instead, Claimant alleges Respondent "willfully misclassified [Claimant's] arrangement, pursuant to C.R.S. § 8-72-114." Section 8-72-114 falls under the Colorado Employment Security Act,[2] which is administered by the Colorado Division of Unemployment Insurance ("DOUI") and its Director. § 8-71-102, C.R.S.

Section 8-72-114 allows the DOUI Director[3] to investigate misclassification complaints and impose fines for willful misclassification of employees in the context of unemployment insurance. § 8-72-114 (3)(e)(III)(a), C.R.S. The statute does not confer authority on the DOWC or its Director in any respect. It also does not permit a workers' compensation claimant to recover penalties for its alleged violation. Claimant has cited no authority otherwise. Because the requested "penalty" is not within articles 40 to 47 of title 8, the ALJ may not impose it.

Claimant's request to refer the matter "to the Director of Workers' Compensation for further review or [to] obtain permission from the Director to allow the [ALJ] to enforce this matter pursuant to § 8-72-114(IV)(c)(9)[4]," is unfounded. The ALJ presumes Claimant seeks this remedy under § 8-72-114 (9)(a), which states: "Subject to the approval of the executive director, the director may enter into an interagency agreement with the department of law for assistance in enforcing this section." The "director" referenced is the DOUI Director, not the DOWC Director. The statute does not empower the DOWC or Director to provide such permission. Moreover, the Office of Administrative Courts is not part of the department of law. The statute does not provide Claimant a remedy.

Claimant's request for "penalties" for an alleged violation of § 8-72-114, C.R.S. under the Colorado Employment Security Act is denied.

ORDER

It is therefore ordered that:

1. Claimant was an "employee" of Respondent within the meaning of the Colorado Workers' Compensation Act on August 13 2022.

2. Claimant sustained compensable injuries to her right knee, right ankle, and left elbow arising out of the course of her employment with Respondent on August 13, 2022.

3. Respondent shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's industrial injuries to her right knee, right ankle, and left elbow.

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[2] § 8-70-101, C.R.S.

[3] The "division" and "director" referenced in § 8-72-114 are the Division of Unemployment Insurance, § 8-70-103 (8), C.R.S.; and its director, § 8-72-114 (2)(c), C.R.S.

[4] Section 8-72-114(IV)(c)(9), C.R.S., does not exist.

4. Respondent shall pay for the medical treatment Claimant received from Care Now Urgent Care on August 13, 2022 and August 22, 2022, and for treatment Claimant received from Panorama Orthopedics on August 24, 2022, and January 24, 2023.

5. Claimant's request for temporary disability benefits is denied.

6. Claimant's average weekly wage at the time of her injury was $429.24.

7. Claimant's request for penalties under 7 CCR 1101-3, Rule 3-6, for failure to maintain workers' compensation insurance is denied.

8. Claimant's request for penalties for alleged non-compliance with § 8-72-114, C.R.S., is denied.

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

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

DATED: November 2, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-173-570-001

ISSUES

I. Whether Respondent has proven by clear and convincing evidence that the Division Independent Medical Examination (DIME) physician, Dr. Hugh Macaulay, was incorrect in his opinion regarding causation, maximum medical improvement (MMI) and permanent impairment.

II. If Respondent overcame the DIME physician's opinion with regard to MMI, what is the MMI date?

III. If Respondent overcame the DIME physician's opinion with regard to permanent impairment, what is the permanent partial disability benefit?

IV. Whether Claimant has shown by a preponderance of the evidence she is entitled to medical benefits reasonably necessary and related to the injury of March 24, 2021.

V. Whether Claimant has shown by a preponderance of the evidence that she is entitled to reimbursement of out of pocket medical expenses.

VI. Whether Claimant has shown by a preponderance of the evidence that she is entitled to interest of eight percent (8%) for benefits which were not paid when due, pursuant to Sec. 8-43-410(2), C.R.S. in accordance with D.O.W.C. Rule 12.

PROCEDURAL HISTORY

Respondent filed a Final Admission of Liability (FAL) on August 18, 2022 pursuant to Dr. O'Toole's report of August 9, 2022, which provided a 0% impairment and admitted to reasonably necessary and related maintenance medical benefits. The parties disclosed that Claimant objected to the FAL and applied for a DIME. Dr. Macaulay was selected to perform the DIME.

Respondents filed an Application for Hearing on March 21, 2023 on issues which included overcoming the DIME physician's MMI and impairment determinations.

Claimant filed a Response to Application for Hearing on issues that included upholding the DIME physician's opinions, medical benefits, permanent partial disability benefits, out of pocket expenses and interest on benefits which were not paid when due.

Claimant requested this ALJ take judicial notice of the Rules of Evidence, specifically W.C.R.P. Rule 12; the Medical Treatment Guidelines for Traumatic Brain Injury, W.C.R.P. Rule 17, Exhibit 2A; and the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*), Chapter 3, Table 53.

FINDINGS OF FACT

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

A. Generally

1. Claimant was 35 years old at the time of the hearing and reported she had worked as a Social Caseworker II for Employer since 2016. She would travel to and from clients' homes, complete reports, enter data into their system and prepare letters for the court, among other things.

2. On March 24, 2021, towards the end of the day, Claimant was coming to a stop when she was rear-ended in a motor vehicle accident (MVA) in the course and scope of her employment with Employer. This was not contested. The police was called to the scene of the accident in Fort Collins, off of Prospect and Riverside, and the parties exchanged insurance information.

3. While still at the scene of the accident, Claimant called her supervisor to report the accident. Claimant also called the client, she was in-route to, to cancel the appointment. Claimant took pictures of the vehicle to document the damage. Claimant was driving a Toyota Rav 4 and was hit by a Chevrolet Trailblazer. Claimant then proceeded to her mother's house in Greeley, CO, where her child was being cared for. At the time of the accident Claimant had been living with her partner in Windsor, Colorado.

4. Claimant reported that she went to the emergency room that evening, after the accident, because she had developed a headache and felt her speech was becoming slurred. She felt her processing was beginning to slow down, her neck was hurting and parts of her back were also hurting. She was also having visual disturbances though not quite double vision or blurred vision. She also reported having light sensitivity. She did not believe she had any loss of consciousness and the airbags did not deploy during the accident.

B. Prior Work Injury

5. The Division of Workers' Compensation file shows Claimant was injured on July 31, 2012. It listed the lumbar spine and sacral as body parts injured.

6. Claimant was placed at MMI as of February 14, 2013 by Dr. Gregory Reichhardt of Rehabilitation Associates of Colorado. He noted Claimant continued to have some low back pain on the right side and was taking medication (Tramadol). Her knee pain had resolved. Dr. Reichhardt provided a diagnosis of low back pain caused by bending over and picking up a basket with an MRI demonstrating a mild L4-5 disc bulge without nerve root impingement and mild right foraminal encroachment. He recommended maintenance medical benefits including follow ups, laboratory tests and medication, which she was taking one tablet up to three times a week.

7. A Final Admission of Liability was filed on April 2, 2013 for 8% whole person impairment paying an amount of $13,176.03 at $239.40 per week for 55 weeks.

8. On February 16, 2015 Dr. Reichhardt noted that Claimant may require greater than the two years of maintenance care previously anticipated.

9. On May 23, 2017 Claimant was seen at the UCHealth Internal Medicine Clinic for back pain and a request for physical therapy.

10. On April 4, 2018 PAC Kathryn Milizio last review Claimant's problem list, which included "back pain, thoracic (midback) -- chronic issue, and the UCHealth ER staff included it in their March 24, 2021 report. They also included, under "Past Medical History," that Claimant had a history of back pain.

11. On January 27, 2019 Claimant had an incident where she had neck pain and a tingling sensation on her right cheek. Claimant was cleared and was advised to see her primary provider. The head and neck CT were negative.

12. No other records were provided in the interim between the last 2019 visit and Claimant's MVA.

C. Medical Records

13. Claimant proceeded to the emergency room (ER) at UCHealth in Greeley, CO on March 24, 2021 where the ER staff documented she complained of headaches, neck pain and low back pain, though her exam was within normal limits, including range of motion. She provided a history of rolling to a stop at approximately 10 miles per hour when she was rear-ended by another vehicle travelling approximately 30 miles per hour. She reported development of diffuse head pain following the MVA as well as neck pain especially to the right lateral aspect of her neck. She also reported feeling nausea right after the crash. Claimant was injected with Norflex, a muscle relaxant, and Ketorolac (Toradol), an inti-inflammatory drug and released.

14. On March 30, 2021 Claimant was seen at ESP, where she reported an MVA consistent with prior history recorded. She was complaining of pain in her head, neck, back and right side of her rib cage. They also noted sensitivity to light, muscle spasms, fatigue, stiffness and tightness, mood changes, insomnia and irritability. At that time, she believed that she had been diagnosed with a concussion and whiplash in the ER but had no structural injuries. She was also complaining of problems sleeping, difficulty with screen time for extended periods, and getting comfortable, with a pain of 5/10 to 8/10. She noted numbness in both hands, around the little finger on the right and around the thumb on the left. She reported pain that was deep, shooting, constant, and sharp with stabbing, throbbing, weakness and numbness. Things that made her pain worse included light, movement, lifting, twisting, sitting, standing, time on screens, and driving. She was provided with myofascial release to the head, neck, shoulders, and back by Kim Schemahorn, LMT.

15. On April 8, 2021 Claimant was evaluated by Dr. Kevin O'Toole of UCHealth Harmony. Dr. O'Toole took a history consistent with Claimant's testimony. She reported symptoms of low back soreness and tightness and developed a headache, upset stomach and tightness in the neck approximately 30 minutes following the accident. She did not want to move a lot, she described muscle spasms and tingling. Claimant reported she continued working though was taking rest breaks as needed and was limiting her screen time. At the time of the exam, she was complaining of light sensitivity, stabbing headache pain behind her eyes, neck stiffness, fatigue, losing track of time, back spasm, swollen limbs, could not feel her ring and small finger, sore shoulder blades, right rib cage soreness, poor sleep, and slow processing. She reported that she normally had an excellent memory and was very quick. She denied having prior work restrictions. She

reported recreational activities of playing softball, dancing, fishing, camping, hiking, and enjoying family and friends.

16. During the visit at UCHealth Harmony, she requested that the lights be turned off in the exam room. On exam, Dr. O'Toole noted that Claimant had some aversion to the light of the otoscope as well as had jerky movements during eye exam. He noted allodynia over the cervical spine musculature and right supraclavicular space, and loss of range of motion. Otherwise she had a normal neurologic exam including a normal Romberg test, though she was withdrawn by the end of the visit. Dr. O'Toole assessed neck pain, headaches above the eye region, photophobia of both eyes, acute bilateral thoracic, low back and rib pain, right hand paresthesia and vestibular equilibrium. He referred claimant for medical massage, biofeedback, and vestibular therapies, as well as for a neuropsychological evaluation with Dr. Gregory Thwaites. He provided work restrictions and medications and commented that Claimant's subjective complaints were greater than expected from a low velocity MVA. He was concerned about symptom magnification and questioned the consistency of the subjective complaints. He specifically noted that "her response to the change in treating provider is a significant red flag for delayed recovery" and that the work relatedness of the injuries were only "tentatively and weakly supported."

17. Claimant was treated by Michelle Hykes, RMT, of Medical Massage of the Rockies, who documented Claimant had a concussion, was sensitive to light, memory loss, headaches, timeless, thought processing, whiplash, cervical pain, mid-back pain, stabbing pain, and pain in her rib region. She noted Claimant had spasms in her lumbar spine, and swelling in her extremities. She recommended further massage treatment.

18. On May 11, 2021, the claimant was seen by neuropsychologist Gregory Thwaites, Ph.D. Claimant reported disequilibrium when standing, which she stated she reported to the ER physician. She reported that she walked very "specifically and deliberately" because her gait was "very off." She described that she experienced light sensitivity and dysarthric speech, both of which began before or upon arrival to the ER, and blurred vision, since the evening of the accident.

19. Dr. Thwaites noted that overall neuropsychological testing at 21 one days was unremarkable other than subtle difficulties with speed processing. Dr. Thwaites opined Claimant would benefit from seeing a clinical psychologist with experience in delayed recovery and who had experience in psychological factors contributing to a medical condition. He noted that "This would assist with differential psychological diagnosis, apportionment, and treatment planning." He stated that diagnosis and treatment of headache and pain complaints were outside his area of expertise and he would defer to the medical team regarding the headache complaints. He did recommend a sleep study and labs outside of the workers compensation system.

20. Dr. Thwaites determined that the claimant did not sustain a concussion in the motor vehicle accident. He certified that he spent one (1) hour reviewing the records and dictating his nine (9) page report.

21. On June 16, 2021 Dr. O'Toole recommended continued medical massage for additional visits.

22. Claimant treated with a chiropractor at Colorado Chiropractic and Sports Injury Specialists beginning June 30, 2021. Dr. Scott Parker diagnosed cervicothoracic and lumbar strain and pain complaints. He treated her with manual traction, soft tissue mobilization, neuromuscular reeducation, and kinesiologic joint mobilization at least through July 2021. He advised to apply ice, take Epson salt baths, be involved in functional activities and home self-management techniques, and recommended further chiropractic care.

23. On July 21, 2021 Claimant was evaluated by Lynn Parry, M.D., a neurologist, at Claimant's request. She recounted the mechanism of injury consistent with Claimant's testimony. On her physical examination she noted findings that were "consistent with a skew deviation[1] or ocular nerve paresis." She also found issues with paracervical musculature, lumbar spine musculature and right sacroiliac joint. She felt that the findings were consistent with a mild traumatic brain injury or vestibular concussion. She noted that Claimant had both cervical and low back strains as well as headaches that had a postconcussive and cervicogenic components.

24. Dr. Parry diagnosed probable brainstem concussion with residual oculomotor and vestibular pathway dysfunction, cervical strain, post-concussive headaches, cervicogenic headaches and low back strain. She recommended radiographs of the cervical and lumbar spines and a brain MRI, an ENT evaluation, neuroptometric evaluation, physical therapy and holding further neuropsychometric evaluation until all of the issues had been addressed. She noted that neuropsychiatric evaluations were not helpful early in recovery from any type of TBI unless there were specific areas of dysfunction that were better identified of specific deficit. Overall function could not be reliably assessed because of recurring injuries.

25. Jason R. Meyer, M.D., of Eye Center of Norther Colorado, documented Claimant was having double vision and light sensitivity, in addition to dizziness, headaches, blurred vision, with possible post-concussion related to the March 24, 2021 accident. Following the eye exam, he recommended Claimant be seen by Dr. Arnold regarding the double vision and possible phoria.[2]

26. Claimant had an audiology evaluation by Rachel White, Au.D. of All About Hearing on August 17, 2021 and was tested with a videonystagmography. She found Claimant had VOR Dysfunction,[3] diagnosed dizziness and giddiness as well as unspecified disorder of vestibular function of the right ear and recommended vestibular therapy.

27. Claimant was evaluated by Blake J. Hyde, M.D. of Alpine Ear, Nose Y Throat and issued a report on August 21, 2021. Dr. Hyde noted that Claimant presented for lingering overt dizziness/vertigo sensation with certain head movements suspicious for BPPV which was not active on exam that day, possibly recently treated as well as generalized imbalance and "on a boat" sensation. He recommended VNG and VEMP test

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[1] This ALJ infers that a skew deviation is a neurological condition characterized by a vertical misalignment of the eyes.

[2] This ALJ understands that "phoria" is a type of eye misalignment or latent deviation of the eyes while the eyes are open and can be caused by mTBI.

[3] Vestibulo-Ocular Reflex Dysfunction.

to clarify peripheral versus central but strongly suspicious for central etiology with her residual symptoms and characteristics.

28. Claimant returned for VEMP[4] testing on September 16, 2021 with Cheryl Hadlock, Au.D., and she found that Claimant had left ear reduced function of the vestibular nerve.

29. On September 22, 2021 Dr. Hyde determined that Claimant had developed dizziness following the MVA, which persisted, consistent with left weakness isolating to the saccule which leads to the type of symptoms she was experiencing like rocking on a boat.

30. Claimant returned to Dr. O'Toole who continued to assess headaches, neck pain, thoracic back pain, vestibular disequilibrium, diplopia (double vision) and alternating exotropia.[5]

31. Claimant proceeded with therapy with Hannah Lamitie, M.S., P.T. of Alpine from September 27, 2021, including balance stability.

32. On November 3, 2021 Dr. O'Toole noted that Claimant continued to take a rest break at least once per day. She continued physical therapy, continue massage therapy and vestibular therapy.

33. Claimant had a CT on November 4, 2021 and read by Dr. Nathan Kim, which showed normal temporal bones.

34. Patrick D. Arnold, M.D. of Eye Center of Norther Colorado noted on November 24, 2021, that Claimant continued to complain of blurry vision, both for near and far vision. His impression was alternating exotropia and convergence insufficiency in both eyes secondary to concussion. He recommended continued orthoptics therapy.

35. On December 1, 2021 Dr. O'Toole was recommending continued massage therapy and would request authorization for additional visits. He continued to diagnose headaches above the eye region, neck, thoracic and lumbar pain, and vestibular disequilibrium.

36. J. Raschbacher, M.D. issued a Rule 16 medical record review report on December 7, 2021. He opined that Claimant did not have any diagnosis related to the MVA and did not require further massage treatment under the work related claim.

37. On February 4, 2022 Dr. O'Toole noted that Claimant was diagnosed with headaches and convergence insufficiency and should continue with computer orthoptics treatment. The following visit on March 29, 2022 he noted that Claimant reported she still had some headaches associated with neck pain and tightness. He noted that she had done well with the central vision tasks but was having difficulty with peripheral vision tasks. He assessed improved headaches above the eye region, improved neck pain and stiffness as well as improving convergence insufficiency. He ordered her to take rest breaks as needed, perform light aerobic exercises daily, and continue with orthoptics with Dr. Arnold.

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[4] Vestibular-evoked myogenic potential testing

[5] This ALJ infers that alternating exotropia is a misalignment of the eyes.

38. Claimant was evaluated by Dr. Arnold on August 2, 2022. He diagnosed her with convergence insufficiency secondary to concussion. He stated that Claimant had improved but had been unable to complete her computer orthoptics. He stated she could discontinue them and restart computer orthoptics if she was having more trouble in the future.

39. On August 9, 2022, Dr. O'Toole placed Claimant at MMI with no impairment and ordered maintenance medical benefits. This exam was done via video over a 15-minute period, with no range of motion (ROM) testing. It also included time to write the actual report.

40. On November 28, 2022 Dr. Hugh Macaulay performed a Division Independent Medical Examination (DIME) of Claimant for consideration of Claimant's complaints, with chief symptoms from the MVA of cervical thoracic and lumbar pain, and vertigo. Dr. Macaulay reviewed the medical records and took a history consistent with Claimant's testimony.

41. Dr. Macaulay documented that Claimant complained of problems thinking, including memory, scattered thinking, and tracking; change in behavior, including a short fuse, lessened focus, sleep difficulties and exhaustion; neck and upper back pain, lower back pain and headaches. She noted that she had extremity numbness and tingling, which resolved with treatment. Dr. Macaulay documented that Claimant had frequent problems with dizziness, slurred speech and memory loss, some degree of motion sickness or vertigo, discomfort in her shoulders and occasional discomfort in her arms, elbows and wrists, in the lower extremities as well extending from the hips to the feet. Claimant reported that she had improvement from the time of her injury but continued to have multiple difficulties.

42. She benefited from physical therapy, massage therapy and chiropractic care, which was ultimately discontinued due to Claimant's lack of noticeable progress. She also benefited from medications and muscle relaxants, ice and heat, which she continues to use, vision therapy, vestibular therapy and a TENS unit.

43. Dr. Macaulay commented that Claimant felt her ATP, Dr. O'Toole, was very perfunctory in his follow up evaluations and dismissive of her complaints, just checking boxes.

44. On exam, Dr. Macaulay noted that Claimant had a somewhat slow gait, but appeared normal, with decreased sensation over the left lateral thigh compatible with meralgia paresthetica, mild paracervical tenderness with functional range of motion, mild parathoracic muscular tenderness, functional lumbar range of motion, mild paralumbar tenderness and an unremarkable Faber's test.

45. Claimant informed Dr. Macaulay that she had moved in with her mother because she could not do all the cooking and cleaning, and pay all her bills. She explained that her co-workers have had to help her, whereas before she was able to do things alone. She noted tightness, achiness, and shooting pains in her lumbar, thoracic, and cervical spine regions. She reported a "dead feeling" in her left thigh for the previous couple months.

46. He specifically cited to the MTGs, Section D.8 which states that "If a patient has persistent symptoms or complaints at 60 days and the initial portion of this guideline has been completed, it is suggested that a referral be made to a neurologist or physiatrist with extensive experience in mTBI treatment."

47. Dr. Macaulay found Claimant "not at MMI," indicating that she needed additional diagnostic evaluations and treatment for her work-related injuries. He recommended a psychological evaluation and impairment rating, a neuropsychological evaluation, and MRI of her brain, a CT of her temporal bone, a neurological consultation for determination of mTBI, an ENT follow-up for determination of etiology of vertigo, an ophthalmology follow-up for her convergence dysfunction and impairment rating, x-rays of the cervical, thoracic, and lumbar spine, and an MRI of those areas if clinically indicated.

48. Bruce Morgenstern, M.D., a neurologist, performed a record review on March 23, 2023 at Respondent's request. He described a concussion as follows:

> A concussion is a subset of mild traumatic brain injury resulting from biomechanically induced physiologic disruption of brain function. Concussion is characterized by the fifth immediate and typically transient onset of cognitive and memory symptoms such as alteration in mental state, confusion, disorientation, or post-traumatic antegrade or retrograde amnesia, typically lasting less than twenty-four hours. Concussion may or may not involve loss of consciousness, and Intracranial imaging and the neurological exam are typically normal.

49. Dr. Morganstern opined that Claimant did not meet the criteria of a concussion. He further stated that it was based on the lack of findings or documentation in the initial presentation at UCHealth and then at the appointment with Dr. O'Toole of April 8, 2021 that described a patient that continued to work, though complained of head pain, neck stiffness fatigue, back spasms, sore shoulder blade, right rib cage soreness and insomnia and slowed mental processing. He attributed Claimant's symptoms to long COVID sequelae sustained some four months or so before the MVA, which is not documented in any of the medical records submitted to this ALJ other than referenced based on information provided by Claimant to other providers.[6] He stated that there was no documentation to support the diagnosis of concussion and disagreed with Dr. Parry's diagnosis. He also opined that Claimant's headaches post-MVA were disproportionate to her initial trauma, and that the whiplash neck pain sustained in the MVA should have resolved within six months.

50. William Boyd, Ph.D. performed a neuropsychological evaluation at Respondent's request, on April 13, 2023, and issued a supplemental report on July 20, 2023. Claimant reported a diffuse pattern of cognitive difficulties including memory problems, difficulties with attention and concentration, and possible confusion. She complained about memory problems, had low tolerance for frustration, did not cope well with stress, and experienced difficulties in attention and/or concentration on her MMPI-3[7]

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[6] This ALJ only found that COVID symptoms were reported to Dr. Thwaites and Dr. Morganstern extrapolated from there.

[7] The MMPI-3 stand for Minnesota Multiphasic Personality Inventory-3. This ALJ infers that it is a tool used by neuropsychologists to assess psychological aspects of a patient's individual personalities and psychopathology.

protocol testing. There were no indications of emotional-internalizing dysfunction, disordered thinking, and maladaptive externalizing. He ultimately opined, based on all testing, that Claimant did not suffer from a concussion based on the lack of medical records documentation, the fact that Claimant did not hit her head and there was no loss of consciousness. He further stated that, even if there were neurocognitive problems that they had resolved by the time Claimant underwent the neuropsychological testing.

51. On May 31, 2023 Dr. Kathleen D'Angelo of Advanced Medical and Forensic Consultants was retained by Respondents to conduct an Independent Medical Evaluation and examination. She provided a lengthy medical records review and provided critique of Claimant's reports of symptoms as well as some commentary regarding discrepancies in the records. For example, she stated that there were contradictions regarding gait discrepancies, noting that "while significant peripheral vertigo may cause gait imbalance, neither Dr. O'Toole's 4/8/21 evaluation nor Dr. Thwaites initial evaluation describe she complaining of significant ongoing vertigo during their evaluations." However, Dr. O'Toole specifically diagnosed vestibular disequilibrium, which this ALJ infers that Claimant was having vestibular problems that caused balance issues. She opined that Claimant was at MMI on August 9, 2022 and only suffered from cervical and thoracic myofascial irritation in the MVA of March 24, 2021, suffered no impairment and that any other conditions, such as the "alleged" post concussive complaints, were not related. Dr. D'Angelo is simply not persuasive in her opinions and the parties likely did not think so either since they did not cite to any portion of her 85 page report in their position statements filed following the hearing.

52. Claimant was evaluated at Claimant's request by Dr. Sander Orent on June 8, 2023. Dr. Orent reviewed the medical records, took a history consistent with Claimant's testimony, and performed a virtual examination of Claimant.[8] He stated that following the accident, Claimant drove to Greeley and her headache became severe. Her family noticed slurred speech so took her to the emergency room, where they gave her medications and patches and released her. He noted that Claimant's symptoms became progressively worse within the next day or so. Claimant reported she felt dismissed by Dr. O'Toole, once Respondents' third party administrator finally contacted her and requested she attend the workers' compensation provider.

53. Claimant reported to Dr. Orent that, despite what the testing performed by Dr. Thwaites showed, she felt a diminution in function, having headaches, visual disturbances with photophobia and diplopia and very fatigued. He documented that, when a headache came on, she had to go into a dark room and take medication and try to sleep. She treated them prophylactically by taking breaks, stretching, and sometimes used caffeine.

54. She continued to have neck pain that would radiate to the 4th and 5th fingers of both hands and paid for massage on her own as it provided some relief. She had ongoing pain between her shoulder blades that has never been evaluated, even with x-rays. She continued to have low back pain accompanied by left lateral thigh numbness,

[8] Dr. Orent's exam was virtual because his wife has just undergone a kidney transplant and was immunocompromised.

and worsened with sitting, standing, and bending. She also complained of sleep difficulties which were much better.

55. Claimant reported to Dr. Orent that, due to the MVA she lost a 10 year relationship because of changes in her personality, and had to rely on her mother for chores, such as cooking and cleaning, because she had trouble both functionally and cognitively. She had been returning to some of her normal activities such as softball, though she took several seasons off. There are multiple other recreational activities that she had to abandon or modify due to her symptoms.

56. He opined that Claimant had serious sequelae of her accident "all of which have been inadequately managed." He felt that she still had an inadequately assessed diagnosis with regard to her closed head injury, that she had ongoing headaches which were posttraumatic migraines and that she had ongoing problems in the cervical, thoracic and lumbar spine, all of which needed to be further addressed. This opinion directly contradicted Respondents' IMEs but were in line with that of the DIME, Dr. Macaulay, and Dr. Parry.

57. Dr. Boyd issued a supplemental records review report on July 20, 2023 but did not change his opinions.

58. Finally, Dr. Parry issued a supplemental record review report on August 10, 2023 commenting that what was clear from her evaluation of [Claimant] that she had suffered an acceleration/deceleration injury and she had findings consistent with whiplash. Dr. Parry also stated as follows:

> … presented to me, shortly after her accident, to Dr. Macaulay, the DIME examiner, and to Dr. Orent as a believable patient with ongoing problems directly related to her automobile accident. The mechanics of the automobile accident were straightforward and reported initially. The patient reported to her different providers that she completely braced herself which even at a low speed would mean that the amount of acceleration and deceleration movement would be applied only to the cervical spine since she braced her body to the extent that she could against the seat with her arms and her right leg. The oblique restraint of the seatbelts, and she was restrained would also account for more torsional component as well to the thoracic and lumbar area as demonstrated by her dominant right shoulder girdle problems when I saw her. The mechanics of the injury and the subsequent complaints are all entirely consistent with a whiplash/mild traumatic brain injury particularly in terms of the headache, of the vestibular and visual tracking abnormalities and the problems with focusing. [Claimant] is a high level functioning woman who has continued to work full time at her job.

59. Dr. Parry opined that Respondent's IME opinions were in error because they relied primarily on the paucity of documentation in the ER records. She stated that the ER, under EMTALA,[9] is obliged to assess patients for acute injuries and determine whether they are acute enough to be admitted. She stated that the ER is not equipped to do a detailed subtle neurologic exam for cognitive deficit, and that if the patient can answer questions, move all four extremities, have a normal Glasgow Coma Scale test,

[9] This ALJ infers that EMTALA stands for Emergency Medical Treatment and Labor Act.

and does not have hyperreflexia they are essentially cleared, but the assessment is NOT a cognitive assessment or an assessment to establish a plan of treatment. Dr. Parry further opined that the ER does not excel, in her experience as a neurologist, in assessing mTBIs. She stated that those who relied on this assessment, did a disservice to Claimant who continued to have visual disturbances, dizziness, and cognitive fluctuations.

60. What is particularly credible and persuasive is Dr. Parry's opinion that Claimant experienced explicit biased based on dismissal of her complaints and inability to take into account her individual presentation of symptoms in the context of her cultural background. As an example, she identified Claimant's "complaint that she had a feeling that she was in a boat appears to have been understood only by Dr. Hyde as a recognizable vestibular abnormality."

61. Dr. Parry further stated that Claimant did not recall everything at impact but remembered hearing a thud but not all the details of movement. She opined that Claimant's ability to perform automatic tasks does not mean that she was mentally completely alert at the time of the accident and the emergency room evaluation did no testing that was documented in terms of memory, concentration or attention other than a Glascow Coma Scale and noting that she did not "lose consciousness."

62. She opined that Claimant's subsequent development of headaches, which have been persistent, and clearly different from her COVID infection, are consistent with both postconcussive migraine as well as a component of cervicogenic headache. She opined that Claimant's vestibular abnormalities, which occurred only after her automobile accident were "pathognomonic for the type of problems following a mild TBI and in and of themselves are consistent with her having sustained a mild head injury."

63. Dr. Parry stated that the sequelae of head injury, including headaches, sleep disorder, sleep apnea, vestibular and visual tracking problems can all occur with normal neuropsychometric testing. She stated that "[P]atients with mild cognitive difficulties after head injury particularly with a high level of education can test within normal limits." She commented that "[I]n fact Dr. Thwaits' (sic.) early evaluation showed some deficits which were cleared by the time Dr. Boyd saw her and did not rule out the need for some brief cognitive skill training."

64. Dr. Parry ultimately agreed with Dr. Macaulay and Dr. Orent that Claimant was not at MMI and required further treatment, including assessment, diagnostic, vestibular and visual tracking therapy.

D. Employer records

65. On March 26, 2021 Claimant completed paperwork, including an Exposure Report, which stated that the accident had occurred at approximately 4:10 p.m. on March 24, 2021 noting that

> I was driving my car to a home visit scheduled with a family when I was rear ended by another vehicle. The other driver reported that he was following too closely and had looked away for a second and couldn't stop in time. I called 911, my clients, and my supervisor to report the accident.

Claimant described the accident as an "automobile accident concussion and whiplash with pain in the lower back ribs shoulders and head" and reported she had a "tightness throughout my lower back, right side of ribs, along shoulder blades into the neck, plus a concussion causing light…"[10] Claimant was provided with a Designated Medical Provider List (DPL) at that time listing UCHealth, WorkWell and Banner Occupational Health.

66. The Employment Performance Evaluation form dated April 13, 2022 addressed various components of Claimant's work. Claimant's supervisor stated that Claimant had improved this year[11] on timely documentation, had taken the time to meet with other caseworkers regarding organization ideas and ways to keep track of her assignments, that her timeliness and organization had improved, noting that timeliness of court letters, documentation and case closure had been a struggle for Claimant,

E. Claimant's testimony

67. Claimant scheduled appointments with ESP Sports Medicine in Lafayette, on her own, as well as scheduling with Dr. O'Toole, the workers' compensation designated provider at UCHealth. She identified ESP after speaking with a coworker who had gone there before. She went to ESP on March 30, 2021 for a massage. She did not recall if they discussed a concussion but agreed that the records documented it that way, in addition to light sensitivity. She also reported she had blurred and double vision, slurred speech, urinary urgency, dizziness, altered gait, swollen limbs, though not all of these were documented in the March 30, 2021 report.

68. She later saw Dr. Kevin O'Toole, pursuant to Employer's request, on April 8, 2021. She agreed she reported complaints of light sensitivity, fatigue, loosing track of time, back spasms, swollen limbs. She stated that she did not have these complaints prior to the March 24, 2021 work injury.

69. She did agree that she had a work related injury to her back on July 31, 2012, for which she complained of gait problems, sitting and standing, radiating pain to the right buttock, and down to the right foot and was eventually placed at maximum medical improvement by Dr. Reichhardt on February 14, 2013 and given a rating. At that time, she was given work restrictions of limited lifting, pushing, pulling and carrying of 40 lbs. occasionally and 20 lbs. frequently as well as limited bending and twisting.

70. Claimant reported that she continued to have difficulties performing her full time job, especially with time management, fatigue, paperwork, screen work, driving for extended periods, as she has to take breaks with ongoing breaks throughout the day for both mental and physical stretching. She continued to do a lot of management within her day to maintain her pain level. She meets with her supervisor twice a month since her accident. She also meets with a colleague to help her prioritize and manage day to day tasks and to make sure she keeps on top of all her assigned work.

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[10] It is clear that the sentence was not finished due to lack of space or that Employer did not include the missing page from this report.

[11] It is presumed that this is for activities that took place after April 2021, through April 2022.

71. Due to the ongoing pain, headaches and fatigue, she sometimes sleeps during the day or takes naps, so she works into the evening hours or weekends to meet her 40 hour requirement. She has had to do this to keep her full time job. Everything now just takes her longer since the work injury. If she is fatigued during the day, she has problems with her eyes and has to rest them. She has light sensitivity during "bad head days." She has had to employ multiple tools to keep her head pain from spiking such as taking breaks, reducing screen time, or taking a nap when she feels a headache coming on, all of which help control her headaches, and vision symptoms.

72. After the MVA Claimant broke up with her partner and moved in with her mother because she had difficulty with time management. She was unable to keep her work life and personal life activities going in a normal manner, so her personal life suffered as she had to focus primarily on mandatory tasks. She continues to suffer from her injuries. She has to set multiple alarms throughout the day to keep herself on task and not let time lapse. She continues to struggle with word finding, or word recollection as well as memory. She used to be able to write her reports for the day from memory and now has to take notes. She meets regularly with her co-worker to help her stay on top of deadlines and prioritize. Because of fatigue, she has to take multiple breaks during the day and manage her symptoms so they do not flare up and overload herself. She used to be able to work without problems. She continues to have occasional headaches, back pain, neck pain and she manages them as best she can with stretching and exercise.

73. Claimant is now wearing prism glasses due to her eye movement disorder. She had never worn glasses before her work injury. The workers' compensation provider had advised her that Respondent may not cover the prism glasses, so she declined to purchase them from Dr. Arnold's office because of the high cost. She never declined to have prism glasses, she just had to go to a different location to obtain them because of her out of pocket costs. She generally wears the glasses during the day, when she is not outside in the sun. She requires sunglasses in the sun. She especially needs them when she is fatigued.

74. She has difficulty with slurred speech on "bad-brain days," when she has difficulties. She experiences dizziness, for example, when she gets off elevators, when she is a passenger in a car, when her eyes are doing weird movement. It is a dizziness/motion sickness issue. She does her therapy to alleviate the feeling.

75. She was not aware that she could return to Dr. O'Toole for treatment since her release. She has obtained psychological treatment, which she pays for.

76. Claimant testified that this accident has had a significant impact on her life and continues to do so but she would like to have the recommended diagnostic testing and medical care in order to get better.

F. Testimony of Supervisor

77. Claimant's supervisor (Supervisor) testified at hearing. She stated that she had started as Claimant's supervisor since May 2020, supervising a team of five case workers and supporting them in assessments and ongoing case load, though she had known Claimant since she started in 2016. She has regular communication with Claimant at least every other day either by text, phone calls, and emails or in person. She directly

oversees Claimant's work. Supervisor reported that Claimant consistently meets expectations, is great at engaging with her families, meets with them, both parents and children when required, and did overall excellent work engaging and communicating with them. Over time, documentation, paperwork and computer work had been fluctuating, including documenting visits, writing letters or updates to the court, documenting in the system, making referrals, though she did not have a big drop off after the March 2021 accident.

78. Supervisor did not recall how often she saw Claimant in the 2020-2022 period in person or by video but likely around twice a month. She did not recall seeing Claimant wearing sun glasses inside when they had team meetings at a restaurant or other venue. She did state that Claimant has played softball since she has known Claimant.

79. Supervisor explained that they did not make formal accommodations for Claimant through Human Services but had informally discussed and approved Claimant taking breaks when needed and getting her work arranged around her symptoms and need for breaks, so long as she was keeping up with the work. They had also discussed time management issues between face-to-face work and the documentation piece of the work. Supervisor reported that Claimant's timeliness had improved over the last year but she could not establish if there was a connection to the injury or not. She has set up for Claimant to meet twice a month with coworkers, "just to get things on track and keep things on track."

80. Claimant is accountable and is able to work through a problem to fix it where needed or ask for help when needed. Supervisor has received a complaint against Claimant recently, which is the only complaint she has received while in her supervisory position. Supervisor emphasized that Claimant had a strong work ethic and worked really hard with her assigned families. Supervisor stated that she trusts Claimant, and opined that Claimant was honest and had integrity.

81. Due to work performance issues, Supervisor offered to take on some of the more tedious computer tasks like data entry. She stated that the work involved a lot of paperwork, a lot of documentation, meeting with families of different cultures, backgrounds, and often angry people, which was taxing, though there were ebbs and flows to the work. She stated that it was emotional work, emotionally taxing and stressful work.

G. Testimony of Dr. William Boyd

82. Dr. Boyd testified as a board certified neuropsychologist on behalf of Respondents, who was retired by the date of the hearing. While practicing he specialized in mild traumatic brain injury, concussions, post-concussive syndrome and evidenced based approach to neuropsychology. He would typically see patients after they had had extensive evaluations and treatment. He would evaluate for neurocognitive issues and make recommendations for medical treatment, vision and vestibular therapies, and any needed rehabilitation. He would treat with cognitive behavioral therapy and provide psychological strategies to help patients get beyond any symptoms of post-concussion syndrome.

83. Dr. Boyd stated that he was asked to perform the April 14, 2023 evaluation by Respondents. Dr. Boyd reviewed the records, including the negative temple bone scan, did not find evidence of retrograde amnesia, anterograde amnesia, loss of consciousness, or any trauma to the head. He noted that Claimant was able to return to function and that there was no particular head trauma. He administered multiple tests which showed Claimant was not suffering any measurable lingering brain dysfunction and had no neuropsychological impairments when compared to the general population. However, he did find that she had short term memory impairment and made a mathematical arithmetic error. His impression was that Claimant most likely did not suffer a concussion in the motor vehicle accident. He agreed that when Dr. Thwaites tested Claimant, Claimant had slowed processing speed and only an average IQ score. He agreed that Claimant had performed better with his tests than the prior tests overall. He generally liked to wait to perform neuropsychological testing until about six months to a year following the incident to determine any permanency or impairments.

84. Dr. Boyd agreed he did not have the ER report when he issued his initial report but that he did not require them because he was only testing neurocognitive impairment at the time of his testing. He did not note the vision problems Claimant had other than through review of the medical records and was not aware of whether they were related to the MVA. Dr. Boyd believed that post-concussive syndrome was not an mTBI diagnosis. He failed to note that the records showed Claimant had frequent headaches, and sleep disturbances. He agreed that whiplash can cause TBIs.

85. He also agreed that he did not have Dr. Parry's report nor the DIME report but that having the neurologists report would have been important in assessing for a brain injury. Nevertheless, Dr. Boyd did not change his opinion that Claimant did not suffer from any neurocognitive impairments, and early testing was not good for determining persisting or permanent impairments.

86. Dr. Boyd noted that on the ER report visit, which was approximately three hours after the accident, there were no symptoms reported that were concerning but if there was only a mild concussion, there might not have been any outward symptoms. He did agree that Claimant's complaints on arrival were for whiplash, back pain, headache, right rib cage and neck pain.

H. Testimony of Dr. Kevin O'Toole

87. Dr. O'Toole testified as a board certified occupational medicine physician, which he had been practicing full time since 2006 seeing anywhere from 12 to 20 patients in a day. He reviewed the past records including the ER visit notes prior to seeing Claimant initially and there was no concern for concussion or cognitive problems noted. He listed the presence of symptom magnification based on the ER records and his unremarkable examination.

88. Dr. O'Toole stated that, in cases of mTBI, he would expect worse symptoms with early onset and then gradual improvement, though in this case there were symptoms expressed later, including severe concussion. He noted that at no time did he think Claimant was faking her symptoms but was put in a difficult position by other medical professionals who had misdiagnosed issues, causing Claimant other symptoms,

including anxiety about the effects of the trauma. He did not record any symptoms of slurred speech, dizziness, or altered gait at the initial visit, though he remarked that on the following visit, Claimant complained that he had not documented all her symptoms.

89. He noted that patients frequently forget to report prior injuries, especially if they are focused on the current symptomology they believe related to the most recent in time event, whether or not they can be attributable to that event.

90. Dr. O'Toole stated that he referred Claimant to Dr. Thwaites because of complaints that were not supported by the clinical exam and Claimant's apprehension of having to treat with a new provider.

91. He noted that the next visit with him was not until June 16, 2021, and that is when Claimant complained to Dr. O'Toole that he had not documented the slurred speech and memory lapses.

92. Dr. O'Toole did place a referral for an ENT evaluation based on Dr. Parry's recommendation. By February 4, 2022 Claimant was ninety percent better, managing her pain and symptoms with stretching and breaks, performing vestibular therapy exercises, wearing the prism prescription glasses.

93. By the time he placed Claimant at MMI on August 9, 2022, Claimant continued to have the occasional headache, had being going through vision treatment and computer orthoptics training including jumpduction, the final phase of the computer work with which she continued to have difficulty and which was being discussed with Dr. Arnold, so he left her medical benefits open for maintenance.

94. Dr. O'Toole reviewed the DIME exam by Dr. Macaulay but stated that Dr. Macaulay's findings of muscular tenderness were not significant and he did not believe that they would qualify Claimant for an impairment rating.

95. He noted that his own later exams were not comprehensive and only noted normal range of motion (not measured), some pinpoint complaints with chin to chest flexion and no palpatory exams. He also remarked that he considered Dr. Thwaites' recommendation for Claimant to see a psychologist outside of the workers' compensation system and that he did not consider she had any depression related to the MVA.

96. He stated that there may be some merit to having Claimant referred for a psychological evaluation in accordance with the DIME physician's recommendation, though he believed some of the psychosocial factors may be related to litigation compensation.

97. Dr. O'Toole disagreed that Dr. Macaulay's recommendations were appropriate, with the exception of an ENT/ophthalmology follow up with Dr. Arnold to assess the prism glasses and to determine if an impairment was appropriate as well as, potentially, a psychological evaluation.

98. Lastly, Dr. O'Toole believed that the *AMA Guides*, Third Edition (*Revised*) were antiquated and that there was "newer guidance with regard – how to determine impairment. And – and the intent is – is not to assign unnecessary impairment for pain if there is not clinical evidence of a – of a functional problem," and he did not believe Claimant had a functional problem because she had return to full time employment. He

opined that, even if he used an inclinometer, it may not have been helpful because he did not know what Claimant's pre-motor vehicle measurements were for Claimant. As found, Dr. O'Toole simply did not believe it was necessary to follow the *Third Edition*, though he could see why other providers would perform the range of motion testing and provide a rating, but he disagreed with them. Dr. O'Toole was not persuasive in this matter despite his assertions that he followed Colorado requirements.

I. Testimony of Dr. Sander Orent

99. Dr. Sander Orent testified on behalf of Claimant as an expert in occupational and environmental medicine, internal medicine and toxicology as well as a Level II accredited physician and expert in the Medical Treatment Guidelines and *AMA Guides*, Third Edition (*Revised*).

100. He noted that he reviewed the extensive records in this case before anything else, which is his normal procedure when conducting an IME, and it helps him understand the claim better. He took a history from Claimant, including her symptoms, occupational history, recreational history, history of treatment and response to treatments. He specifically noted he had become an expert with COVID issues in the workers' compensation system in the last few years. He disagreed with the Respondent IMEs and Dr. Thwaites in this matter regarding COVID having any lingering effects as Claimant may have had COVID in November 2020 but that it resolved in six (6) weeks. He stated that any mention of a history of COVID in Claimant's case was a "red herring" as there was no medical documentation that Claimant ever sought treatment for COVID or had lingering effects of COVID.

101. Dr. Orent disagreed with the interpretations of the neuropsychological testing as there were internal contradictions and agreed with Dr. Macaulay that Claimant required a completely independent neuropsychological evaluation.

102. Dr. Orent agreed with Dr. Parry's recommendation with regard to further diagnostic testing and treatment recommendations, her finding of intermittent nystagmus which required the prism glasses to correct, as Claimant was at the end stage of the cranial nerve trauma that caused diplopia and visual problems.

103. He also agreed with the DIME physician, Dr. Macaulay's recommendations for further evaluation and treatment and that Claimant was not at MMI until the recommended diagnostic testing and treatment took place to relieve Claimant from the effects of the injury.

104. He explained that the episode for which she was seen at UCHealth in 2019 for neck pain was actually torticollis, an acute spasm of the neck muscles that obviously resolved.

J. Mild Traumatic Brain Injury Medical Treatment Guidelines (mTBI MTGs)

105. The MTGs state that "any alteration of mental status at the time of the injury, for example, feeling dazed, disorientated or confused, within 72 hours of the accident may be signs of a traumatically induced physiological disruption of brain function, indicating an mTBI.

106. They further indicate that a risk factor for ongoing symptoms following an mTBI is a very demanding or stressful vocation or job, preinjury issues with general health or psychological wellbeing as well as a history of preinjury migraines or recurrent headaches.

107. Common mTBI symptoms include headaches, sleep disturbances, dizziness, nausea, visual disturbances, photophobia, attention and memory problems, difficulty multi-tasking, increased distractibility, losing focus, feeling foggy, and fatigue.

108. The MTGs note that post-concussive syndrome was an accepted diagnosis that is generally determined by a number of symptoms present after an mTBI and how long they persist, though the symptoms of PCS are commonly present in those without mTBIs.

K. Conclusory Findings

109. This ALJ infers from Employer's Injury Exposure Report that the incomplete statement of "plus a concussion causing light…" would be that Claimant had "light sensitivity." Two days following the accident Claimant was describing a condition that included a concussion and problems with light sensitivity. Claimant believed that she had a concussion despite the lack of documentation in the emergency room records.

110. As found, Claimant is not at MMI as determined by Dr. Macaulay, the DIME physician. As found, Claimant suffered a mild traumatic injury, which caused concussion and nerve damage which resulted in vision and vestibular injuries to Claimant, in addition to injuries to her cervical spine, thoracic spine, an aggravation of the lumbar spine and aggravation of her preexisting depression. As found, Claimant is credible and persuasive. She continues to suffer from the effects of the mTBI, including headaches, vision and vestibular issues with occasional difficulties focusing, time management and depression, all of which should be accurately evaluated and treated within the confines of this March 24, 2021 work related injury.

111. As found, Dr. Parry, Dr. Orent Dr. Arnold, Dr. Hyde, Dr. Hadlock, Dr. White, Dr. Mayer and the DIME physician, Dr. Macaulay, are very credible and persuasive in their opinions over the opinions of Dr. Thwaites, Dr. Boyd, Dr. Morgenstern, and Dr. O'Toole. Dr. D'Angelo is found not credible. And while Dr. Thwaites, Dr. Boyd, Dr. Morgenstern, and Dr. O'Toole have portions of their reports and testimony that are credible, they were not persuasive in their opinions regarding causation, evaluations, diagnosis and treatment of Claimant regarding this claim.

112. As found, the providers should not have only relied on the incomplete evaluation performed at the emergency room. Dr. Parry was persuasive and credible in her explanation of the procedures of the ER, where they are focusing on those issues that might be cause for admission of the particular patient they are evaluating. Here, Claimant had very subtle issues to identify, which were clearly not detected by the ER staff, including the dizziness, vision issues, light sensitivity, cognitive issues, and other issues better identified and described by Claimant, such as slurred speech, blurred vision, ongoing headaches, slowed processing speed. These are frequently issues that might not be readily noticeable by someone other than immediate family, friends or Claimant, or individuals that know Claimant really well. Even Claimant's supervisor noted that

Claimant needed assistance in time management and was meeting with Claimant frequently. Further, she agreed that Claimant was meeting bi-weekly with a co-worker to help her with time management and prioritizing tasks that had to be completed. As found, Claimant had to change the manner in which she worked, including taking breaks away from her computer screen in order to manager her symptoms caused by the mTBI.

113. As found, the opinions of Dr. Thwaites, Dr. Boyd, Dr. Morgenstern, and Dr. O'Toole do not rise to the level of clear and convincing to overcome the DIME physician's opinions with regard to maximum medical improvement or impairment. Their opinions are simply differences of opinion and any opinions they have given stating that the DIME physician was in error are not credible or persuasive.

114. As found, a determination of impairment is premature, as Claimant is not at MMI. Claimant is entitled to a full scope of evaluations as recommended by Dr. Macaulay to determine the exact sequelae of the mTBI and likely impairment.

115. As found Claimant has shown by a preponderance of the evidence she is entitled to medical benefits that are reasonably necessary and related to the injury of March 24, 2021. This treatment included the prism glasses recommended by Dr. Arnold and the massage therapy as recommended by Dr. O'Toole, despite the contrary opinion of Dr. Raschbacher that it was not reasonably necessary and related to the injury.

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

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they

seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Overcoming the DIME physician's opinions

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S.

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Sec. 8-42-107(8)(b)(III), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998). Clear and convincing evidence means evidence which is stronger than a mere preponderance. It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. ICAO,* 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, *ICAO,* (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523- 097, ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000). Further, a finding

of MMI inherently involves issues of diagnosis because the physician must determine what medical conditions exist and which are causally related to the industrial injury. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). Because the determination of causation is an inherent part of the diagnostic process, the DIME physician's finding that a condition is or is not related to the industrial injury must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office, supra.*

If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion regarding MMI. Section 8-42-107(8)(b), C.R.S.; see *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)]; *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005); In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

The party challenging the DIME bears the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that MMI had not been attained. See also *Viloch v. Opus Northwest, LLC*, W. C. No. 4-514-339, ICAO, (June 17, 2005); *Gurule v. Western Forge*, W. C. No. 4-351-883, ICAO, (December 26, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. ICAO, supra*. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. ICAO, supra.*

Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In the case at bench, Respondents had the burden of proof to overcome, by clear and convincing evidence, the opinions of Dr. Macaulay, the DIME physician regarding causation, MMI, and impairment. Respondents relied on the opinions of Dr. O'Toole, Dr. Raschbacher, Dr. Boyd, Dr. D'Angelo and Dr. Thwaites as well as other medical reports, to support their contentions. However, these physician's opinions regarding diagnosis and causation of injuries, as well as MMI and impairment, were simply a difference of

opinions and were either not credible or not persuasive. The opinions of Dr. Macaulay, Dr. Parry and Dr. Orent were credible and persuasive that Claimant had not reached MMI as she required further work-up and treatment to address her conditions related to the injuries she sustained in the March 24, 2021 MVA. This included neurological evaluations, psychological treatment, visual therapy and vestibular evaluations. Under the Impairment Rating Tips, Desk Aid 11, DIME Panel Physician Notes, Section 6., it states that "[i]f there is a reasonable possibility that the results of a diagnostic test will change the patient's MMI status, then in most instances, the patient will not be at MMI." They also state at Section 5, that a "recommendation for therapies that present a reasonable prospect for improving physical function may be viewed as evidence that the claimant's condition is not stable." Here it is clear that, while Claimant is an extremely strong individual that has kept working full time despite her limitations, treatment will likely improve her condition regarding her difficulties in focusing, processing information, management of her symptoms, visual disturbances, vestibular and psychological impacts the March 24, 2021 work injury have had on Claimant.

Respondents also rely on discrepancies in the record regarding what Claimant reported and the timeline of those issues. This was not persuasive. As explained by Dr. O'Toole, when injured workers are being seen for the first time, that is the time when they are asked about their prior history, and it is common for them to forget prior injuries because they are not present on their mind or are focusing on the injury itself. Dr. O'Toole also stated he reviewed the ER records and those documented Claimant's past history of back pain. In fact, if Dr. O'Toole had access to Claimant UCHealth records, he would have seen her past history of chronic low back pain. While Claimant had a prior workers' compensation injury in 2012, she clearly aggravated that condition during the MVA. She had been working full time without limitation or restrictions and pursuing all of her hobbies without difficulties for some time. The last report in evidence, prior to the March 24, 2021 accident, was a 2019 torticollis (stiff neck) condition, which resolved. The last mention of low back problems was in 2017, four years prior to the MVA.

The argument that Claimant's symptoms are a residual of Claimant's "long COVID" is not credible or persuasive. Dr. Parry and Dr. Orent credibly and persuasively explained that, if she had COVID, which was not documented in any medical records, her symptoms were likely resolved within six weeks. This ALJ was persuaded by Dr. Orent that the opinion of the providers that indicated Claimant's symptoms were caused by COVID which occurred the prior November 2020, a full four months before the MVA, was speculative and did not cause Claimant's ongoing symptoms.

Respondents' argument that Dr. Macaulay was basing his opinions only on Claimant's subjective complaints is incorrect. Dr. Macaulay reviewed the records, including Dr. Parry's report explaining that the neuropsychological evaluation performed by Dr. Thwaites on April 14, 2021, a mere 21 days after the motor vehicle accident of March 24, 2021, was premature and likely invalid. He was persuaded by Dr. Parry's analysis of what happened including her findings of neurologic problems such as a skew of her eye, which was later confirmed by Dr. Arnold, for which he prescribed the prism glasses. Further, Dr. Macaulay reviewed all of Dr. O'Toole's, Dr. Thwaites', the UCHealth ER's and other available records to reach his determination, citing to them and the reason he opined that further testing and evaluations were necessary. While Dr. O'Toole was

credible, he simply had a different opinion regarding Claimant's medical needs and conditions related to the MVA. This did not stop him from making multiple referrals including for physical therapy, massage therapy, biofeedback, chiropractic care, vestibular therapy, vision evaluation and therapy, all of which addressed Claimant's physical conditions related to the MVA and the results of the mTBI. And, he opined that the treatment he provided Claimant was reasonably necessary and related to the March 24, 2021 injury. At his first evaluation he provided an assessment that Claimant had neck pain, headache above the eye region, photophobia, thoracic and lumbar pain, rib pain and vestibular disequilibrium. At his last evaluation of Claimant, he provided the diagnosis that Claimant had convergence insufficiency and neck pain. His opinions regarding whether or not Claimant suffered from an mTBI or concussion related to the March 24, 2021 was not persuasive, and, certainly, did not rise to the level of proving by clear and convincing evidence that Dr. Macaulay's opinion, as the DIME physician, was overcome. This is especially so since Dr. O'Toole was the one to make the referrals for treatment for her neck, mid and low back as well as for the vestibular disorder and vision problems.

Lastly, the argument that Dr. Macaulay erred in assigning an impairment rating is also not persuasive. The point of Dr. Macaulay recommending further evaluations and treatment is to provide the care Claimant needs to reach MMI and then be appropriately rated under the *AMA Guides*. Level II providers are asked to provide provisional impairments. Desk-Aid 11, DIME Panel Physician Notes, Sec. 4 specifically states "*If the party requesting the DIME has asked that impairment be addressed, and if you find the patient* ***not at MMI*** *for that work-related injury, you should nevertheless provide a rating for that injury*." Dr. Macaulay found that Claimant had loss of range of motion of the spine, which is an objective findings, in and of itself, as well as spine tenderness. Further, he documented that Claimant continued to have pain in her spine. The records document ongoing symptoms of the cervical, thoracic and lumbar spine since her injury of March 24, 2021. This is substantial evidence to justify a finding that Claimant is entitled to a Table 53IIB rating under the *AMA Guides* as Claimant had a medically documented injury and a minimum of six months of documented pain and rigidity. Dr. Macaulay properly identified the injuries he found causally related to the motor vehicle accident of March 24, 2021 and which he proceeded to rate based on the information he had available.

As found and concluded, the Claimant suffered an mTBI that resulted in vestibular, visual and psychological problems, as well as physical injuries to her head (headaches), neck, mid and low back. As found and concluded, Respondents have failed to show by clear and convincing evidence that Dr. Macaulay's opinions have been overcome. Moreover, his opinions are supported by the credible and persuasive opinions of both Dr. Orent and Dr. Parry who assessed the Claimant's conditions and the effect they had on her related to the March 24, 2021 work related injuries, and provided similar recommendations than Dr. Macaulay.

Since Claimant is not at MMI, the issue of permanent partial impairment and interest, related to benefits owed and not paid when due, are premature and will not be addressed by this order.

C. Medical Benefits

Employer is liable for medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

As previously found, Claimant suffered an mTBI that resulted in vestibular, visual and psychological problems, as well as physical injuries to her head (headaches), neck, mid and low back. Dr. O'Toole prescribed additional massage therapy, which was later denied when Dr. Raschbacher issued a Rule 16 opinion that it was not reasonably necessary and related to the injury. As found, such treatment was and is reasonably necessary and related to the March 24, 2021 work injury as it was addressing the headaches caused by the mTBI as well as neck pain. Claimant stated that she had been paying for her own massage therapy and that she wished to continue receiving medical care for her work related medical conditions. The massage therapy was helping Claimant manage her chronic pain and to continue working full time. This is functional gain. Claimant has shown she is entitled to medical benefits that are reasonably necessary and related. As found, the treatment prescribed by Dr. O'Toole was reasonably necessary and related to the March 24, 2021 work injury. Claimant should be reimbursed for the costs of her massage therapy.

Dr. Arnold prescribed prism glasses. Dr. Arnold's office advised Claimant that Respondent would likely not pay for the prism glasses, therefore, she resorted to find a most cost effective provider and purchased them due to ongoing need and visual problems. The prism glasses were reasonably necessary to address Claimant's vision problems brought about by the mTBI by cause the March 24, 2021 MVA. Claimant has shown by a preponderance of the evidence that she is entitled to reimbursement for the cost of the prism glasses.

The panel in *Deane v. Regis Corp*., W.C. No. 4-664-891, I.C.A.O. (August 7, 2023) determined that an ALJ was unable to direct a medical professional to administer a particular treatment the professional did not believe was appropriate because it was not a matter arising under articles 40 to 47 of title 8 for which the ALJ is provided authority by Sec. 8-43-201(1), C.R.S. and Sec. 8-43-503(3), C.R.S. (employers, insurer. claimant or their representative shall not dictate to any physician the type or duration of treatment...). The panel emphasized that, should a party dispute the reasonableness and necessity of a recommended medical care, they remained free to file an application for hearing pursuant to Sec. 8-43-207, C.R.S., *Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997),* or to possibly request a utilization review under Sec. 8-43-501(2),

C.R.S. See *Deane v. Regis Corp., supra*; *Torres v. City & County of Denver*, W.C. No. 4-937-329-03, I.C.A.O. (May 15, 2018) and *Short v. Property Management of Telluride*, W.C. No. 3-100-726, I.C.A.O. (May 4, 1995).

W.C.R.P. Rule 11-7(A), CCRC states in pertinent part as follows:

> If a DIME physician determines that a claimant has not reached MMI and recommends additional treatment, a follow-up DIME examination shall be scheduled with the same DIME physician, unless the physician is unavailable or declines to perform the examination. Either party may file the Follow-Up DIME form *after the claimant completes all additional recommended treatment. (Emphasis added).*

With regard to medical benefits specifically recommended by Dr. Macaulay, this ALJ has no jurisdiction to dictate what care Claimant's treating providers are to provide, only that Dr. Macaulay was correct in his determination that Claimant was not at MMI and requires further medical care to assess her work related injuries and provide the care she requires to reach MMI. However, the rules also indicates that a follow-up DIME cannot take place until "after the claimant completes all additional recommended treatment" recommended by the DIME physician. It is found that the treatment recommended by Dr. Macaulay is reasonably necessary and related to Claimant's March 24, 2021 work injury. Claimant has proven by a preponderance of the evidence that she is entitled to reasonably necessary medical care related to the March 24, 2021 work related injuries but it is up to the authorized providers to prescribe the recommended treatment.

ORDER

IT IS THEREFORE ORDERED:

1. Respondent failed to prove by clear and convincing evidence that the DIME physician was incorrect. Claimant is not at maximum medical improvement and requires further diagnostic and medical care related to the compensable injuries to her head, cervical, thoracic and lumbar spine as well as for her vision and vestibular conditions related to the mTBI.

2. Claimant is not at MMI as determined by the DIME physician, Dr. Hugh Macaulay.

3. Respondent shall pay for reasonably necessary and medical care related to the March 24, 2021 work injury, in accordance with the Colorado Fee Schedule, to cure and relieve her of the compensable injury.

4. Respondent shall reimburse Claimant for the costs of the massage therapy and prism glasses which were reasonably necessary and related to the March 24, 2021 work related injuries.

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

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

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

DATED this 3rd day of November, 2023.

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS

DIGITAL SIGNATURE

By: _____

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to a closed period of Temporary Total Disability (TTD) benefits extending from March 4, 2022 through April 24, 2023.

FINDINGS OF FACT

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

1. Claimant works as a package delivery driver for Employer. (Tr., p. 14, ll. 11-19). She suffered an admitted injury to her left ankle on October 7, 2021, while delivering packages for Employer. According to Claimant, she had delivered a package to a customer's house and was walking down a steep flight of steps when she rolled her ankle "kind of fell over". (Tr., p. 15, ll. 7-13).

2. Claimant has a prior history of injury to her left ankle on March 27, 2021, while working for [Redacted, hereinafter US] in Las Vegas, Nevada. (RHE E, p. 28; Tr. p. 29, ll. 16-24).

3. Claimant was ultimately referred to and began treating her October 7, 2021 work-related ankle injury at Concentra Medical Centers on December 1, 2021. (RHE E, p. 28). During her December 1, 2021 appointment at Concentra, Nurse Practitioner (NP) Valerie Joyce documented the following history regarding Claimant's prior left ankle injury, the mechanism of injury (MOI) on October 7, 2021 injury and Claimant's referral to Concentra:

> MOI – walking back to her truck and coming down a customer's stairs, stepped down on the stairs and rolled her left ankle, she saw her PCP when it was injured, now instructed to be seen by work comp to take over care, hx of injuring left ankle in July 2021 when living in Vegas and was seen by a work company – completed PT, since DOI she has been working a light route to help keep the pain controlled, its most painful when she has to get in and out of the company truck, wearing left ankle brace, elevates and uses ice as much as possible.

4. Following her initial evaluation of Claimant on December 1, 2021, NP Joyce started Claimant on Naproxen, referred her to physical therapy (PT) and ordered x-rays. (RHE E, pp. 29-30). Claimant was instructed to wear an ankle brace, ice as needed and perform home exercise. *Id.* at p. 30. The report from this date of visit also indicates that the "Supervising physician reviewed the chart and concurs with the final

disposition". *Id.* at p. 31. The supervising physician on this date of visit was identified as George P. Johnson. *Id*. Dr. Johnson amended NP Joyce's report on 5:24 p.m. to reflect the imposition of work restrictions to include no lifting or carrying greater than 15 pounds, pushing/pulling 20 pounds, no standing/walking greater than 30 mins./hour, no kneeling or squatting, no use of ladders, minimal use of stairs and no driving of company vehicles. *Id.* Claimant was returned to modified duty with these restrictions until her next appointment scheduled for December 3, 2021. *Id.*

5. Although there is no persuasive evidence that she personally evaluated Claimant on December 1, 2021, Dr. Trina Bogart completed a WC 164 form outlining the information contained in NP Joyce and Dr. Johnson's narrative report from December 1, 2021. (RHE E, p. 27).

6. Following the imposition of work restrictions on December 1, 2021, temporary disability benefits were paid pursuant to an Amended General Admission of Liability filed February 2, 2022. (CHE 1, p. 1).

7. Claimant proceeded through conservative care as directed by NP Joyce under the direction of Dr. Johnson, who would review and amend the record to reflect any changes in Claimant's activity status. (RHE E, pp. 37-42).

8. Claimant was evaluated during a follow-up visit by Dr. Kristina Robinson on December 16, 2021. (RHE E, pp. 43-48). Claimant described worsening pain during this visit. *Id.* at p. 43. Accordingly, Dr. Robinson ordered an MRI of the ankle without contrast. *Id.* at p. 46.

9. Dr. Morgan Meury evaluated Claimant on January 18, 2022. He noted that Claimant had contracted COVID, which delayed her follow-ups and further left ankle injury work-up. (RHE E, p. 52). By this appointment date, Claimant still had not had the requested left ankle MRI. *Id.* It was also noted that Claimant was continuing her work in PT and that she had been working modified duty prior to her bout of COVID and that her employer was "under the impression" that she was cleared for full duty, which she reportedly did not feel ready for." *Id*. at p. 53. Dr. Johnson opined that Claimant could return to modified duty work with the same restrictions he had imposed on December 1, 2021; however, the evidence presented supports a finding that Claimant's employer elected not to accommodate her restrictions as Insurer began paying temporary total disability benefits on January 19, 2022. (CHE 1, p. 1).

10. Authorization to proceed with the left ankle MRI was denied. (RHE E, p. 60. However, NP Joyce reordered the study on February 15, 2022, because Claimant was "not progressing in improvement per PT sessions. *Id.* (See also, RHE E, p. 68).

11. Claimant underwent an MRI of the left ankle as requested on February 25, 2022, at Colorado Springs Imaging. The study revealed evidence of "[p]rior lateral ankle sprain with scarring/thickening of the ATFL (anterior talofibular ligament) and CFL" (calcaneofibular ligament) but no full thickness tearing. (RHE G, pp. 121-122).

12. Claimant returned to Concentra on March 4, 2022, where she was once again evaluated by NP Joyce. (RHE E, pp. 71-74). NP Joyce opined that Claimant was "at functional goal" and "ready for discharge". *Id.* at p. 73. NP Joyce placed Claimant at maximum medical improvement (MMI) without impairment and returned her to full work without restriction or maintenance care. *Id.* Claimant expressed her concern about returning to full duty work. *Id*.

13. Dr. Bogart then completed a WC 164 form placing Claimant at MMI without impairment or maintenance care as referenced in NP Joyce's March 4, 2022 narrative report. (RHE E, p. 70). The WC 164 form completed by Dr. Bogart indicates that Claimant was able to return to full unrestricted work on March 4, 2022. *Id.* Based upon the evidence presented, the ALJ finds no convincing support a conclusion that Dr. Bogart actually saw Claimant before completing the March 4, 2022 WC 164 form. Indeed, there is no indication that NP Joyce shared her report with Dr. Bogart as she had with Dr. Johnson or that Dr. Bogart amended or signed off on NP Joyce's report. (RHE E, pp. 71-74).

14. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Bogart's opinions regarding MMI and impairment on March 18, 2022. (CHE 1, p. 2). The admission terminated Claimant's TTD benefits as of March 3, 2022. *Id.*

15. Claimant objected to the FAL and would subsequently undergo a Division Independent Medical Examination (DIME) with Dr. Lloyd Thurston on January 24, 2023. (CHE 2, pp. 7-13). In the interim, Claimant, who was reportedly still experiencing pain and instability, sought treatment with her primary care physician ("PCP") who referred her to Dr. John Shank for an orthopedic evaluation.

16. Dr. Shank evaluated Claimant on April 7, 2022 during which he documented the following history:

> [Claimant] worked for US[Redacted] and reports that approximately a year ago; when she was in Las Vegas, she had an inversion injury. She had lateral sided ankle pain, bruising and swelling after the injury. She was treated with a brace and physical therapy. She improved somewhat after the injury but continued to have instability symptoms. She reports that again at work at US[Redacted] in Colorado in November she had another inversion injury.

(CHE 2, p. 16).

17. Dr. Shank reviewed Claimant's MRI noting that it demonstrated "chronic tearing about the region of the ATFL and calcaneofibular ligament. (CHE 2, p. 16). Because she had not improved with conservative care, Dr. Shank raised the option of proceeding with a "left ankle arthroscopic synovectomy debridement and possible microfracture with a modified Brostrom Gould repair with an internal brace. *Id*. at p. 17. Claimant expressed a desire to proceed with surgery. Accordingly, she was taken to the operating room on April 13, 2022 where Dr. Shank performed the aforementioned

procedures. *Id.* at p. 18-20. Dr. Shank noted as part of his postoperative plan that Claimant placed on non-weightbearing status and instructed to return for a follow-up appointment in two weeks.

18. During a follow-up appointment on April 28, 2022, Dr. Shank noted that Claimant was to begin weightbearing. (CHE 2, p. 21). Nevertheless, he added that Claimant would "likely not be able to return to her normal job for 3 to 12 months depending on the progress with her recovery". *Id*.

19. US[Redacted] was unable to accommodate Claimant in her regular position post-surgically; however, they accommodated her in a temporary position. Because US[Redacted] only accommodates employees in transitional duty for up to 30 days, which had been exhausted between the date of Claimant's injury and Dr. Bogart placing her at MMI on March 4, 2022, Claimant applied for and was ultimately awarded short-term disability benefits. (Tr., p. 17, ll. 12-25, pp. 18-19, ll. 1-11). Claimant was paid short-term disability benefits by US[Redacted] from April 20, 2022, through October 18, 2022 totaling $12,005.76. (CHE-3).

20. Claimant continued to treat with Dr. Shank through April 25, 2023, when he indicated that she was doing "very well" one year after her left ankle injury. He added that Claimant could return to full duty work. (CHE 2, p. 30). The ALJ interprets Dr. Shank's April 25, 2023 note to constitute Claimant's release to full duty work.

21. As noted above, Dr. Thurston performed a DIME on January 24, 2023. Following his examination, Dr. Thurston prepared a written report outlining his findings/opinions. (CHE 2, pp. 7-13). In his January 27, 2023 report, Dr. Thurston opined that Claimant was erroneously placed at MMI. *Id.* Based upon his discussion with Claimant and review of the available medical records, Dr. Thurston felt it was clear that Claimant was not recovering consistently with the MRI interpretation. *Id*. Accordingly, he opined that she "acted appropriately in seeking additional orthopedic care for her injured left ankle". *Id*. at p. 9. Noting that Dr. Shank planned to release Claimant to full duty work at an upcoming follow-up appointment in April 2023, one year after her surgery, Dr. Thurston concluded that Claimant was not at MMI on March 4, 2023 as found by Dr. Bogart. *Id.* at p. 10.

22. A follow up DIME with Dr. Thurston was never scheduled. Rather, Counsel for Respondents advised the ALJ that an amended GAL was filed in lieu of scheduling a follow up DIME. Counsel also informed the ALJ that Respondents were no longer pursuing the issue of overcoming the DIME with regard to Dr. Thurston's MMI determination. (Tr., p. 4, ll. 22-25; p. 5, ll. 1).

23. Dr. Bogart testified as a board certified emergency medicine physician. (Tr., p. 38, ll. 3-4). Between Claimant's date of injury (October 7, 2021) and March 4, 2022, Dr. Bogart worked for Concentra as the Director of Medical Operations in Colorado. *Id*. at p. 38, ll. 15-16.

24. Dr. Bogart testified that although her name was placed on the March 4, 2022 WC 164 form, she never actually saw Claimant or reviewed/cosigned any of Claimant's Concentra related documentation.[1] (Tr., p. 39, ll. 3-13). Accordingly, she testified that she was not an authorized treating physician for Claimant.[2] *Id.*

25. Dr. Bogart testified that she did review the DIME report of Dr. Thurston, including the DIME packet sent to Dr. Thurston. (Tr., p. 41, ll. 4-16).

26. Dr. Bogart testified that after review of the records, including the PT notes, that she should not have placed Claimant at MMI on March 4, 2022. (Tr., p. 42, ll. 1-10). Indeed, Dr. Bogart testified that in retrospect Claimant's case was "prematurely closed" which should not have happened because Claimant still had persistent deficits in range of motion, strength and her gait. *Id*. at ll. 13-20. Instead of placing Claimant at MMI, Dr. Bogart testified that the "next best steps should have been a referral to an orthopedic surgeon for evaluation". *Id*. at ll. 20-23. Accordingly, Dr. Bogart testified that the referral to Dr. Shank was an appropriate course of treatment, and Claimant should have continued restrictions after March 4, 2022. (Tr., p. 42, ll. 24-25- p. 43, ll. 1-2).

27. Dr. Bogart testified the restrictions of lifting and carrying up to 15 pounds; pushing and pulling 20 pounds, no standing or walking more than 30 minutes per hour; no kneeling or squatting; no ladders; minimal stairs; and no driving were never advanced or changed over Claimant's five month treatment course, but because she never examined Claimant she couldn't really opine on what they should have been. (Tr., p. 43, ll. 10-23). Nonetheless, she felt these restrictions were "appropriate based on what physical therapy was showing with her range of motion and her gait and her difficulties with, you know, her daily activities." Id. at p. 43, ll. 22-25- p. 44, ll. 1-2.

28. During cross-examination, Dr. Bogart testified that while NP Joyce may have examined Claimant and believed that she could return to full duty work, she (Dr. Bogart) disagreed with that clinical decision-making.

29. Based upon the evidence presented, the ALJ finds that Dr. Bogart is not an attending physician who treated Claimant during her appointments at Concentra. Claimant's contrary testimony is unpersuasive and probably inaccurate.

30. The ALJ credits Dr. Bogart's testimony to find that Claimant was erroneously placed at MMI and wrongly released to regular employment on March 4, 2022. The ALJ furthers credits Dr. Bogart's testimony to find that Claimant's

CONCLUSIONS OF LAW

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

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1 Claimant disputes Dr. Bogart's testimony that she never evaluated her. (Tr., p. 48, ll. 7-17).

2 Dr. Bogart reiterated her contention that she was not an ATP because she did not treat Claimant and had "no visibility to this particular case". (Tr., p. 46, ll. 19-23).

Generally

A. 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. *C.R.S. § 8-40-102(1).*

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

C. 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. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). The weight and credibility assigned to expert testimony is also a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). 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).

Claimant's Entitlement to Temporary Total Disability

D. 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 she 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).

E. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of 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). TTD benefits terminate upon a written release to full, i.e. regular duty work by the attending physician. C.R.S. § 8-42-105(3)(c).

F. Whether or not a physician is the attending physician is a question of fact for the ALJ. *Popke v. ICAO*, 944 P.2d 677, 681 (Colo. App. 1997). "… [T]he ALJ might consider the identity of the initial treating physicians, the length of time the claimant treated with a particular physician, and whether a release to regular employment was approved by the initial treating physician." *In the Matter of the Claim of: Carrie Bitz v. Boulder Valley School District*, W.C. No. 5-067-944-003 (Colo. Ind. Cl. App. Off. 2022)(referring to *Popke*, 944 P.2d at 680). "These criteria were not meant to be exclusive." *Id.* (citing *Herb v. Mariner Post Acute Network*, W.C. No. 4-496-527 (Colo. Ind. Cl. App. Off. 2003)). Nonetheless, an ALJ may not disregard an attending physician's opinion of the claimant's ability to perform his/her regular employment unless there are conflicting medical opinions from multiple attending physicians or a single physician's reports are subject to conflicting inferences. *Burns v. Robinson Dairy, Inc*., 911 P.2d 661 (Colo.App.1995); *Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d. 680 (Colo. App. 1999); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997).

G. In concluding that Claimant has proven that she is entitled to additional TTD benefits from March 4, 2022 through April 25, 2023, the ALJ finds the case of *Thim Keo Ly v. Imperial Headwear, Inc. and Liberty Mutual Insurance Company*, W.C. No. 4-375-030 (2000) instructive. In *Keo Ly*, a Panel from the Industrial Claims Appeals Office (Panel) affirmed the conclusions of a hearing ALJ that Ms. Ly was not at MMI and respondents were liable for retroactive TTD benefits. Based upon a reading of the *Keo Ly* decision and considering the evidence in the instant matter, the undersigned ALJ concludes that the issues presented in *Keo Ly* and the present case are analogous to one another.

H. In *Keo Ly* the Panel found that the claimant was injured on January 9, 1998 and referred to Dr. Brodie for treatment. In reports dated January 26th, 28th and 30th, 1998, Dr. Brodie restricted claimant to modified employment. Dr. Brodie also recommended physical therapy. The claimant initiated physical therapy but missed several appointments. Accordingly, on February 18, 1998, Dr. Brodie issued a report, which placed claimant at MMI, without permanent impairment. The report also released claimant to return to regular employment and discharged her from further treatment. The parties subsequently agreed to a binding independent medical examination (IME) by Dr. Pham on the issue of MMI. Dr. Pham determined the claimant required additional treatment. Consequently, Dr. Pham opined that the claimant was not at MMI. *Id.* As in the present case, Ms. Ly requested reinstatement of retroactive TTD benefits. The respondents refused to reinstate retroactive benefits and argued that her TTD benefits properly terminated when the ATP (Dr. Brodie) released her to regular employment. The ALJ found the February 18, 1998 report by Dr. Brodie did not accurately reflect claimant's ability to perform her regular employment. Therefore, the ALJ granted claimant's request for the reinstatement of retroactive TTD benefits.

I. On appeal, the Panel also determined that the ALJ had found Dr. Brodie's medical reports inconsistent and subject to conflicting inferences. Noting that the ALJ had resolved these conflicts against the respondents, the Panel affirmed the ALJs

finding that Dr. Brodie's February 18 report did not reflect a determination that the claimant was medically capable of performing her regular employment. Consequently, the Panel affirmed the ALJs award of additional temporary disability benefits. *Id.* As in the present case, the respondents' in *Keo Ly* argued that Ms. Ly's attending physician had returned her to regular employment. The respondents in the *Keo Ly* case therefore asserted the DIME's opinion on MMI was "immaterial". *Id.* Nonetheless, the ALJ found an "internal conflict" between "Dr. Brodie's January 1998 medical reports…and the February 18, 1999, release to regular employment." Because the conflicting inferences contained in Dr. Brodie's reports were resolved by the ALJ and the ALJ's resolution of the conflict had support in the record, the Panel noted that it would "not be disturbed on review".

J. In the present case, there are significant inconsistencies/conflicts regarding Claimant's release to return to work regular duty on March 4, 2022. They include:

- Dr. Thurston's opinion that Claimant was not at MMI on March 4, 2022 and required additional treatment. In fact, he stated it was appropriate for Claimant to seek treatment, as quickly as possible, by her PCP since her workers' compensation claim was closed. He also opined she should have seen Dr. Shank and the surgery was work-related. Respondents are not challenging the DIME opinion.
- Dr. Shank's opinion that Claimant's surgery was work-related and required restrictions that were unable to be accommodated by US[Redacted]. Consequently, she received short-term disability benefits from US[Redacted].
- Dr. Bogart's conflicting medical opinions regarding MMI, Claimant's ability to return to regular duty employment and Claimant's need for additional treatment.
- Employer's understanding that Claimant was unable to work full duty as accommodated by transitional work tasks.

K. While it is true that Claimant testified that she recalled being seen by Dr. Bogart, the more persuasive evidence supports a conclusion that this recollection is mistaken. Indeed, there is no convincing record evidence that Dr. Bogart saw Claimant or co-signed any of NP Joyce's notes. Based upon the evidence presented, the ALJ is not convinced that Dr. Bogart qualifies as Claimant's attending physician. Even if Dr. Bogart is considered Claimant's attending physician, she testified in conflict of her March 4, 2022 WC 164 form, noting that while NP Joyce released Claimant to full duty as of March 4, 2022, she did not co-sign that note and further disagreed with such clinical decision making on the part of NP Joyce.

L. As presented, the evidence persuades the ALJ that Claimant has proven that she is entitled to further TTD benefits beginning March 4, 2022 and continuing through April 24, 2023, given that Dr. Shank placed her at MMI on April 25, 2023. Nonetheless, Claimant conceded that Respondents are entitled to a short-term disability

offset due to Claimant's receipt of short-term disability after March 4, 2022. Claimant's Exhibit 3 shows that Claimant received $12,005.76 in short-term disability payments from April 20, 2022 through October 18, 2022. Respondents are entitled to credit the amount of short-term disability benefits paid against TTD benefits owed.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence she is entitled to additional TTD benefits beginning March 4, 2022 and continuing through April 24, 2023. Such TTD benefits will terminate on April 25, 2023, the date of MMI per Dr. Shank.

2. Respondents shall be entitled to credit the amount of short-term disability benefits paid between April 209, 2022 and October 18, 2022 against TTD benefits owed.

3. Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. Any issues not determined herein, or otherwise closed by operation of law, are reserved for future determination.

DATED: November 3, 2023

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-202-333-001

ISSUES

The issues set for determination included:

- Did Claimant prove by a preponderance of the evidence that he sustained a compensable work injury on April 1, 2022?

- If Claimant suffered a compensable injury, are Respondents required to pay for medical benefits to cure and relieve the effects of the injury sustained on April 1, 2022?

PROCEDURAL STATUS

A Summary Order was issued by the ALJ on September 25, 2023 and served on September 27, 2023. On October 11, 2023, Respondents requested a full Order. Neither Claimant nor Respondents filed Amended Proposed Findings of Fact, Conclusions of Law and Order. This Order follows.

FINDINGS OF FACT

1. Claimant was hired on about December 14, 2021 and worked as a security guard for Employer.

2. He testified that he monitored the hallways, reported on incidents and called the police when necessary. Claimant said he worked 32 hours per week.

3. The medical records admitted at hearing showed Claimant treated for migraine headaches and an impinged disk on February 20, 2021 and July 29, 2021. No respiratory issues were noted in those evaluations, although he was congested at the latter appointment. Claimant testified that he had not experienced cardiovascular problems prior to 2022.

4. On September 16, 2021, Claimant was treated for migraines and a sinus infection. He underwent a CT of the maxillofacial sinuses and the films were read by David Dungan, M.D. Dr. Dungan's impression was: filling of the right, ostiomeatal complex and front recess with near complete filling of the right maxillary and anterior ethmoid sinuses. No adjacent intraorbital or facial swelling or fluid collection was present that would suggest transosseous spread of infection. Claimant was also evaluated by John Winkler, M.D that day, who diagnosed a sinus infection.

5. Claimant testified he has been a smoker, but never suffered from shortness of breath prior to the April 2022 incident. The medical records that predated the injury did not reference treatment for chronic shortness of breath.

6. On April 1, 2022, Claimant was working his shift, and went to the office after walking through the property. Claimant testified that he walked by a coworker ([Redacted, hereinafter ML]), who sprayed two bottles of cleaner and the fan in the room blew it directly into his face. Claimant said he immediately felt that his eyes were irritated and went to the bathroom to try to rinse them with water. Claimant testified he also felt his lungs tighten up.

7. Claimant prepared a written description of the incident titled ”incident report” on April 2, 2022. He placed the time of the incident at approximately 2300 hours.

8. The ALJ reviewed the video of the incident on the day in question. The video depicted Claimant and his coworker in the office and showed the coworker spraying bottles into the air. The ALJ found that the video corroborated Claimant‘s version of the events that evening.

9. There was no evidence in the record that Claimant was referred to an Authorized Treating Physician after the incident on April 1, 2022.

10. [Redacted, hereinafter RS] testified as a representative of Respondent-Employer. She works for a [Redacted, hereinafter GY] as the regional manager for Colorado and Wyoming, which is the new owner. RS[Redacted] previously worked at [Redacted, hereinafter MS] starting in 2015. In that capacity, she checks on the properties, review safety, and training.

11. RS[Redacted] testified that she did not know whether ML[Redacted] (Claimant’s coworker) was trained about the location of the MSDS sheets and proper use of those chemicals. RS[Redacted] stated one chemical was used to clean and the other was to make things smell good. She did not believe anyone had mixed Clorox in with cleaning chemicals, as the head housekeeper or laundry person fills up the chemical bottles.

12. RS[Redacted] testified that the laundry person has been there for 6 to 7 years and the head housekeeper had been there for some time. There is a machine in the laundry area that fills up the cleaning bottles. She was not aware of any incident in which Clorox or bleach was mixed into the cleaning materials.

13. Claimant was treated at the Medical Center of Aurora April 1, 2022 (with initial testing started at 23:48 p.m.) and the medical records noted that instructions for eye irrigation were given. Claimant was evaluated by Gilbert Pineda. M.D., who noted the chemical agents appeared to be a noncontrasted disinfectant and a static air freshener. Claimant symptoms of shortness of breath and dyspnea. Claimant also

reported a migraine headache after his arrival. Dr. Pineda reviewed the X-rays taken at that time, which showed no radiographic evidence for acute cardiopulmonary disease. Fluoresecein Sodium eye drops were used at the Emergency Department as a diagnostic agent and Proparacaine HCL was administered when Claimant was discharged.

14. Dr. Pineda's clinical impression was: chemical exposure of the eye, with a secondary diagnosis of exposure to chemical inhalation, inhalation of a cleaning agent, and a migraine headache. Dr. Pineda prescribed Albuterol. Claimant was discharged, with the last documented test at 04:56 a.m. Claimant was advised to make an appointment for follow-up care. The ALJ concluded that Claimant required this treatment because of the chemical exposure at work.

15. On April 9, 2022, Claimant was evaluated by Shawn Zemlicka, P.A. at Kaiser Permanente (Urgent Care) for shortness of breath, as well as fatigue since the incident. PA Zemlicka opined that Claimant's symptoms could be the result of exposure to hazardous chemicals. Claimant was prescribed Ventolin for his symptoms.

16. Claimant was evaluated by Shannon Lee, M.D. at Kaiser on April 11, 2022. Dr. Lee's diagnoses were: shortness of breath; exposure to potentially hazardous chemicals. Dr. Lee noted that the pulmonary examination was unremarkable and ordered spirometry, which was competed on April 13, 2022. Dr. Lee also prescribed Prednisone. The ALJ concluded that Claimant was evaluated and prescribed medication because of the chemical exposure at work.

17. Claimant his burden of proof and established by a preponderance of the evidence that he was injured as a result of the chemical exposure on April 1, 2022.

18. On April 13, 2022, Dr. Lee noted the spirometry testing showed an obstructive pattern consistent with asthma and referred Claimant for a pulmonology consult. Dr. Lee ordered pulmonary function testing on April 25, 2022.

19. Claimant was evaluated by Suzanne Fishman, M.D. on April 26, 2022, whose diagnosis was: reactive airway disease-unspecified. He was evaluated by Andrew Port, M.D on May 3, 2022, who ordered a nebulizer for use at home. At a follow-up telemedicine appointment on June 9, 2022 with Ozioma Gab-Ojukwu, M.D. Claimant noted he was still experiencing shortness of breath and treating with a pulmonologist. The ALJ credited the opinions of the Kaiser physicians that the shortness of breath and other symptoms were caused by the workplace exposure on April 1, 2022 and that Claimant required testing/treatment.

20. Claimant met his burden of proof and established he required medical treatment because of his work injury.

21. An Employer‘s First Report of Injury ("E-1") was prepared under about April 14, 2022 by [Redacted, hereinafter CK]. The E-1 stated a coworker, sprayed clinic

chemicals in employee‘s face and the employee suffered chemical burns to eyes, face, and lungs.

22. A Notice of Contest was filed on behalf of Respondents and further investigation was listed as the reason the claim was contested/denied. Respondents’ cover sheet for the exhibits specified that this pleading was served on May 6, 2022, although the Court‘s copy did not have a completed certificate of mailing.

23. Claimant was taken off work from May 6 through May 20, 2022 (Exhibit K, p. 96.) There was no evidence that any of the physician who treated Claimant took him off work or issued restrictions after May 20, 2022.

24. The ALJ found that the time Claimant missed from work was caused by the work injury.

25. There was no indication in the medical records admitted as hearing that Claimant received additional medical treatment after June 2022.

26. Dr. Lesnak performed an independent medical examination at the request of Respondents on July 22, 2022. Claimant reported he had difficulty breathing and shortness of breath at nighttime, as well as constant fatigue. Dr. Lesnak stated the physical examination of Claimant was within normal limits and he did not find any abnormalities with Claimant’s breathing.

27. Dr. Lesnak opined that Claimant had no reproducible objective findings on examination. He stated Claimant’s pulmonary and cardiac examination did not reveal any abnormalities. Dr. Lesnak said that although there may have been an incident on April 1, 2022, there was no medical evidence to support that Claimant had any medical diagnoses or evidence of any type of injuries that would pertain to the occupational incident.

28. Dr. Lesnak also said that there were appear to be significant psychosocial/psychological issues pertaining to Claimant that may be responsible for his current symptoms. Dr. Lesnak stated Claimant‘s prognosis was excellent, even though he had a myriad of subjective complaints. Dr. Lesnak opined that because there was no evidence Claimant sustained injuries, his status with regard to MMI was not applicable. He did not believe Claimant required additional medical treatment. The ALJ credited this opinion regarding the need for additional treatment, as there was no evidence in the record that Claimant received additional medical treatment after June 2022.

29. Dr. Lesnak testified as an expert witness, and his testimony was consistent with the findings at the time of the IME. Dr. Lesnak testified that he did not question that there was a reported incident on April 1, 2022, but did not have any medical evidence to support Claimant suffered injuries as a result of the incident. (Lesnak Dep. Tr. p. 13:3-6). Dr. Lesnak stated that he thought the emergency room

physician prescribed Claimant Albuterol based on his subjective complaints and not reproducible objective findings. (Lesnak Dep. Tr. p. 16:4-14).[1] He also said Claimant's prescription was continued and a nebulizer was also prescribed based purely on his subjective complaints and not on objective findings by physicians at Kaiser. (Lesnak Dep. Tr. p. 17:25-18:11).

30. Dr. Lesnak opined that Claimant reached MMI as of July 22, 2022 when there were no reproducible findings on exam. (Lesnak Dep. Tr. p. 13:19-14:1). He did not believe there was any basis for an impairment rating, as there were no objective findings or test results upon which to base an impairment. (Lesnak Dep. Tr. p. 14:2-10). The ALJ credited the opinions of the treating physicians over those offered by Dr. Lesnak.

31. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 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. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. 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). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

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

[1] Dr. Lesnak admitted he was not an emergency room physician and did not have that certification. He was testifying from his experience approximately 30 years ago.

P.2d 1205 (1936); CJI, Civil 3:16 (2005). The issue of compensability turned on the credibility of the witnesses.

Compensability

In the case at bar, Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S. (2020). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As a starting point, the evidence first established Claimant was working on April 1, 2022. In this regard, Respondents did not dispute that an incident occurred that day; namely that Claimant was sprayed with chemicals by a coworker. (Findings of Fact 6-8). As found, the incident in question was corroborated by video taken that evening. *Id.* The ALJ concluded Claimant suffered a compensable injury when he was sprayed with an identified chemicals on April 1, 2022. (Finding of Fact 17). As found the chemical exposure required Claimant to seek medical treatment, which he received both at Kaiser Permanente and Aurora Medical Center. (Findings of Fact 13-16).

Second, the ALJ determined the chemical exposure required medical treatment with treating physicians prescribing medications, including eye drops and prednisone. Thus, Claimant established by a preponderance of the evidence that it was more likely than not that he was injured as a result of the chemical exposure on April 1, 2022. This was based upon the reports of the physicians treating Claimant. These documented both symptoms and treatment by the physicians. The ALJ credited the opinions of these physicians that the shortness of breath and other symptoms were caused by the workplace exposure on April 1, 2022. The ALJ also credited the opinions of the treating physicians that Claimant required testing and treatment after the incident. (Findings of Fact 17-19). Under these facts, the ALJ concluded there was a requisite causal connection between the incident of April 1, 20022 and Claimant's symptoms/need for treatment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

In coming to this conclusion, the ALJ considered Respondents' argument that while the incident occurred, it did not cause an injury. Respondents averred the physicians treated Claimant for his subjective complaints alone and there was no evidence of objective findings or need for treatment. Respondents cited Dr. Lesnak's report and testimony in support of their argument. As found, the incident of April 1,

2022 required Claimant to seek treatment and he required evaluations/treatment for a period of at least two months after the incident. Therefore, the ALJ concluded Claimant met his burden of proof in the case at bench.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In the case at bar, the ALJ concluded Claimant met his burden of proof to show that his required medical treatment as result of the work injury. (Finding of Fact 20). Respondents are therefore liable to pay for treatment to cure and relieve the effects of the injury. This includes the treatment at Medical Center of Aurora and Dr. Pineda and Kaiser Permanente as well as referrals from those providers.

ORDER

It is therefore ordered:

1. Claimant is entitled to benefits under the Colorado Workers' Compensation Act, as he suffered a compensable injury on April 1, 2022.

2. Respondents shall pay for Claimant's medical treatment at Medical Center of Aurora and Dr. Pineda and Kaiser Permanente as well as referrals from the providers, pursuant to the Colorado Worker's Compensation Medical Fee Schedule.

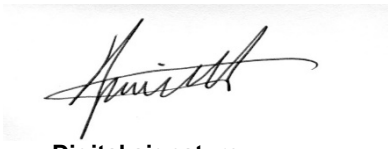
3. All other issues are reserved for later determination.

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 3, 2023

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-291-001

ISSUES

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

- If Claimant has proven a compensable occupational disease, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve the Claimant from the effects of the occupational disease?

- If Claimant has proven a compensable occupational disease, whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of January 15, 2023 through March 23, 2023?

FINDINGS OF FACT

1. Claimant was employed by Employer as a painter. Claimant is 42 years old and has worked for Employer off and on since he was a teenager. Employer is a painting company that is owned and operated by Claimant's brother. Claimant testified that his work with Employer included residential painting with some commercial property painting.

2. Claimant testified that his job duties for Employer included using sprayers and brushes to apply paints, primers, lacquers, lacquer thinners, muriatic acid, sealants, epoxy, stains and paint removers. Claimant testified he worked with sprayers approximately 50% of the time compared to brushes. Claimant testified he worked outdoor 40-50% of the time and exterior work was performed in the Summer. Claimant testified he worked 38-50 hours per week and more than one-half of that time was spent working with chemicals.

3. Documentation entered into evidence at hearing along with testimony from Claimant and Employer establish that Claimant worked for Employer for short periods in 2016 and 2017, from April 2018 through August 2020 and from March 2021 through January 2023. Claimant testified he went to work for a property company and performed mold mitigation beginning in 2019. Claimant testified he wore full body protection when performing mold mitigation. Claimant testified he left that job because he was asked to do things he was not comfortable with.

4. With regard to Claimant's work for Employer, Claimant testified that Employer failed to provide Claimant or other employees with protective gear. Claimant

testified he would have to purchase his own masks and respiratory cartridges on their own, although the owner, CK[Redacted], occasionally would purchase masks and respirator cartridges for Employees. Claimant testified that when he asked Employer to provide additional protective gear, he was told by Employer that Employer was "losing money" and Claimant needed to "man up" and "get the job done".

5. CK[Redacted] testified at hearing in this matter. [Redacted, hereinafter CK] testified that he employs four people currently and has employed up to eleven employees. CK[Redacted] testified that his policy was to have his employees wear respirators 100% of the time that the employees are exposed to chemicals. CK[Redacted] testified that employees were allowed to get respirator cartridges at the [Redacted, hereinafter SW] store and put the cost of the respirators on Employer's account with SW[Redacted].

6. With regard to this conflict in the testimony as to whether Claimant was provided with personal protection equipment by Employer or needed to pay for his equipment himself, the ALJ credits the testimony of Employer over Claimant.

7. Claimant testified that he began having issues with his lungs dating back to 2018. Claimant reported in his medical records that he had started smoking at age 16. Claimant testified at hearing that he may have started smoking earlier than age 16. Claimant testified he smoked a pack of cigarettes every 2-3 days until age 38. Claimant testified he had a history of marijuana use that lasted from age 21 to age 34. Claimant testified he began using meth after his mother passed away and used meth for 6-7 years. Claimant testified he would occasionally smoke meth, but the main way he would consume meth was by snorting or eating meth. Claimant testified he didn't smoke cigarettes very often when smoking meth.

8. Claimant testified that in 2021 he experienced tightness in his lungs, shortness of breath, coughing, and burning in his lungs. Claimant testified he would experience these symptoms right away when working with muriatic acid. Claimant testified he went to the Pagosa Springs Medical Center when he experienced these symptoms.

9. Claimant's medical records document that Claimant sought medical treatment with Dr. Orndorff at Mercy Medical Center in Durango in May 2016 for a cough. Claimant underwent a chest x-ray that showed no chest abnormality. Claimant was evaluated by Dr. Washburn in May 2018. Claimant underwent a computed tomography ("CT") scan of his lungs that showed bilateral pulmonary nodules measuring up to 7 mm. Spirometry tests per1ormed on June 25, 2018 were noted to be normal. It was recommended that Claimant return for follow up CT scan in 12 months. Claimant reported he was able to per1orm his job painting without any difficulties. Claimant reported he only recently started using respiratory protection while at work.

10. Claimant underwent an x-ray of the chest on January 16, 2020. The x-ray showed no radiographic evidence for acute cardiopulmonary disease. Claimant underwent a CT scan of the chest and sinuses on January 23; 2020. The CT scan showed right lower pulmonary nodules that were unchanged since the May 4, 2018 CT

scan. The CT scan of the sinuses showed mild polypoid opacification posterior ethmoid air cells and inferior maxillary sinuses.

11. Claimant returned to Mercy Medical Center on July 22, 2022 with complaints of a cough and shortness of breath as well as some back pain. Claimant reported he did not smoke and worked around chemicals, but does use a respirator. Claimant complained of some pain and numbness down his right leg in addition to the back pain. Claimant was referred for a magnetic resonance image ("MRI") of the low back and x-rays of the chest. Claimant was prescribed medications for his back pain.

12. Claimant returned to Pagosa Springs Medical Center on August 8, 2022 with complaints of marked fatigue having trouble getting through a workday, visual blurring off and on throughout the day helped somewhat by glasses, trouble with concentration and memory, weakness in the extremities to where he has to stop and rest along with complaints of numbness and tingling distally in the extremities and intermittent muscle spasm. Claimant reported he had worked as a painter for over 25 years and therefore has had a lot of exposure to paint, solvents, and other products that are involved in his profession. Claimant reported that several years ago, "they all started wearing respirators." Claimant reported he had a history of some lung "nodules". Dr. Bentley, the examining physician, noted that his "first bet" is that due to Claimant's marked ongoing anxiety and perhaps for other stressors, that we are dealing with a somatization disorder. Dr. Bentley explained that this meant that by producing too much adrenaline type chemical influence in his system, it interteres with other daily important functions and that treating the anxiety and stress could *very* much help his physical symptoms. Dr. Bentley also noted that another possibility would be that of gradual or significant toxic exposure over the years. Dr. Bentley noted he was not exactly sure how to tie in his complaints of the lung problem, but recommended Claimant undergo a toxicology consultation.

13. The ALJ notes that Claimant's report to Dr. Bentley on this visit that "they all started wearing respirators" several years ago is consistent with Employer's testimony at hearing that the respirators were provided by Employer for the employees. The ALJ notes that if Claimant were providing his own personal protection equipment, he likely would not have referred to the use of the equipment in the plural sense of "they all started wearing" . The ALJ takes this into consideration when considering the credibility of the conflicting testimony between Claimant and Employer.

14. Claimant returned to Pagosa Springs Medical Center on September 7, 2022 with multiple concerns, including low back pain with bilateral leg weakness and numbness intermittently. Claimant reported he had a spinal fusion about 9 years ago and "it has progressively gotten worse". Claimant reported he was having trouble working because of the pain. Claimant also reported still having right knee pain and noted he had knee surgery with Dr. Webb not long ago. Claimant also requested a referral to pulmonology at National Jewish. Claimant reported he had "reactive airway for his lungs" and felt it was related to chemical exposure at work as a painter. The Medical Center noted that Claimant had some lung nodules that were followed with

repeat CT scans that did not change, but Claimant was still very nervous that there was something wrong with the nodules.

15. Claimant was initially evaluated at National Jewish Health Center on December 1, 2022 at which time he underwent spirometry testing by Mr. Townsley. Claimant was examined by Dr. Pacheco with National Jewish Health Center on December 2, 2022. Dr. Pacheco noted in her report that Claimant had symptoms over the past 7-8 years that have gradually gotten worse in severity. Claimant reported that he gasps for air when moving ladders at work and often needs to stop to catch his breath. Claimant reported he gets short of breath with bending over to pain baseboards, while walking on level ground, and occasionally at rest. Claimant reported that stopping to perform deep breathing exercises seems to help his dyspnea after 10- 20 minutes. Claimant reported a feeling of chest tightness with dyspnea, and on rare occasion, develops sharp, non-radiating, substernal chest pain that self resolves after a few minutes. Claimant reported to Dr. Pacheco that he notes a significant difference when spraying paints and lacquer products. In particular, Claimant noted the greatest amount of chest burning when spraying lacquer with a spray gun. Dr. Pacheco noted that Claimant's primary care provider had started him on a Flovent inhaler for maintenance and albuterol inhaler as needed. Claimant reported not noticing any improvement with his symptoms from using the albuterol once daily and the Flovent 1-2 times per week. Claimant reported a history to Dr. Pacheco of smoking 2-4 cigarettes per day currently.

16. Dr. Pacheco ordered various testing to be performed, and following the testing, diagnosed Claimant with "asthma with positive methacholine challenge testing (PC20 FEV1 <0.0625 mg/ml). Dr. Pacheco noted Claimant had occupational exposures during 25 years as a painter including aerosolized lacquer with added catalysts, urethane and acrylic latex paint, paint primers, painVlacquer thinners, two-part industrial epoxies and spray foam insulations. Dr. Pacheco noted Claimant had other occupational exposures include mold for one year in 2019 working for a mold mitigation company. Dr. Pacheco noted that Claiimant would pick up the lacquer from SW[Redacted] where a store worker adds a catalyst prior to purchase, and Claimant would load the lacquer into a spray gun machine and spray it onto wood surfaces. Claimant reported he used to apply 55 gallons of lacquer in a single day.

17. Dr. Pacheco noted that the pulmonary function tests were normal, but methacholine challenge was strongly positive (PC20 FEV1 < 0.0625 mg.ml) indicting a diagnosis of asthma. Dr. Pacheco noted that she was concerned for work-related asthma from his workplace exposures, especially the lacquers, urethane paints, and primers. Dr. Pacheco ultimately diagnosed Claimant with asthma with positive methacholine challenge most likely work-related from Claimant's occupational exposures. Dr. Pacheco requested Claimant perform Peak Expiratory Flow Response ("PEFR") measurements of his breathing four times daily at work and away from work to compare Claimant's breathing ability in both places.

18. Claimant returned to Dr. Pacheco on December 16, 2022. Dr. Pacheco reviewed Claimant's PEFR data and noted that Claimant's breathing ability decreased

at work compared to at home. Dr. Pacheco noted that Claimant's PERF demonstrated a 20% or more decline in his measurements while at work compared to at home. Dr. Pacheco opined that Claimant was suffering from asthma that was caused by his work related exposures to various products at work.

19. Claimant testified that after he was advised by Dr. Pacheco that his asthma was work related, he decided to file a Workers' Claim tor Compensation. Claimant testified he initially asked his brother to file the claim for him, but when Employer failed to file the claim, he filed the Workers' Claim for Compensation. The Workers' Claim for Compensation was filed on January 24, 2023.

20. CK[Redacted] testified at hearing that when his brother advised him that he had a work injury, CK[Redacted] initially believed he was referring to a back injury. CK[Redacted] testified that after his brother filed the Workers' Claim for Compensation, he asked Insurer to look into whether the claim was valid. A Notice of Contest was filed on February 7, 2023.

21. Claimant returned to Pagosa Springs Medical Center on February 7, 2023 and was evaluated by Physician's Assistant ("PA-C") Mashburn. PA-C Mashburn noted that Claimant had been diagnosed with work-related asthma by National Jewish Health. Ms. Mashburn noted that National Jewish had provided Claimant with a note to avoid all pain and paint product exposure while working, but his employer did not have any desk jobs for him so he had been unable to work. PA-C Mashburn noted she was referring Claimant to a Level II accredited physician for his workers compensation case.

22. Claimant returned to Dr. Pacheco on February 10, 2023 and reported that he had some improvement in his symptoms and had not returned to work. Dr. Pacheco noted that Claimant's PEFR data showed values between 400-500 Uminute, though they tend to vary by no more than 40ml across a single day. Dr. Pacheco continued to provide a diagnosis of work-related asthma. Dr. Pacheco noted that the chest CT scan showed subtle centrilobular nodules that suggest a diagnosis of respiratory bronchiolitis from cigarette use, but noted this diagnosis would not cause a positive methacholine challenge or acute peak expiratory flow decline while at work.

23. Respondents obtain an independent medical examination ("IME") with Dr. Jeffrey Schwartz on April 19, 2023. Dr. Schwartz reviewed Claimant's medical records, obtained a medical history and performed a physical examination, which included spirometry testing, as part of his IME. Dr. Schwartz also requested a complete copy of the data from National Jewish Health with regard to the methocholine challenge test.

24. Dr. Schwartz issued a report dated June 5, 2023 that noted issues with regard to the methacholine challenge testing results, which included that the methacholine challenge test showed the volume-time curves for each of Claimant's FVC efforts during the test. Dr. Schwartz noted that the two lower curves represented Claimant's reported FVC maneuvers performed after Claimant inhaled methacholine. Dr. Schwartz noted that it was noteworthy that Claimant's two volume-time curves for his post-methacholine tests showed obvious differences which should not occur if

Claimant's efforts are reproducible under ATS standards. Dr. Schwartz reported that the numerical data for Claimant's post-methacholine spirometries showed Claimant preformed three FVC maneuvers in the minute after his methacholine dose but Claimant's report showed his best effort, based on his FVC and FEV1 at 12:21:55, did not have the accompanying flow-volume curve required per ATS quality confirmation. Dr. Schwartz opined that based on the two post-methacholine FEV1s with accompanying flow-volume curves which showed a difference of 210 ml, Claimant's "positive test" was not acceptable because it failed the reproducibility criterion, and, therefore, there was no evidence Claimant's low post-methacholine spirometry values represented maximal expiratory efforts. Dr. Schwartz hypothesized that Claimant's failure to perform reproducible spirometry after he inhaled methacholine was not a result of possible asthma, but likely represented Claimant's malingering, as Claimant was able to perform reproducible expiratory efforts before and after his immediate post- methacholine testing. Dr. Schwartz further noted that Claimant's post-methacholine spirometry did not show the airflow obstruction expected with Claimant's significant fall in FEV1, a finding that would be typical of poor inspiratory or expiratory efforts that lead to a reduced FEV1 but a normal FEV1/FVC.

25. Dr. Schwartz testified consistent with his IME report at his deposition in this matter. Following Dr. Schwartz' testimony in this matter, Claimant presented the rebuttal testimony of Dr. Pacheco. Dr. Pacheco testified that the methacholine challenge test is the gold standard test for asthma. Dr. Pacheco testified that she did not agree that the methacholine challenge test results were not acceptable. However, Dr. Pacheco noted that the test results were interpreted by a pulmonologist, and Dr. Pacheco relied on the pulmonologists judgment that the test was acceptable.

26. Dr. Pacheco took issue with Dr. Schwartz' conclusion that the test results of the methacholine challenge test were influenced by Claimant's effort during the test and noted that Claimant would not know which test he was not to perform well at during the administration of the test. Dr. Pacheco testified on cross-examination that she relied on interpretation of data that had been performed by other people in her office, including the technician performing the test and the pulmonologist.

27. Dr. Schwartz testified on sur-rebuttal and reiterated his testimony that the methacholine challenge test did not meet the ATS testing standards. Dr. Schwartz noted that it appeared that Dr. Pacheco was given improper information as to whether the Claimant met the ATS standards in the methacholine challenge test. Dr. Schwartz testified that it appeared that Claimant's one positive test for asthma was based on improper testing, as all of Claimant's other testing was normal.

28. The ALJ credits the testimony of Dr. Schwartz and finds that the methacholine challenge test resulted in findings that did not meet the ATS testing standards. The ALJ notes that the testimony of Dr. Pacheco does not establish that the findings of the methacholine challenge test should be relied upon in light of the failure to meet the ATS testing standards. The ALJ therefore credits the testimony of Dr. Schwartz over the conflicting testimony of Dr. Pacheco and finds that Claimant has

failed to establish that it is more probable than not that Claimant is suffering from work related asthma.

29. Based on the finding that Claimant has failed to establish that he is suffering from work related asthma, the ALJ need not address the issue of whether the condition is related to Claimant's employment with Employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S.

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8- 43-201, C.R.S., 2022. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

4. 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.

5. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff,* 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational

disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin* & *Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992).

6. As found, the ALJ credits the testimony and opinions expressed by Dr. Schwartz over the conflicting testimony and opinions by Dr. Pacheco and finds that Claimant has failed to establish by a preponderance of the evidence that he contracted work related asthma as a result of an occupation disease Claimant sustained at work with Employer. As found, the testimony and opinion of Dr. Schwartz that the methacholine challenge test findings were based off of test results that did not meet ATS standards is found to be credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits for an occupational disease related to his work with Employer 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.** 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/dp/oac/forms-WC.htm. In **addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac:9it@state.co.us.**

DATED: November 6,, 2023

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-221-180-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with employer on or about March 5, 2022.

2. If compensable, whether Claimant established by a preponderance of the evidence entitlement to temporary disability benefits.

3. If compensable, whether Claimant established by a preponderance of the evidence that right shoulder decompression surgery is reasonable and necessary to cure or relieve the effects of an industrial injury.

4. If compensable, determination of Claimant's authorized treating physician.

5. If compensable, determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 67-year-old woman who worked for Employer as a warehouse worker, beginning in September 2020. (Ex. 3). Claimant previously worked for Employer in Nashville, Tennessee in 2018 and 2019. Claimant's job required her to prepare products for delivery by drivers by selecting products from the warehouse, placing them into a "tote," and taking the loaded totes to a station for delivery drivers. Claimant testified that on March 5, 2022, she was retrieving a tote from an overhead shelf when she felt a "pull" and pain in her right shoulder.

2. Claimant testified she reported the incident to her "lead" who instructed her to take ibuprofen and ice her shoulder. Claimant testified the lead did not ask Claimant to complete paperwork, and did not provide her a list of places to obtain medical treatment. Claimant did not work the following day due to her shoulder pain, and was not scheduled to work the next three days. She returned to work on Thursday, March 10, 2022, and continued to work after returning. Claimant's time records from this period show Claimant worked approximately 24 minutes on Sunday, March 6, 2022, and took voluntary time off the remainder of the day. Claimant returned to work on Thursday, March 10, 2023, and worked approximately four hours. (Ex. 9). Claimant continued to work after March 10, 2022, but did not work full shifts.

3. She testified that by the first week of April 2022, she continued to have pain and sought treatment at Peak Vista on April 4, 2022. At that visit, Claimant saw Iana Shamah, PA-C, and reported upper back, shoulder, and hand pain. Claimant did not report a specific injury causing her shoulder pain, and reported an onset of one month earlier, the record states "Context: no injury," and no mechanism of injury was discussed. Claimant's symptoms were aggravated by lifting and movement, and diagnosed her with a right

shoulder sprain. Although Ms. Shamah documented an assessment of "generalized body aches," Claimant's examination was focused on her right shoulder, and demonstrated limited strength and motion in the right shoulder, with tenderness to palpation and pain on motion. Examination of Claimant's left shoulder, spine, neck, and hands was normal. A right shoulder x-ray showed mild arthritis in the glenohumeral and acromioclavicular joints. Claimant was instructed to take ibuprofen and Tylenol for discomfort, and to return if her symptoms did not improve. Claimant declined a physical therapy referral. No work restrictions were imposed. (Ex. C).

4. Claimant returned to Peak Vista on April 26, 2022, reporting that her right shoulder pain was constant and worsening. She reported an onset two months earlier, with aching, and sharp pain. The record again documents "no injury." Ms. Shamah recommended an MRI of the right shoulder and referred Claimant for an orthopedic evaluation. (Ex. C).

5. The right shoulder MRI performed on May 31, 2022, was interpreted as showing age-related rotator cuff tendinosis, partial-thickness tearing of the proximal supraspinatus, intrasubstance tearing within the distal tendon; and osteoarthritic changes in the glenohumeral joint with small effusion, biceps tendinitis. (Ex. E).

6. Claimant returned to Peak Vista on June 3, 2022, reporting continued right shoulder pain. Claimant had begun physical therapy and noted that it helped . (Ex. E).

7. On June 7, 2022, Claimant saw Richard Stockelman, M.D., at Colorado Springs Orthopaedic Group, reporting reported right shoulder pain in the superior aspect that began insidiously and was worse with reaching and use of the right arm. Claimant had been in physical therapy for 6 weeks and noted that treatment to date had not resolved her pain. Dr. Stockelman reviewed Claimant's MRI and diagnosed Claimant with right shoulder pain, subacromial bursitis, rotator cuff tendonitis, and acromioclavicular joint degeneration. Dr. Stockelman performed a right shoulder subacromial steroid injection, and recommended Claimant return in three weeks. (Ex. 6).

8. On June 29, 2022, Claimant returned to Dr. Stockelman reporting three-days relief from the subacromial injection, but no lasting benefit. Dr. Stockelman prescribed an oral steroid and scheduled a follow up in three weeks. (Ex. 6)

9. On July 20, 2022, Claimant saw Dr. Stockelman and again reported no change in her symptoms. She indicated she would pursue a workers' compensation claim, because "she knows she is better when she is not going to work and doing all the lifting required in her job." Dr. Stockelman recommended proceeding with an arthroscopic subacromial decompression, but delayed performing the procedure until Claimant determined whether to pursue the treatment through workers' compensation or private insurance. (Ex. 6).

10. On August 5, 2022, Dr. Stockelman assigned Claimant work restrictions, and indicated her right shoulder condition was "thought to be secondary to overuse." The work restrictions included no lifting greater than five pounds overhead, no repetitive lifting or motions overhead, and a weight restriction of 10 pounds. He indicated the restrictions would remain in effect until October 1, 2022. (Ex. 6)

11. Claimant returned to Dr. Stockelman on October 3, 2022, requesting authorization to be off work for an additional two months, which the doctor provided. Claimant indicated she was considering surgery and pursuing a workers' compensation claim. Dr. Stockelman's impression was subacromial bursitis of the right shoulder. (Ex. 6). ON October 26, 2022, Dr. Stockelman completed a work restriction form for Employer indicating there were no accommodations that would permit Claimant to return to work until December 1, 2022. (Ex. 6).

12. On October 5, 2022, Claimant was seen at Peak Vista, and reported that she was trying to open a workers' compensation case. (Ex. D).

13. On November 15, 2022, Claimant saw Daniel Peterson, M.D., at Concentra. Claimant reported, for the first time, that the initial injury occurred at work while lifting boxes. Claimant reported that Employer did not offer medical care, so she saw her primary care provider at Peak Vista. On examination, Dr. Peterson noted tenderness in the acromioclavicular and glenohumeral joints, with limited range of motion in all planes. Claimant also had positive rotator cuff tests including painful arc, Hawkin's, Neer, and empty can tests, and positive biceps tests. He diagnosed Claimant with a traumatic incomplete tear of the right rotator cuff, a sprain of the right acromioclavicular ligament, and right shoulder arthritis. Dr. Peterson referred Claimant to Dr. Stockelman for evaluation and treatment as a workers' compensation case. Dr. Peterson noted claimant "clearly has pre-existing arthritis in her [right] shoulder but worked without difficulty for 17 months doing heavy lifting without any problem until March of 2022 when she started having marked [right] shoulder pain. Based on her [history] and her MRI she clearly has an exacerbation of a pre-existing condition to the point where she will need surgery for her right shoulder to return her to her prior function. I will refer her to Dr. Stockelman under WC to proceed with surgical repair." (Ex. 7).

14. Claimant saw Dr. Stockelman again on November 18, 2022, for a pre-surgical visit. On November 22, 2022, Dr. Stockelman requested authorization from Insurer to perform the recommended surgery. (Ex. D).

15. Claimant saw Dr. Peterson again on December 2, 2022, he noted that he did not believe Claimant was safe to return to work. On January 3, 2022, he opined that Claimant was approximately 25% of the way toward meeting the physical requirements of her job. (Ex. 7).

16. On January 31, 2023, Respondents filed a Notice of Contest, indicating that Claimant's injury was not work-related. (Ex. 4)

17. On February 22, 2023, Claimant filed a Workers' Claim for Compensation, alleging that she "was working on March 5, 2022, performing daily picking, stowing, and staging duties. I reached up over my head to pull a tote from the shelf and experienced a tightness in my muscle of right arm." Claimant indicated that she reported the incident to "[Redacted, hereinafter BE] also [Redacted, hereinafter JN]." (Ex. 3)

18. Claimant returned to Peak Vista on April 19, 2023, reporting continued right shoulder pain, and that she had not returned to work. Claimant reported her pain had improved, but she still could not lift, and her range of motion was poor. (Ex. 5).

19. Claimant has not had the surgery recommended by Dr. Stockelman and Dr. Peterson.

20. On July 11, 2023, Timothy O'Brien, M.D., performed a record review at Respondents' request. Dr. O'Brien was admitted as an expert in orthopedic surgery, and testified through deposition. Dr. O'Brien opined that Claimant did not sustain a work-related injury to her shoulder. He further opined that Claimant's MRI shows only age-related conditions, and no sign of an acute injury. He opined that the shoulder surgery recommended by Dr. Stockelman is reasonable, although he believes it is not work-related and unlikely to completely relieve Claimant's symptoms. Dr. O'Brien's opinions regarding causation of Claimant's injury are not persuasive.

21. Claimant testified that she has not had any right shoulder symptoms or treatment in the five years before March 5, 2022, and was able to perform her job duties. Claimant testified that after March 5, 2022, she continued to perform her job, but her shoulder condition continued to worsen, so she worked reduced hours. Claimant's wage records indicate that she averaged approximately 42.5 hours per week in the 14 weeks before March 5, 2022, and approximately 30.5 hours per week in the 14 weeks after March 5, 2022. Claimant testified that in June 2022, she made an accommodation request and Employer placed her on a leave of absence. (No document evidencing the accommodation request was admitted into evidence).

22. On June 18, 2022, Claimant was placed on a leave of absence until October 2022. Claimant testified that Employer required her to take a leave of absence because they could not accommodate her work restrictions. Claimant attempted to return to work pm October 2, 2022, and was paid for 6.68 hours, according to her wage records. (Ex. 9). Claimant has not returned to work for Employer since October 2022.

23. Claimant testified that she reported to providers at Peak Vista and Dr. Stockelman, that she first experienced shoulder pain when lifting a tote off a shelf while working for Employer.

24. In position statements, Claimant and Respondent agree that Claimant's average weekly wage was $851.18. After reviewing Claimant's wage records, the ALJ finds this to be a fair approximation of Claimant's AWW.

CONCLUSIONS OF LAW

Generally

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

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury “has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee’s service to the employer in connection with the contract of employment.” *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm’n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int’l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No.4-894-311-03, (ICAO Apr. 9, 2014). All results flowing proximately and naturally from an industrial injury are compensable. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right shoulder arising out of the course of her employment with Employer. The ALJ finds credible Claimant’s testimony that she sustained an injury to her right shoulder on March 5, 2022, while working for Employer. When Claimant saw her Peak Vista on April 4, 2022, she reported an onset of her symptoms one-month earlier, which corresponds to her testimony. Moreover, Claimant's wage records correspond to her testimony that she took time off work the following day, and that she had difficulty working her full shifts after March 5, 2022.

Although, the several physicians documented “no injury” or an “insidious onset’ of her symptoms, this does not rule out a work-related injury. While the evidence is contradictory on whether the symptoms Claimant experienced on March 5, 2022 were caused by an acute injury, or the manifestation of an injury resulting from overuse, the evidence does establish an onset of symptoms arising out of the course of Claimant’s employment with Employer. That Claimant may have described different mechanisms of injury is not dispositive. Claimant is not required “to understand the exact mechanism of the injury to prove a compensable injury, nor is [a claimant] required to explain in the medical, physiological, or anatomical terms of an expert the way in which the accident resulted in the symptoms.” *In Re Montoya*, W.C. No. 4-633-835 (ICAO, April 26, 2006).

The ALJ finds credible the opinion of Dr. Peterson that Claimant aggravated a pre-existing condition in the course of her employment. Claimant credibly testified she had no right shoulder symptoms or treatment in the five years before March 5, 2022, and no credible evidence was admitted contradicting that testimony. Claimant had also performed her warehouse job for Employer for approximately three years in Colorado, and also from 2018 to 2019 for one of Employer’s facilities in Nashville, Tennessee. It is unlikely Claimant could have worked in her position with a shoulder injury.

Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Rule 8-2 (A)(2) clarifies that, "[a] copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury." The term "business days" refers to any day other than a Saturday, Sunday, or legal holiday. W.C.R.P. 1-2 (C).

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

Claimant's authorized treating physician is Dr. Peterson at Concentra. Claimant has failed to establish that Employer was aware of her work-related injury until sometime in October 2022. The record contains insufficient credible evidence to determine the date Employer became aware Claimant sustained a work-related injury. The ALJ does not find credible Claimant's testimony that she reported her work injury to Employer on March 5, 2022. Moreover, had Claimant reported a work-related injury, the ALJ finds it unlikely Employer would have required to take a non-workers' compensation leave of absence in June 2022.

The first credible evidence in the record that Claimant was considering pursuing a workers' compensation claim was July 20, 2022, when she informed Dr. Stockelman she intended to pursue a claim However, October 3, 2022, was the first time Claimant indicated she was actively pursuing a workers' compensation claim. Her previous reports to physicians were prospective statements of intent, but no indication she was actively pursuing a claim. A report in October 2022 is also consistent with Claimant first seeing Dr. Peterson at Concentra on November 15, 2022, and beginning treatment with him as her ATP. Dr. Stockelman became an ATP by virtue of Dr. Peterson's November 15, 2022 referral, and was an ATP after that referral, but not before. The treatment and evaluations Claimant received from Peak Vista were not provided by an ATP.

Specific Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and

is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Stockelman is reasonable, necessary and causally related to her industrial injury. The ALJ finds persuasive Dr. Peterson's opinion that Claimant requires surgery to address an aggravation or exacerbation of her pre-existing osteoarthritis. Dr. O'Brien agreed that the surgery was reasonable, but did not believe it was related to her injury. Having found the Claimant's injury compensable, and accepting that the surgery is intended to address the aggravation of her pre-existing conditions, the ALJ concludes that, more likely than not, the surgery recommended by Dr. Stockelman is compensable medical treatment.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Temporary disability benefits continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.; See also § 8-42-106 (1)(b), C.R.S. (for temporary partial disability benefits) The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) *citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

Claimant has established an entitlement to temporary disability benefits beginning March 6, 2022. The evidence demonstrates that Claimant was medically incapacitated due to her work-related injury, and sustained a loss of earning capacity for more than three work shifts. Claimant's wage records demonstrate that Claimant worked 2.97 hours the week following her injury. She was then able to return to work at a slightly diminished capacity for approximately 14 weeks, until she was placed on a leave of absence on June 18, 2022. No credible evidence was admitted indicating that the criteria for termination of temporary disability benefits has been satisfied. Respondents shall pay Claimant

temporary disability benefits from March 6, 2022 until terminated by statute, or order, subject to applicable offsets. Per agreement of the parties, what, if any, offsets are to be applied to Claimant's temporary disability benefits is reserved for future determination.

Per the request of the parties, the issue of offsets is reserved.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate a claimant's average weekly wage (AWW) based on a claimant's monthly, weekly, daily, hourly, or other earnings. The overall objective in calculating the AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., *supra*; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007).

As found, the parties agree Claimant's AWW at the time of injury was $851.18. The ALJ has reviewed Claimant's wage records contained in Exhibits 9 and F, and finds that $851.18 is a fair approximation of Claimant's AWW at the time of injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to her right shoulder arising out of the course of her employment on or about March 5, 2022.

2. Claimant's authorized treating physician is Daniel Peterson, M.D. Richard Stockelman, M.D., became an authorized treating physician on November 15, 2022, by virtue of Dr. Peterson's referral.

3. Claimant's request for authorization of the surgery recommended by Dr. Stockelman is granted.

4. Claimant is entitled to temporary disability benefits from March 5, 2022, until terminated by statute or further order, subject to applicable offsets. The determination of amount and applicable offsets is reserved for future determination.

5. Claimant's average weekly wage is $851.18.

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

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

DATED: November 7, 2023

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

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he sustained a compensable injury to his back in the course and scope of his employment on March 15, 2023?

2. If Claimant proved he suffered a compensable injury, did Claimant prove by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical benefits?

FINDINGS OF FACT

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

1. Claimant is a 62 year-old male who worked as a cashier for Employer. On Wednesday, March 15, 2023, Claimant was assisting an elderly customer who was refilling a five-gallon water bottle. Claimant credibly testified that he bent over to lift the water bottle to put it in her shopping cart. When he did this, he immediately felt a pop in his back. Claimant's supervisor, [Redacted, hereinafter RN], was next to him and saw the event. Claimant credibly testified that RN[Redacted] asked if Claimant needed a break. Claimant took a brief break and went to the bathroom. Shortly thereafter, he returned and completed his shift. (Tr. 11:16-25).

2. Claimant worked part-time for Employer. Claimant was not scheduled to work Thursday, March 16, 2023 or Saturday, March 18, 2023. Claimant continued to experience back pain, so he "called in" to work on Friday, March 17, 2023, and Sunday, March 19, 2023. (Tr. 12:6-13). Claimant credibly testified that he experienced immediate pain in his lower back, and later the evening of March 15, 2023, he began experiencing left leg symptoms. (Tr. 16:1-11).

3. Claimant testified that from March 15, 2023 to March 19, 2023 he tried home remedies for his back pain. He tried a heating pad, ice, over-the-counter medications like ibuprofen, Tylenol and patches, but these did not relieve his symptoms. (Tr. 12:14-19).

4. On Sunday, March 19, 2023, Claimant went to the Emergency Room at St. Anthony North Health Campus. He complained of left-sided low back pain and left leg pain that he had been experiencing since Wednesday, March 15, 2023. According to the medical records, Claimant reported that while at work, he lifted a large bottle of water, and developed left low back pain that radiated into his left leg. He described the pain as aching, sharp and throbbing. (Ex. 6 p. 10). In the same medical record, there is an ED Triage Note from Monica L. Monnin, describing Claimant as reporting that he "[c]ould have lifted something wrong at work, unsure what caused the pain which started

Wednesday." (Ex. 6, p.12). Claimant credibly testified that he consistently reported his mechanism of injury as lifting a five-gallon water bottle at work. (Tr. 25:4-9). The ALJ credits Claimant's testimony and does not find the triage note to be persuasive.

5. Maris Drazek, PA-C treated Claimant in the emergency room. She ordered lumbar spine x-rays and read them as showing Claimant having scoliosis and degenerative changes. Ms. Drazek diagnosed Claimant with acute left-sided low back pain with left-sided sciatica. She prescribed Claimant Robaxin, Gabapentin, and lidocaine patches, and advised Claimant to follow up with his PCP. She gave Claimant a note that he may return to work on March 23, 2023. (Ex. 6 pp. 9-10). Claimant credibly testified that he took this one-page note to his Employer on Monday, March 20, 2023. (Tr. 12:25-13:6 and 24:4-9). This testimony was uncontroverted.

6. Claimant credibly testified that while he was off of work, he called several chiropractors to try to get an appointment, and he called his primary physician to try to get an appointment. (Tr. 13: 7-11).

7. Claimant was able to schedule a chiropractic appointment with Kyle Zachgo, D.C, on March 20, 2023. Dr. Zachgo noted in the record that Claimant "comes in today with low back pain that started last week when he was lifting a bucket at work. He didn't feel pain initially but throughout the next few days he started noticing significant pain. He went to St. Anthony's yesterday to get looked at, they diagnosed [him] with sciatica and referred him to me. They gave him medication that did not help." (Ex. 8). As found, Claimant credibly testified that he consistently reported his mechanism of injury as lifting a five-gallon water bottle at work. (Tr. 24:21-25:9). The ALJ credits Claimant's testimony and does not find the reference to lifting a bucket at work to be persuasive.

8. At Claimant's March 20, 2023 chiropractic appointment, Dr. Zachgo performed dry needling, but noted Claimant did not respond well to care. (Ex. 8). This is consistent with Claimant's testimony that the dry needling did not relieve his symptoms. (Tr. 13:23-25).

9. Claimant returned to Dr. Zachgo on March 24, 2023 for a follow-up appointment, and reported having no improvement in his symptoms. Claimant testified he was unable to undergo manual manipulation because he was too sore and swollen. (Tr. 13:12-16). This is consistent with Dr. Zachgo's records that he performed no treatment, and suggested Claimant go to his primary care provider to get an MRI and possible injection to relieve his symptoms. (Ex. 8).

10. On April 10, 2023, Claimant went to the emergency room with chief complaints of urinary retention and flank pain. According to the medical record, Claimant was getting up seven times a night to urinate, and experienced pain with urination that radiated through his perineum to his back. At the emergency room, Claimant gave a urine sample without any difficulty. No emergent causes for his symptoms were identified. His urine test was normal and there was no evidence of infections or kidney stones. Claimant was given a urology referral, and he was advised to follow up with his primary care physician. (Ex. 6 pp. 15-21).

11. Claimant saw his primary care physician, Taylor Hart, M.D. on April 13, 2023, with a chief complaint of acute left-sided low back pain with left-sided sciatica. Dr. Hart was concerned about disc protrusion/herniation and nerve compression. Claimant also reported difficulty urinating over the past few weeks. Dr. Hart noted Claimant's recent low back pain, and Claimant's strong family history of prostate cancer. He did not have concern for acute cauda equine syndrome, but wanted Claimant to have a lumbar MRI. (Ex. 9).

12. On March 22, 2023, Claimant completed an "Employee Incident Questionable Claim Form." On the form, Claimant wrote he "was assisting a customer with P.O.S. I lifted a 5 gal water bottle to put in the cart." He listed the date of injury as March 15, 2022. The document was to be completed by store management, but it was completed by Claimant. (Ex. 14 p. 107).

13. Claimant's supervisor, RN[Redacted] , completed an Associate Incident Report Packet on March 22, 2023. [Redacted, hereinafter KS] signed the form on April 20, 2023 and wrote the following "updated/notified." (Ex. 14 p. 103). No evidence was offered to explain why KS[Redacted] signed the form on April 20, 2023, indicating that is when she was notified.

14. Claimant completed an "Associate Work Related Injury/Illness Report" on April 20, 2023. He noted an injury date of March 15, 2023, and stated "I was assisting a[n] elderly woman with a[n] [Redacted, hereinafter EO] 5 gallon exchange. I kneed [sic] down, pulled out the full water bottle and set in on the ground in front of the EO[Redacted] water station. The customer brought her cart closer and then I lifted it to her cart." There was no evidence offered as to why this form was not completed earlier. (Ex. 14 p. 108).

15. Employer's First Report of Injury was completed on April 20, 2023. According to the Report, Claimant injured his lower back on March 15, 2023 when he was lifting a water bottle for a customer, and he notified Employer of the injury to his lower back on March 20, 2023. (Ex. 2). The ALJ finds that Claimant notified Employer of his back injury on or about March 20, 2023.

16. Claimant went to Concentra on May 16, 2023, and was evaluated by ATP, Michelle Viola-Lewis, M.D. There is no objective evidence in the record as to why Claimant was not sent to Concentra before this date. Claimant explained to Dr. Viola-Lewis that on March 15, 2023, he was helping a customer with a five-gallon water bottle when he injured the left side of his lower back. Dr. Viola-Lewis recorded that he went to the emergency room initially because the pain kept him from sleeping. He also developed urinary retention and was referred to a urologist. She further noted that his May 15, 2023 MRI showed significant bulging of the L4 disc with impingement of the nerve root as well as degenerative changes in the L4-L5 area. Dr. Viola-Lewis referred Claimant to an orthopedic spine specialist and to physical therapy. She gave Claimant restrictions of being allowed to sit as needed, and no lifting, pushing, pulling or tugging greater than 10 pounds. On the WC164 Form, she noted Claimant's work-related medical diagnoses as: L4-L5 disc bulge, injury of sciatica nerve, and neurogenic bladder. (Ex. 10).

17. On May 18, 2023, Claimant had an MRI of his spine. The MRI showed a large extruded disc at L4-5 with severe stenosis in the left-sided neural foramen. This was also pushing on the cauda equine. The MRI also indicated degenerative disc disease. (Ex. 12).

18. ATP, Stephen Pehler, an orthopedic spine specialist, evaluated Claimant on May 18 and 29, 2023. Dr. Pehler noted that since the March 15, 2023 work-related injury, Claimant experienced increasing back pain with buttock and left greater than right lower extremity pain, and Claimant was having urinary retention and difficulty with voiding. Dr. Pehler concluded Claimant had evolving symptoms of cauda equine syndrome from a large disc herniation, spinal stenosis and a spondylolisthesis. He believed Claimant's condition was severe and approaching a critical nature. Dr. Pehler opined that proceeding with conservative care was contraindicated. He and Claimant discussed moving forward with decompression fusion with interbody placement at the L4-5 level. Dr. Pehler also made sure Claimant was aware that if his symptoms of cauda equine syndrome evolved, he would need emergent surgery. (Ex. 11).

19. Claimant returned to Concentra on May 26, 2023 for a follow-up appointment. Nathan Adams, P.A. noted in the medical record that Claimant saw Dr. Pehler who recommended surgery, and felt physical therapy would not be helpful. (Ex. 10).

20. On June 12, 2023, Respondent filed a Notice of Contest asserting Claimant's injury was not work-related. (Ex. L)

21. Claimant saw Qing-Min Chen, M.D., an Orthopedic Surgeon, for an Independent Medical Examination on July 1, 2023. Dr. Chen evaluated Claimant and conducted a records review. Claimant denied any prior symptoms or issues with his back. (Ex. A).

22. Dr. Chen opined that based on the May 13, 2023 MRI, Claimant had bone marrow edema at L4-5 endplates suggestive of chronically degenerated discs. According to Dr. Chen this "suggests the claimant already had a compromised disc and a compromised annulus." He further opines "the mechanism of injury could have caused this particular issue in an otherwise compromised disc. In a normal healthy spine, this would not have occurred." (Ex. A).

23. Dr. Chen ultimately opined that the surgery recommended by Dr. Pehler is reasonable and necessary, but is not related to the claim. In Dr. Chen's opinion, '[t]his is just a natural progression of claimant's underlying disease. Disc herniations in this setting are kind of like a pimple that is waiting to be popped. This disc was already ready to go, and again the body should be able to lift a 5-gallon jug of water without any compromise. This was only a matter [of] time regardless of whether or not the claimant was picking up a jug of water, whether he was bending over to put on his socks, whether or not he coughs and herniates the disc. Any of those things could have occurred given how compromised his back was at that time." (Ex. A).

24. Both Dr. Pehler and Dr. Chen credibly opined that the recommended spinal surgery is reasonable and necessary. (Ex. 11 and Ex. A).

25. Claimant credibly testified he had no prior back issues or treatment for his back prior to the incident on March 15, 2023. (Tr.17:14-22). This testimony was uncontroverted. The ALJ finds that Claimant did not have back issues nor did he have any treatment for his back prior to March 15, 2023.

26. The ALJ finds Dr. Chen's opinion regarding relatedness to be credible, but not persuasive. As found, Claimant did not have any back issues prior to lifting the five-gallon water bottle for a customer on March 15, 2023. And as Dr. Chen stated, this mechanism of injury could have caused a disc herniation in a compromised disc, and Claimant had degenerative discs.

27. Claimant testified he was scheduled to have surgery on August 15, 2023. Claimant scheduled surgery, even though it had not been authorized, because he was fearful of his symptoms becoming permanent. (Tr. 17:1-9).

28. Based on the totality of the evidence, the ALJ finds that Claimant proved by a preponderance of the evidence that he suffered a compensable injury on March 15, 2023. The ALJ further finds that the surgery recommended by Dr. Pehler is reasonable, necessary and related to Claimant's March 15, 2023 workplace 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 a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ.

Cordova v. Indus. Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Compensability

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

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

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

requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 at 791; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant was asymptomatic prior to the March 15, 2023 work-injury. Even if Claimant was susceptible to disc herniation as Dr. Chen posits, it was the March 15, 2023 work-related lifting event that caused Claimant to become symptomatic and led to the need for a spinal decompression surgery. Claimant's back was aggravated by his work-related injury and his need for treatment accelerated by the same.

Medical Benefits

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs Sch. Dist. #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, WC 4-517-537 (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* WC 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997).

If an injury is found to be causally related to an industrial accident, respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the industrial injury. § 8-42-101, C.R.S.; *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Put another way, the right to medical benefits "arises only when an injured employee initially establishes, by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment." *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Delta Drywall v. Indus. Claims Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

The totality of evidence and testimony proves Claimant sustained a compensable injury in the course and scope of his employment on March 15, 2023. Respondents are liable for all medical treatment that is reasonable, necessary, and related to relieve Claimant of the effects of the March 15, 2023 lumbar injury, including but not limited to the surgery recommended by Dr. Pehler.

ORDER

It is therefore ordered that:

1. Claimant sustained a work-related injury to his back on March 15, 2023.

2. Respondents are responsible for all medical treatment needed to relieve the effects of the industrial injury to Claimant's back, including, but not limited to, the surgery recommended and performed by Dr. Pehler.

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 7, 2023

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

ISSUES

- Did Claimant prove by a preponderance of the evidence she is permanently and totally disabled?

- The parties stipulated that Respondents are entitled to a statutory offset for Social Security Disability Insurance (SSDI) benefits if Claimant is awarded PTD benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as an Animal Control Officer. The job entailed responding to situations involving various wild and domesticated animals, including game animals. The job was physically demanding and required lifting and carrying more than 50 pounds.

2. Claimant suffered admitted injuries on September 21, 2016, while removing the carcasses of two dead pigs from Highway 115. Claimant developed pain in her left hip, left buttock, and low back after struggling to load the carcasses into her vehicle.

3. Claimant initially thought she had "pulled a muscle," but the pain persisted and worsened over the next few days.

4. Employer referred Claimant to CCOM for authorized treatment. At the initial evaluation, Claimant reported pain in her low back and left hip, radiating pain down her left leg, with numbness in her left foot. She was diagnosed with left hip and lumbar strains and referred for MRIs. She was also taken off work.

5. The left hip MRI was unremarkable. The lumbar MRI showed multiple disc bulges and a central disc herniation at L4-5, but no stenosis or nerve compression to account for the lower extremity radicular symptoms.

6. Claimant was evaluated by Dr. Michael Sparr on October 20, 2016. She reported aching pain in the left buttock and low back, stabbing pain in the buttock and left leg, and numbness and tingling in the lateral left leg and left foot. Her 4th and 5th left toes were numb. Her leg pain increased with ambulation. Dr. Sparr observed she walked with a steppage gait due to apparent foot drop. She was exquisitely tender over the left L5-S1 facet and left SI joint, and deep palpation reproduced radiating symptoms in the left leg and foot. Dr. Sparr appreciated mild atrophy of the left anterior and posterior leg. Left leg strength was "profoundly abnormal," with 3-/5 and 4-/5 strength in multiple muscles. Dr. Sparr opined Claimant suffered a severe left sacroiliac strain that caused a traction injury to the left sciatic nerve resulting in profound left foot weakness. He recommended an EMG, a piriformis injection, and a left SI joint injection. He prescribed Gralise (a name brand formulation of gabapentin) for neuropathic pain.

7. The EMG testing was completed on November 16, 2016. It showed sciatic neuropathy, without evidence of lumbar radiculopathy. Dr. Sparr noted Claimant could not increase her dose of Gralise above 600mg because it was too sedating.

8. Claimant had a left SI joint injection and lumbar ESIs in November and December 2016. The injections provided temporary relief but no sustained benefit.

9. On January 3, 2017, Dr. Sparr noted Claimant's gait had improved slightly with the use of an AFO. Her lower extremity strength was still "profoundly" abnormal but somewhat improved from previous evaluations. She found active release treatment and acupuncture to be beneficial. Claimant asked if she could go back to work on limited duty. Dr. Sparr released Claimant to sedentary activities with no lifting over 10-15 pounds.

10. Claimant followed up with CCOM on January 17, 2017. CCOM released Claimant to modified duty with no lifting over 15 pounds, no crawling or squatting, minimal stairs, and the opportunity to alternate walking, standing, and sitting every 30 minutes as needed.

11. Employer could not accommodate Claimant's restrictions and she was terminated.

12. In March 2017, Dr. Sparr documented Claimant had been able to increase the Gralise to 1200 mg at night before bed, which was helpful. However, she continued to have severe numbness and stabbing pain in her lower leg and left foot. Her gait remained abnormal, although not as awkward as noted previously. Lower extremity strength testing also showed some improvement.

13. Dr. Centi took over as Claimant's primary ATP on May 16, 2017. The foot drop was slowly improving, and Claimant was walking slightly better. Dr. Centi amended Claimant's restrictions to no lifting and carrying more than 10 pounds, no kneeling or squatting, and minimal stairs. He did not indicate why he removed the restriction about changing positions as needed.

14. In June 2017, Dr. Sparr documented some improvement in Claimant's foot and ankle strength, although she was still reporting severe nerve pain in her lateral thigh and leg and deep aching in her low back and buttock. She had decreased the Gralise because the 1200 mg dosage was "causing her to feel stupid." Physical examination still showed significant lower extremity weakness and difficulty lifting her toes.

15. On August 8, 2017, Dr. Sparr advised Claimant to wear the AFO brace at all times when outside her home.

16. On September 18, 2017, Dr. Centi further liberalized Claimant's work restrictions to allow lifting and carrying up to 15 pounds, and minimal squatting or kneeling. Those formal restrictions were subsequently carried forward through the remainder of the claim, with no additional discussion or analysis.

17. Claimant continued to receive massage therapy, chiropractic treatment, injections, and medication management through 2018, with limited benefit beyond temporary symptom relief.

18. Dr. Nicholas Olsen performed an IME for Respondents on December 19, 2018. Claimant reported ongoing symptoms and functional limitations, with minimal improvement since the date of injury. She walked with an antalgic gait and objectively demonstrated significant weakness in her left ankle dorsiflexors. Dr. Olsen observed atrophy of the anterior tibialis. Strength was significantly diminished in the left ankle dorsiflexors and EHL. Sensation was decreased in the L4, L5, and S1 dermatomes. Dr. Olsen opined Claimant's symptoms were likely related to a subluxing proximal tibiofibular joint and peroneal neuropathy. He recommended a left knee MRI with particular attention paid to the proximal tibiofibular joint and a repeat MRI of the pelvis. He thought Claimant would probably require surgery to address the proximal tibiofibular joint instability. Given the long duration of her problems, he expected she would continue to need an AFO indefinitely.

19. Claimant had a left knee MRI on February 18, 2019. It showed a bone bruise in the femoral condyle, consistent with proximal tibiofibular instability. Dr. Olsen recommended evaluation by an orthopedic surgeon.

20. Dr. Derek Purcell performed a left knee open peroneal nerve release surgery on July 22, 2019.

21. Claimant saw Dr. Olson at CCOM on August 1, 2019, and reported some improvement in her left foot function and return of sensation in her shin area after surgery.

22. On April 15, 2020, Dr. Sparr documented that Claimant appreciated "some mild benefit" from the surgery, but still had a complete foot drop on the left. She had received a custom AFO, but it did not fit with any of her shoes, and necessary modifications had been delayed by COVID restrictions. She was using a functional electrical stimulator almost constantly and found it helpful. Claimant had ongoing burning pain in the buttock radiating to the thigh, and asked about an ablation procedure. Dr. Sparr ordered a lateral branch block of the left SI joint and would consider rhizotomy depending on her response.

23. The SI joint injection was performed on May 13, 2020. At a follow up appointment with Dr. Sparr on June 4, Claimant reported a significant decrease in her pain for several hours after the injection. Dr. Sparr considered this an excellent diagnostic response to the block, and recommended SI joint rhizotomy.

24. Claimant had the rhizotomy on July 1, 2020. It initially helped with the buttock and SI joint-related pain, but she subsequently worsened. Dr. Sparr provided additional trigger point injections.

25. On August 5, 2020, Claimant asked for a second opinion because she had not made sustained progress with the treatments offered by Dr. Sparr. Dr. Centi referred her to Dr. Scott Primack.

26. Claimant saw Dr. Primack on August 9, 2020. She described pain in her low back, left buttock, and left leg, with numbness and tingling in the left leg and foot. These symptoms caused difficulty with prolonged standing, walking, and sitting. On examination, Dr. Primack noted strength deficits in the dorsiflexors and plantar flexors, and atrophy of the left leg musculature. Sensation was reduced over the dorsal surface of the left toot. Dr. Primack ordered a left knee MRI neurogram to evaluate the common fibular nerve and the tibial nerve.

27. The MRI was completed on December 11, 2020. It showed increased signal in the tibial nerve, which Dr. Primack opined was the source of Claimant's foot drop. At a follow up appointment on January 4, 2021, Dr. Primack told Claimant her treatment options were (1) medication management with drugs such as Lyrica, (2) a left tibial nerve hydrodissection, (3) neuromodulation with a peripheral nerve stimulator or spinal cord stimulator, or (4) surgery. He referred Claimant to Dr. Tanya Oswald for a surgical evaluation.

28. A repeat EMG on April 19, 2021 showed left sciatic neuropathy affecting the common fibular and tibial nerves.

29. Claimant was evaluated by Dr. Oswald regarding surgical options on July 12, 2021. Dr. Oswald was not enthusiastic about nerve release surgery, as this would not guarantee resolution of her pain. Nor would it likely improve the foot drop given the length of time the nerves had been compressed. According to Dr. Oswald, Claimant's primary options were ankle fusion, tendon transfer, or replacing her AFO splint. Claimant preferred to try a new AFO.

30. Claimant had a second IME with Dr. Olsen on November 11, 2021. Claimant indicated she had no significant benefit from the surgery by Dr. Purcell or rhizotomy. She reported "pain in her buttock and lies on a heating pad." She also described pain-related fatigue, frequent swelling in her left leg at the end of the day, and difficulty with balance because of the leg weakness. Dr. Olsen again documented objective sensory and motor deficits in the left foot. Claimant was not interested in repeating the rhizotomy, pursuing a spinal cord stimulator, or any surgical procedure mentioned by Dr. Oswald. Claimant was at MMI as of January 4, 2021, and. He assigned a 38% lower extremity rating based on range of motion deficits and sensory loss.

31. Claimant saw Dr. Timothy Sandell on January 25, 2022, to discuss pain management options. She described constant burning and stabbing pain radiating down her left leg, weakness in the leg, and a left foot drop. Her pain was aggravated by cold weather and prolonged sitting. Dr. Sandell opined a significant portion of Claimant's pain was neuropathic in nature. Because Lyrica and Gralise had caused Claimant to experience "confusion," Dr. Sandell recommended Topamax. He also prescribed Norco, Celebrex, and nortriptyline.

32. Claimant developed severe constitutional symptoms in February 2022, and was diagnosed with Stage IV colorectal cancer. She was started on chemotherapy.

33. On July 13, 2022, Dr. Kathryn Murray at Concentra assumed the role of primary ATP. Claimant reported ongoing severe left lower extremity symptoms, which made it "hard to walk and stand." She had a 24-month DIME scheduled for the following month. Examination showed sensory and strength deficits in the left leg and foot, trigger points in the lumbar spine, and a gait disturbance. Dr. Murray intended to await the DIME report before determining what, if any, additional treatment Claimant would be provided. Dr. Murray maintained the same work restrictions that had been placed by Dr. Centi in September 2017.

34. Dr. William Watson performed the 24-month DIME on August 9, 2022. Claimant reported ongoing low back and left buttock pain radiating down the left leg. Claimant appeared uncomfortable during the examination. Dr. Watson noted paraspinal muscle spasm in the lumbar spine and tenderness in the left buttock. Lumbar range of motion was limited in all directions. Sensation was markedly decreased in the L4, L5, and S1 distribution on the left. There was profound grade 0/5 weakness of the ankle dorsiflexors and toe extensors. She had no eversion. Dr. Watson opined no additional treatment was likely to materially change her condition, and agreed Claimant was at MMI as of her evaluation with Dr. Olsen on November 11, 2021. Dr. Watson assigned a 24% whole person rating, including 10% for the lumbar spine and 15% whole person for impairment of the common peroneal nerve.[1] He thought a lumbar spine rating was warranted "because she has complained and been treated for this since the initial injury." Regarding work restrictions, Dr. Watson opined, "Currently, she can only do sedentary-type work. Another complicating factor is that she is being treated currently with chemotherapy for stage IV colorectal cancer."

35. Insurer filed a Final Admission of Liability (FAL) on September 2, 2022, admitting for Dr. Watson's DIME rating. No PPD benefits were owed, because Claimant had been paid TTD benefits greater than the applicable benefit "cap". The FAL claimed an overpayment of TTD benefits paid after the date of MMI and reserved the right to recover the overpayment from future indemnity benefits.

36. Claimant timely objected to the FAL and requested a hearing on permanent total disability (PTD) benefits.

37. Dr. Olsen performed a third IME on October 13, 2022. Claimant stated her symptoms remained the same since the previous IME in November 2021. Aggravating factors included sitting, standing, laying down, and lifting. Claimant had decreased appetite because of the cancer and had lost 15 pounds. She reported excessive fatigue due to the cancer, but stated "her leg pain exhausts her" as well. The leg pain was interfering with her sleep and causing her to awaken repeatedly during the night when rolling over in bed. She was suffering from depression, which she attributed to both the cancer and her leg symptoms. Dr. Olsen stated Claimant's symptoms were "similar, if not identical, to the previous IME" in November 2021. Dr. Olsen reviewed Dr. Watson's DIME report and agreed it was reasonable to include a rating for the lumbar spine. Dr. Olsen

[1] Dr. Watson calculated 38% lower extremity for the peroneal nerve—the same rating as provided by Dr. Olsen. This converts to 15% whole person.

tested Claimant's lumbar range of motion and obtained measurements that were "very similar" to the numbers Dr. Watson referenced in his report.

38. Regarding work restrictions, Dr. Olsen noted the work restrictions from Claimant's ATPs had remained unchanged for several years. Specifically, Claimant was restricted to lifting and carrying no more than 15 pounds, no crawling or climbing, and minimal squatting or kneeling. Dr. Olsen opined those restrictions were appropriate for the work injury. He also noted she now has unspecified "additional" restrictions due to the diagnosis of metastatic colorectal cancer.

39. Dr. Olsen provided a supplemental report dated November 10, 2022, to clarify his opinion about Claimant's work capacity. He thought the the longstanding restrictions from CCOM and Concentra were appropriate as pertains to the work injury. However, he opened Claimant could not work in any capacity at the time of his IME because of the cancer.

40. In his deposition, Dr. Olsen testified that Claimant's presentation changed significantly between the November 11, 2021 IME and the October 13, 2022 evaluation. Specifically, he testified she exhibited fatigue, generalized malaise, muscle wasting, and generally "appeared quite ill when compared from one exam to the other." He opined these changes were related to the cancer. Dr. Olsen affirmed his opinion that Claimant's medical condition attributable to the work injury does not support any limitations on sitting, standing, and walking.

41. Claimant was approved for Social Security Disability Insurance benefits in January 2023. The SSA Notice of Award lists the disability onset date as January 30, 2022, which the ALJ infers coincides with the cancer diagnosis. After satisfying the 5-month wait period, Claimant was entitled to SSDI benefits commencing July 1, 2022. The parties stipulated that Respondents are entitled to a statutory offset for SSDI benefits if Claimant is awarded PTD benefits.

42. Robert Van Iderstine performed a vocational evaluation at the request of Claimant's counsel on October 22, 2022. Claimant described ongoing severe low back and leg symptoms that significantly limited her ability to perform routine activities. She said she can stand and walk approximately 20 minutes before needing to rest. She also reported difficulty with prolonged sitting despite constantly shifting her weight to manage discomfort. She maintains a restrictive lifestyle because of her symptoms. Although they briefly discussed Claimant's cancer diagnosis, Mr. Van Iderstine noted the primary focus of the evaluation was Claimant's medical condition and functional limitations related to the work injury.

43. Katie Montoya performed a vocational evaluation for Respondents on December 21, 2022. She initially tried to do a Zoom meeting but had to switch to a telephone interview because of poor connectivity on Claimant's end. Claimant described symptoms and functional limitations consistent with what she previously told Mr. Van Iderstine. Claimant reported significant pain in her low back, left leg and left foot from the work injury. She noted difficulty with prolonged sitting, standing, and walking. She needs

to be cautious to avoid tripping and falling. She occasionally uses a cane but often feels the cane is more of a hazard for her. Claimant referred to herself as a “couch mommy” or “bed mommy.” She spends much of her day trying to find a comfortable position. When asked about limitations related to the cancer, Claimant described frequent nausea and vomiting.

44. Regarding her educational and vocational history, Claimant is a high school graduate with one year of college courses but no college degree. She subsequently received an EMT certificate from [Redacted, hereinafter PP] and worked as an EMT for approximately 10 years. She left the job in 2012 or 2013 because it was too difficult to manage the long shifts while caring for her small children. She subsequently worked as an Emergency Room Technician for [Redacted, hereinafter MH], for approximately one year. She next worked as a 911 Dispatcher, initially for the [Redacted, hereinafter FD], later transitioning to the [Redacted, hereinafter FS] who assumed the 911 responsibilities. The job required 12-hour shifts and long periods of static sitting with minimal breaks. She performed the dispatch job for 2 years before taking the job as an Animal Control Officer in 2015.

45. Ms. Montoya and Mr. Van Iderstine used a similar process of evaluating Claimant’s ability to work, but their analyses diverged in a handful of important respects. First, Ms. Montoya identified Claimant’s commutable labor market as Canon City, Florence, and Pueblo West. Mr. Van Iderstine agreed that Canon City and Florence were suitable, but excluded Pueblo West because he did not believe Claimant told tolerate commuting that far.

46. Ms. Montoya and Mr. Van Iderstine’s analyses diverged more significantly when considering Claimant’s residual functional capacity. Ms. Montoya relied principally on the medical restrictions from CCOM/Concentra and Dr. Olsen. By contrast, Mr. Van Iderstine also incorporated Claimant’s self-reported limitations, including difficulty with prolonged sitting, standing, and walking and the need to change positions frequently.

47. Both vocational experts agreed that Claimant cannot return to any of her past work. But Ms. Montoya concluded that Claimant can transfer her acquired skills to jobs in medical-related fields such as patient representative and general medical office. She also identified the unskilled occupations of cashier and customer service as consistent with the restrictions from CCOM/Concentra and Dr. Olsen. Notably, Ms. Montoya stated she did not identify any work-from-home options because of the poor internet and phone service at Claimant’s relatively rural property.

48. Mr. Van Iderstine opined Claimant cannot perform any work within her commutable labor market. Although Claimant has previously worked in skilled and semi-skilled occupations, he opined her skills are not transferable to any occupations within her residual functional capacity. Additionally, Mr. Van Iderstine opined that light level jobs such as cashier are inappropriate for Claimant because of the amount of standing and walking required. Considering Claimant’s need for frequent position changes, Mr. Van Iderstine opined she is realistically limited to sedentary occupations that allow the worker to change from sitting to standing as needed. He also noted she will likely require extra

breaks during a work shift, perhaps as often as every 30 minutes. As a result, even if Claimant were hired for a position, it is unlikely she could sustain the job.

49. In her hearing testimony, Claimant described constant "gnawing" and "burning" nerve pain, which causes her to change positions frequently. The nerve pain substantially impairs her sleep. Years of disrupted sleep since the injury have resulted in significant generalized fatigue. Claimant needs to lie down and rest intermittently during the day. She described difficulty concentrating because of pain and the effects of medications. Claimant only drives short distances because of her pain and the need to change positions frequently. Claimant does not believe she can tolerate even a part-time job requiring significant standing, such as a cashier position. Furthermore, any job she could do would also need to accommodate her need to change positions and use ice packs to relieve back and leg pain. Additionally, she does not believe she can reliably work on consecutive days, as even family outings and basic activities cause flares that can last for a day or more. Claimant testified that the above-described limitations are caused by her low back and leg issues that were present before she was diagnosed with cancer.

50. Claimant's testimony regarding her injury-related symptoms and associated functional limitations is generally credible.

51. Dr. Olsen's opinion that Claimant has no injury-related limitations on standing and walking is not persuasive. Claimant has consistently reported severe symptoms affecting her left leg and foot, including pain and numbness. Multiple providers have objectively documented "profound" motor deficits that significantly interfere with her gait and station, despite regular use of an AFO and external nerve stimulator. In light of these long-standing lower extremity issues, it is unrealistic to conclude that Claimant can tolerate unlimited standing and walking in a competitive work setting. Additionally, Claimant has consistently and credibly reported difficulty maintaining a static posture, including sitting for long periods of time. These limitations must also be factored into the residual functional capacity determination.

52. At most, Claimant is capable of sedentary-level work that allows her to change positions from sitting to standing and walking at her discretion to manage low back and leg symptoms. Claimant will also probably need extra breaks during a work shift because of her low back and leg problems. She is limited to unskilled work due to her lack of transferrable skills coupled with documented "confusion" and "brain fog."

53. The likelihood that Claimant can obtain and sustain employment within her limited residual functional capacity is severely reduced by her relatively small commutable labor market and the inability to consider work-from-home options.

54. Mr. Van Iderstine's opinions are credible and more persuasive than the contrary opinions offered by Ms. Montoya. Mr. Van Iderstine's analysis better accounts for Claimant's non-exertional limitations including the need for frequent postural changes and extra breaks and lack of transferrable skills. Mr. Van Iderstine persuasively opined

there are no jobs consistent with Claimant's residual functional capacity in her commutable labor market.

55. Claimant proved by a preponderance of the evidence that she cannot earn any wages in the same or other employment.

CONCLUSIONS OF LAW

A claimant is considered permanently and totally disabled if they cannot "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means wages in excess of zero. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

In determining whether the claimant can earn wages, the ALJ may consider a wide variety of "human factors." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1988). These factors include the claimant's physical condition, mental abilities, age, employment history, education, training, and the "availability of work" the claimant can perform within her commutable labor market. *Id*. Another human factor is the claimant's ability to obtain and maintain employment within their limitations. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant can get hired and sustain employment. *See e.g., Case v. The Earthgrains Co*., W.C. No. 4-541-544 (September 6, 2006); *Cotton v. Econo Lube N. Tune*, W.C. No. 4-220-395 (January 16, 1997). If the evidence shows the claimant cannot "sustain" employment, the ALJ can find they cannot earn wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001). Although the industrial injury need not be the sole cause of a claimant's inability to earn wages, it must be a "significant causative factor" in the disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). This means the claimant must prove a "direct causal relationship" between the work injury and the disability. *Id*. Under this test, the ALJ must determine whether the residual impairment caused by the injury is sufficient to render the claimant totally disabled without regard to the effects of subsequent intervening events or preexisting conditions. *E.g., Wallace v. Current USA, Inc*., W.C. No. 4-886-464 (December 24, 2014).

As found, Claimant proved she cannot earn any wages in the same or other employment. Claimant's testimony regarding her injury-related symptoms and associated limitations is credible. The argument that Claimant can perform light-level work with no limitations on standing and walking is not persuasive. Her difficulties with standing, walking, and prolonged sitting were documented by multiple providers before she was diagnosed with cancer. At most, Claimant is capable of unskilled sedentary-level work with the freedom to change positions at her discretion to manage low back and leg symptoms. Claimant will also need extra breaks during a work shift because of her low back and leg problems. These limitations are caused by the effects of the work injury. Claimant's ability to obtain and sustain employment is further limited by her relatively small commutable labor market and the inability to consider work-from-home options. Dr. Van Iderstine's vocational opinions are credible and more persuasive than the contrary opinions offered by Ms. Montoya. While Claimant undoubtedly has additional limitations

attributable to the diagnosis of and treatment for cancer, the persuasive evidence shows she is totally disabled irrespective of the cancer.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant permanent total disability benefits, based on the admitted average weekly wage, commencing November 11, 2021.

2. Insurer may take a statutory offset based on Claimant's award of Social Security Disability Insurance benefits.

3. Insurer may take credit for any TTD benefits paid on or after November 11, 2021.

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

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

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

DATED: November 8, 2023

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained a work related injury or occupational disease to her left shoulder on or about October 14, 2022 or October 15, 2022.

IF THE CLAIM IS DEEMED COMPENSABLE:

II. Whether Claimant has proven by a preponderance of the evidence that she was attended by an authorized treating physician and whether she was entitled to reasonably necessary and related medical care for the compensable work related injury.

III. Whether Claimant has proven by a preponderance of the evidence what her average weekly wage was.

IV. Whether Claimant has proven by a preponderance of the evidence that she was entitled to temporary total disability benefits from March 2, 2023 until terminated by law.

STIPULATIONS OF THE PARTIES AND PROCEDURAL MATTERS

The parties stipulated that the only body part in question was the left shoulder injury and did not involve a cervical spine injury, only shoulder symptoms that radiated into the neck and have now resolved following surgery.

Further, if the claim was found compensable and Claimant is entitled to temporary disability benefits, the parties stipulated to benefits from March 2, 2023, when the surgery took place, through May 17, 2023, after which Claimant returned to work full time.

Lastly, this ALJ takes administrative notice of the Workers' Compensation Rules of Procedure including the Medical Treatment Guidelines as they are used by multiple providers in this matter.

FINDINGS OF FACT

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

A. Generally

1. Claimant worked for Employer for approximately 9 years, since 2014. At the time of the hearing she was 54 years old and measured five foot three inches in height. She worked as a bus driver going from county to county, shuttling skiers in the winter and workers year round.

2. On October 14, 2022 Claimant took over an older bus, [Redacted, hereinafter BN], from another worker and she noticed that the emergency brake was very

difficult to engage and disengage. It would snap so hard that it would hit her hand causing numbness in her fingers. That evening she felt pain going into her neck, with stiffness and soreness in her arm and in her shoulder. She did not recall a specific moment in time where she felt a sharp pain, other than the dull pain in her shoulder and neck.

3. On October 15, 2022, the second night, she noted she had the same bus, BN[Redacted], with the hard brakes. It was extremely hard to engage the brake. She had to pull it up with her shoulder at an awkward angle. She had to exert a lot of pressure to pull it up and push it down, while operating the older bus. After still having the pain and stiffness from the night before, she engaged the brake and fell extreme pain in the shoulder. After that, it caused a lot of pain to operate the destination signs. At one break she took some Tylenol and massaged her shoulder, to see if the pain would subside some. She was able to finish her routes, but she could not change the destination sign and had to use both hands to deploy and disengage the emergency brakes. She just did the minimum, not even operating the heater, because the pain was so intense. She did not hear any specific snap or pop as there was always a lot of noise on the bus and she had to be concentrating very hard on driving the big bus, making sure that the bus and passengers were safe.

4. She generally operated a 40 foot bus or a 35 foot bus. The steering wheel was 14 inches, which was approximately 2 ½ inches wider than a normal steering wheel but it seemed so much larger to Claimant. It was not easy to rotate, especially with windy roads or when there were bumps on the road. Some areas required harsh turns, like going into the bus barn, Claimant would be required to really crack the wheel. She would drive to one county and then pick up a different bus. She would normally start at 12:30 p.m. and got back home around 12:30 a.m., with several breaks, while getting into the office, changing buses and for lunch. She worked four days a week. She was required to pull the emergency brake at each stop. In a typical two and one half hour route, she would typically pull the brakes and release the lever approximately 18 times each in addition to making all the other maneuvers of driving the bus.

5. To operate the emergency brake in one of the buses, Claimant would have to extend her left arm downward and forward, inverting her arm with the palm up and pulling on the lever between her index and middle finger, pressing with her thumb on top of the lever, almost reaching the area of her knee.

6. In another bus, she would have to raise her shoulder to operate the emergency brake that was on the left side console at the approximate level of her waist, and three inches above her thigh level, pulling on the lever and pushing on the lever to operate it. While she drove with both hands on the wheel for the most part, Claimant indicated that almost everything was operated with the left hand.

7. At a typical stop, she would pull the emergency brake, flip the hazard lights on, put the vehicle in neutral and open the doors. She would also have to operate the destination sign, which was found above her head on the left hand side. The only thing, other than steering, that she operated with her right hand was the intercom. She would have to turn her neck to look out the various mirrors to make sure that no one was coming when she was turning, looking all the way down the 40 foot bus to make sure there were no cars before getting on the interstate or merging into traffic. She had to move around

in her seat a lot to make sure she could see around the panels of the bus for oncoming traffic, especially going into the roundabouts. She had to use her whole body to drive the bus and it was difficult and exhausting work.

B. Medical Records

8. On October 24, 2022 Claimant was examined by PA Zachary Feldman of CCOM Frisco with a chief complaint of left shoulder injury with radiating pain going into the neck. She provided a history generally consistent with her testimony noting significant soreness after having driven a bus with a particularly hard to operate brake. On exam he noted a very positive Hawkins test for impingement. Her range of motion was good though she had pain with lowering her arm. He diagnosed impingement syndrome of the left shoulder, and muscle, fascia and tendon strain of the neck. He prescribed a Medrol Dosepak, recommended ice, heat, Epsom salt soaks, BenGay rubs, and ordered physical therapy at Panorama Physical Therapy. Dr. Braden Reiter provided work restrictions of no lifting, repetitive lifting, pushing, pulling, carrying greater than 5 lbs. with the left upper extremity and no commercial driving, limiting her to administrative or desk work. On November 3, 2022 Claimant continued to have a positive Hawkins (impingement) test. P.T. had not started yet. PA Feldman referred her to P.T. again and continued her modified duty.

9. [Redacted, hereinafter SN] issued a Physical Demands Analysis and Risk Factor Assessment on November 7, 2022, which was conducted on November 1, 2022. Claimant was interviewed by telephone and one of Claimant's co-workers was observed performing the duties.[1] The report was issued based on a sampling of a 2 lbs. pinch force and a 10 lbs. hand force three times or more per minute and work that required shoulder movement at the rate of 15-36 repetitions per minute and no 2 second pauses for 80% of the work cycle. SN[Redacted] concluded that there were no risk factors associated with Claimant's work based on the Division's Medical Treatment Guidelines for cumulative disorders.

10. PA Feldman followed up with Claimant on November 10, 2022. He stated he reviewed the ergonomic evaluation performed. Claimant explained the motions she made including that she exerted 20 pounds of pressure to engage the emergency brake. On exam Claimant had good range of motion of the shoulder and neck but continued to have a positive Hawkins test.

11. Claimant started PT at Panorama PT on November 14, 2022, which included PT evaluation, therapeutic exercises and activities, manual therapy and neuromuscular reeducation. It continued through December 23, 2022.

12. Respondents sent Dr. Braden Reiter a letter on November 23, 2022 enquiring whether he agreed with the Job Assessment completed by [Redacted, hereinafter GX] on November 1, 2022. He disagreed that there were no risk factors. He stated that he disagreed because Claimant performed multiple motions done in an

[1] The other workers' physical measurements and characteristics were not detailed in the report or likened to Claimant's 5'3" height and BMI.

awkward position with her arm externally rotated and adducted to pull the brake handle.[2] He opined that this was enough to cause the injury described by Claimant.

13. By November 28, 2022 Claimant's neck pain was essentially resolved but Claimant continued to have a positive Hawkins showing impingement.

14. On December 15, 2022 Claimant continued to improve with physical therapy, but Dr. Reiter noted she continued to have symptoms of impingement with an empty can tests and positive impingement test but a negative Spurling's.[3] Dr. Reiter referred Claimant for an MRI of the left shoulder and continued her work restrictions.

15. The MRI took place at St. Anthony Summit Medical Center on December 26, 2022. Dr. Saidmunib Sana noted that there was severe tendinosis of the intra-articular long head biceps tendon, moderate subscapularis tendinosis with a tiny low grade intrasubstance footprint tear, severe tendinosis of the anterior third fibers of the supraspinatus tendon, full-thickness tearing of the middle third fibers of the supraspinatus tendon, a moderate infraspinatus tendinosis with some low grade partial thickness tear and mild AC joint arthritis.

16. The December 26, 2022 St. Anthony Summit Medical records showed Respondent Insurer as having provided verbal authorization for the MRI.

17. On January 3, 2023 PA Feldman noted that Claimant was handling administrative work well, but continued to have a positive empty can test and impingement signs though a negative drop arm test. Dr. Reiter continued Claimant's work restrictions and advised she follow up with the orthopedist.

18. Claimant was evaluated by Aaron K. Black, M.D. on January 4, 2023 at Panorama Summit Orthopedics. He reviewed the imaging which showed a full thickness supraspinatus tendon tear with a 1 cm retraction. He took a history which included her prior injury treated by Dr. Benedetti and which resolved with physical therapy. He noted a history of injury consistent with Claimant's testimony though included that Claimant believed she exerted greater than 20 lbs. of force while using the emergency brake. He noted that she had a positive empty can tests, weakness with external rotation at the side but had good strength with belly press and internal rotation at the side. He noted that PT had been of benefit but had not resolved her pain.

19. Dr. Black diagnosed strain of the tendon of left rotator cuff, left rotator cuff tear, biceps tendonitis, and bicipital tendinitis of the left shoulder. He recommended Claimant continue working administrative or desk work, and no lifting or carrying greater than 10 lbs. Dr. Black considered conservative care had failed and since her exam and imaging were consistent with a rotator cuff tear, that moving forward with left arthroscopic rotator cuff repair, biceps tenodesis and PRP augmentation were indicated. A referral and authorization for surgery was issued the same day.

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[2] This ALJ infers that if Claimant had to adduct to pull the brake lever, she would have to abduct to push the lever, with adduction meaning towards the body center and abduct meaning away from the body center.

[3] This ALJ notes that a Spurling's test is a cervical compression test to assess the presence of cervical nerve compression.

20. Upon Respondents' request, Dr. William Ciccone II issued a medical records review dated January 9, 2023. Following his review of the records, he stated that he did not believe Claimant had suffered a work-related injury to the left shoulder as the physical demands analysis showed no primary or secondary risk factors for overuse and no mechanism of injury was described that would cause the rotator cuff tear. He also stated that he was in agreement with the orthopedic plan of care but not as related to any work event and the authorization for surgery should be denied.

21. On January 10, 2023 Respondents sent Dr. Black a denial of the request for prior authorization based on Dr. Ciccone's record review.

22. Claimant returned to see PA Feldman on February 2, 2023. They discussed the surgery denial and the hopes of an appeal. She continued to have a positive empty can test and impingement signs. PA Feldman stated that he felt that her reported injury was not an exacerbation of her prior old injury but was having pain related to her activities as a bus drive, specifically engaging and disengaging the emergency brake. Dr. Reiter extended her anticipated MMI date and requested she follow up with the orthopedic specialist.

23. Dr. Black issued a letter on February 6, 2023 concerning the denial of Claimant's workers' compensation claim. He stated in part:

> She has a chronic rotator cuff injury, this could certainly be multifactorial. Clearly she had an increase in symptoms that occurred with her workplace activities. Whether or not she had a preexisting injury is immaterial as she was likely hired with this and cleared for her job requirements after which she went from asymptomatic to symptomatic during workplace activity. As such, this certainly appears to be related to her job.

24. A bill for $1,222.57 was issued by Centura on March 13, 2023 for the December 26, 2022 MRI. Further, Insurer confirmed having received the billing statement on March 20, 2023.

25. Claimant was evaluated by Dr. Nicholas K. Olsen on June 1, 2023 via telephone at Respondents' request. Dr. Olsen took a history consistent with Claimant's testimony, including Claimant's bus routes and how hard the emergency brakes were to operate on some buses. He documented that Claimant had no issues before October 14, 2022. Upon finishing her route, she felt her arm was weak and when she finished her shift she had pain in her neck. The following morning she had pain in her shoulder and rubbed on BenGay on her neck and shoulder. She went to work but when she went to push down on the brake, she felt a lot of pain in her neck and in the front of her shoulder. Despite her symptoms, she finished her route.

26. Dr. Olsen stated that the activity Claimant describes as aggravating her complaints was performed with her hand and arm at 90 degrees bent at the elbow while applying force to operate the brake. Claimant reported to him that "[W]hen I went to push down on the brake, I felt so much pain in my neck and in the front of my shoulder."

27. He opined, within a reasonable degree of medical probability, that the activity described by Claimant did not result in the rotator cuff tear identified on her December 26, 2022 MRI. In reviewing the GX[Redacted] physical demands analysis and

risk factor assessment as well as the description of her responsibilities as a bus driver, none of these activities were highly repetitive or performed at a frequency to result in a rotator cuff injury. He also opined that she did not detail any activities that put her arm in an extended position for impingement where the arm is lifting above shoulder height on a repetitive basis. Lastly, he stated that it was minimally probable that Claimant injured her shoulder in 2020 when she felt an electric lightening-like feeling in her left shoulder with overhead lifting, while opening up an emergency overhead access on a bus.

C. Prior Injury Records

28. Nurse Colleen Ihnken, at Summit Community Care Clinic, issued a report on July 29, 2020, noting Claimant had intermittent left shoulder pain aggravated by overuse at work. Claimant had returned after PT, chiropractic, and dry needling without resolution. She noted that her ROM was intact, so concern for rotator cuff tear was low, though remarked that she could have a strain. She stated that she had been reaching up and had sudden onset of sharp pain and tingling. Nurse Ihnken assessed that Claimant had an aggravation due to overuse at work and referred her to orthopedics anticipating she would probably be given a steroid injection.

29. Claimant was attended at Panorama Summit Orthopedics by Dr. Gary Benedetti on July 30, 2020 for tendonitis of the left shoulder. On exam, Claimant had no muscle atrophy, excellent shoulder range of motion without stiffness, a negative drop arm, though she did have a positive impingement sign, she had a negative push-off and normal gross motor function. X-rays showed only some subtle changes in her AC joint but no other significant bony or soft tissue abnormalities. He issued a referral for the physical therapist to provide her with a Thera-Band program. Claimant was to return in three months to consider a subacromial injections, if she had not improved. This ALJ did not find any other evidence of treatment between July 2020 and October 2022.

D. Employer Records

30. Employer's job description detailed physically demands including work for long periods of sitting/driving, repetitive motions, occasional heavy lifting (up to 40 pounds), ability to climb in & out of buses and other Employer vehicles, walking, seeing, stooping, standing, bending, kneeling, grasping, carrying, driving, and listening/observing with a high degree of public contact. It required Claimant to do pre-trips, pre-relief and post trip inspections, reporting to scheduled trips and stations on time, announcing stops, helping passengers on and off the bus if needed, and maintaining an up to date DOT physical.

31. The Workers' Claim for Compensation is written in the third person and seems to have been completed by Claimant's supervisor, though it is not dated. It reported that "[A]s a bus driver, one of the buses *she* drives has a brake that is incredibly hard to engage. Was engaging and felt sharp pain in her shoulder." (*Emphasis added*).

It noted a torn rotator cuff, and neck soreness. It listed an average weekly wage of $1,230.20 and identified Dr. Black as a treating provider.[4]

32. Employer's First Report of Injury of October 21, 2022 indicated that Claimant was injured on October 15, 2022 and Employer was notified on October 19, 2022. It showed that Claimant's average weekly wage was $1,095.60 and she was injured while in a bus by pushing and disengaging the emergency brake repeatedly during her shift.

33. From the detailed check history issued by Employer, Claimant was earning $1,202.35 per week in the 32 weeks from pay period ending (PPE) April 8, 2022 through PPE October 21, 2022, as Claimant earned a total of $38,475.46.[5]

34. As this did not include the winter time month check stubs for the height of the ski season, this ALJ calculated the AWW based on the year to date earnings for 2022. Claimant's year to date earnings showed as $63,118.79 for pay period ending December 26, 2022, with a check date of December 30, 2022. This ALJ presumes that this is for the full 52 weeks that would have been shown on her W-2. It provided an AWW of $1,213.82, which is not significantly different from the 32 week period of wages provided by employer and would include post injury earnings, which should not be considered.

35. As found, the fair computation of Claimant's AWW was $1,202.35 based on the first calculation.

E. Medical Treatment Guidelines

36. The Cumulative Trauma Conditions Medical Treatment Guidelines, W.C.R.P. Rule 17, Exhibit 5, addresses cumulative trauma exposure of upper extremity conditions. Under Using Risk Factors for Medical Causation Assessment of CTC, Sec. D.3.a and b, it states that "[U]sing the history, physical examination and supporting studies, a medical diagnosis must be established" by referring to Section F and Section G of the CTC MTGs.

37. Sections F and G refer to diagnosis referring to digit, hand and wrist osteoarthritis, De Quervain's disease, epicondylitis, extensor tendon disorders of the digits or writs, flexor tendon disorders, TFCC, trigger digits, carpal tunnel syndrome, cubital tunnel syndrome, guyon canal syndrome, posterior interosseous nerve entrapment (elbow or forearm), pronator syndrome, and radial tunnel syndrome. None of these conditions involve the shoulder other than tangentially.

38. It further states that "[T]he medical causation assessment for cumulative trauma conditions is not a substitute for a legal determination of causation/compensability by an Administrative Law Judge. Legal causation is based on the totality of medical and non-medical evidence, …"

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[4] This ALJ infers that this report was issued after Claimant started seeing Dr. Black and had already had a diagnosis of a torn rotator cuff.

[5] The Check History shows the earnings as a "NET." However, when adding all the deductions and earnings (DDNET), it shows that the amount under NET is actually the gross wages.

39. The Shoulder Injury Medical Treatment Guidelines, W.C.R.P. Rule 17, Exhibit 4, Sec. C.2 addresses principles of causation of occupational shoulder diagnosis stating that work-related conditions of the shoulder may occur from the following:

> • a specific incident or injury,
>
> • aggravation of a previous symptomatic condition, or
>
> • a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment.
>
> …
>
> Cumulative work-related causation for shoulder disorders is difficult to quantify given
>
> > 1) the variable techniques used to measure work exposures and the paucity of studies which have measured exposures,
> >
> > 2) the lack of verified clinical exams and
> >
> > 3) the lack of prospective studies.

40. As found, the third option in Exh. 4, Sec. C.2, addresses occupational exposures, in other words, occupational diseases or cumulative trauma exposures to the shoulder. This ALJ infers from this that Exhibit 4 applies to shoulder conditions and not Exhibit 5.

41. The same section C.2 also stated that a cross-sectional study provided some evidence that "upper arm elevation above 90° increases the odds of shoulder pain with disability, … and supraspinatus tendinitis, with a greater than fourfold increase when the upper arm is elevated at that level for more than 6% of working time (about 30 minutes per day)."

42. It further stated that "[G]iven the lack of multiple high quality studies it is necessary to consider each case individually when dealing with the likelihood of cumulative trauma contributing to or causing shoulder pathology."

F. Claimant's Testimony

43. Claimant stated that she liked to go on walks to the lake and some hiking on the Colorado Trail but nothing that would involve her upper extremities like her co-workers that skied and climbed. At home she would take care of her children, her home and her pets but tried to avoid doing much as she came home exhausted from driving and would have to take the time to rest a lot.

44. Claimant had a prior injury in 2020, when she was closing an emergency hatch on the roof of a bus and injured her left shoulder. Claimant asserted she was treated by Dr. Benedetti with physical therapy and Claimant's symptoms resolved. Claimant was able to return to her regular work as a bus driver.

45. Claimant stated that it was sometimes normal to have a stiff neck or shoulder or back following a 10 hour bus route as she would be in her seat the whole time operating the controls, where the seat was bouncing, while she was holding onto the steering wheel, feeling the vibration of the tires and every single bump in the road. When

there was a pothole, it was twice as bad, causing the impact to go from the steering wheel, up her arms and into her shoulders.

46. Claimant explained that the pain she experienced after the October 15, 2022 incident was very different from the symptoms she had had when she was treated by Dr. Benedetti, because that was only soreness compared to the pain she experienced after this injury. This time she had difficulty lifting her arm and had excruciating pain. She rested for a couple of days but it did not get better. She attended a company barbeque, tried to lift a can of soda and dropped it because the pain was so bad.

47. That same day of the BBQ she completed the workers' compensation paperwork. She turned it in to her supervisor the next day and asked her boss if she could see a doctor. Her supervisor made the appointment for her for the following Monday with CCOM. In the interim she took a lot of Tylenol and Advil.

48. Claimant had not had any kind of problems with her neck or shoulder other than the work related incident of 2020.

49. Claimant presented to CCOM on October 24, 2022 and saw PA Feldman.

50. She had surgery on March 2, 2022 to repair her left shoulder rotator cuff. Since then, on May 18, 2023 she started a new position with Employer as a dispatcher and she no longer drove buses or interact with the public. Though she continued to work with the same people as she did before, while she was driving.

51. She noted that she was not available for the job assessment performed by SN[Redacted] but another dispatcher, who had also been a bus driver before she became a dispatcher, was the one to do it.

G. Dr. Olsen Testimony

52. Dr. Nicholas K. Olsen testified as a board certified physical medicine and rehabilitation expert as well as a physician generally. His practice involved treating patients, conducting independent medical evaluations, performing electrodiagnostic examinations, and doing interventional spine care. He conducted an IME on Respondents' behalf and prepared a report dated June 1, 2023, which contained his findings and conclusions. He reviewed the medical records and interviewed Claimant by phone, not in person. He was asked to determine whether Claimant had an acute injury to her left shoulder and whether the work activities of a bus driver resulted in an occupational disease to her left shoulder.

53. Dr. Olsen noted that Claimant had a full thickness rotator cuff tear and underwent surgical repair. He stated that when the rotator cuff was repeatedly placed in a position of impingement by lifting high overhead, and left there repeatedly, or if there was a lot of force, a patient could experience a rotator cuff tear due to stress on the rotator cuff and resultant breakdown of the rotator cuff causing the full-thickness tear. Having the arm at the shoulder level can decrease the blood supply and place tension across the rotator cuff. It is a critical zone that as individuals age, have less blood supply. The critical zone is an area that demands blood supply.

54. Dr. Olsen opined that the muscle groups used by Claimant to engage and disengage the brake did not involve the shoulder in any form and that the rotator cuff tears seen on the December 26, 2022 MRI were not caused by her work activities as a driver.

55. He testified to the risk factors associated with shoulder occupational diseases as well, identifying the Medical Treatment Guidelines for cumulative trauma disorders, that address risk factors for the hands, wrist and forearms, which he opined also applied to the shoulder. He addressed several steps, including diagnosis, history of work activities, identifying activities with necessary force, frequency and duration to cause body party injuries as well as adequate rest and recovery periods between stresses to that body part. He opined that there was insufficient force used to affect the shoulder that would contribute to an occupational disease to the shoulder and to cause a rotator cuff tear. He stated that the rest time between each activity was sufficient recovery time and that none of her activities were sufficiently repetitive to result in a rotator cuff tear. He opined that Claimant's rotator cuff tear was simply a sign of aging due to the decrease in blood supply and the course of time.

H. Conclusive Findings

56. As found, Claimant was operating a bus with a very hard emergency brake that was located on the left side panel, approximately three inches above her thigh at approximately her waist level. The operation panel was an undetermined amount of space away from her but no less than 6 inches away. Claimant is 5'3" in height. The picture at Respondents' Exhibit D, bate 55 showed an individual who is not Claimant, and is of an indeterminate height.

57. As found, this ALJ observed Claimant's demonstrative postures at hearing, used while operating the emergency brake on BN[Redacted]. This ALJ observed how she was lifting her arm to the side, at approximately waist level, in an awkward position with her arm externally rotated and abducted to pull the brake lever and adducted to push the lever. The shoulder was shrugged up, and the upper arm was at or above 90 degrees at the shoulder.

58. As found, Claimant credibly testified that she was operating the stiff emergency brake on October 15, 2022 when she felt an extreme pain in her shoulder. She was then unable to change the overhead location signs and had to brake using both her hands in order to operate the emergency brake. As found, this was the time Claimant injured her rotator cuff causing the need for treatment, including surgical repair of the rotator cuff.

59. As found Claimant has shown by a preponderance of the evidence that she sustained a specific injury on October 15, 2022 while operating the emergency brake, tearing her rotator cuff in the course and scope of her employment. As found, Claimant had a prior impingement syndrome that contributed to an underlying pathology that was asymptomatic at the time of the current work related injury but was aggravated, causing the current disability and need for medical care. Further, due to her age and body habitus, Claimant likely had a weakened rotator cuff due to decreased blood supply to this critical area.

60. As found Dr. Reiter and Dr. Black are more credible and persuasive than the contrary opinions of Dr. Olsen and Dr. Ciccone. Dr. Reiter credibly stated that Claimant sustained an occupational injury with exerting up to 20 lbs. of force by externally rotating and adducting her shoulder to engage the brake of the bus in an awkward position. Further, Dr. Black opined that the rotator cuff tear was an occupational injury as claimant was asymptomatic before the event and symptomatic following the event of engaging the emergency brake.

61. While Dr. Olsen described that the muscle group Claimant would be using to operate the brake, was the hand, wrist and forearm, this ALJ viewed Claimant's motions and considered her description on video that she was having to use her arm by putting her elbow directly back and to the side, with her upper arm directly out and her shoulder lifted, and making a pulling and pushing motion at the side of her. The motion described by Dr. Olsen was not the one for BN[Redacted] when Claimant was injured.

62. What external rotation means to this ALJ is that the infraspinatus muscle rotates the humerus in the outward position together with the posterior deltoid and teres minor that assist in external rotation of the arm, but if the individual engages the trapezius and rhomboid muscle that can affect the muscles going into the neck. While there can be external rotation at higher degree levels such as 45 or 90 degrees or higher, this does not mean that external rotation cannot be achieved with the arm close to the body. But if Claimant was having difficulty with the brake, this ALJ concludes that she was putting pressure on her shoulder to externally rotate and, because she likely had a weakened shoulder cuff, she tore the rotator cuff when she engaged the stiff brake, causing an aggravation to preexisting weakness and a full rotator cuff tear, which required surgical repair.

63. As found, the Job Assessment by SN[Redacted] considered the risk factors of cumulative traumas for the elbow, forearm, wrist, hand and digits, not the shoulder, in the second risk factor assessment, and did not apply to this case. Further, she failed to assess the operation on BN[Redacted] or measure the specific force used to operate the emergency brake, as well as failed to consider Claimant's specific physical characteristics and underlying weakness in the left shoulder when reaching her conclusions.

64. Even if Claimant had not sustained a specific incident, the movements Claimant made to operate the hard emergency brake on BN[Redacted] was sufficient to cause an occupational disease.

65. As found, Claimant reported her injury and was referred to CCOM for medical treatment and was seen by PA Feldman and Dr. Reiter, who referred Claimant to her surgeon, Dr. Black. These physicians are within the chain of referral and are authorized.

66. As found, Claimant sustained a work related injury that required medical care, including evaluations, physical therapy, diagnostic tests and surgical repair. The medical care was reasonably necessary and related to the October 15, 2022 work injury.

67. As found, Claimant's average weekly wage was $1,202.35.

68. As found, Claimant had surgery performed by Dr. Black, an authorized treating provider, on March 2, 2023 to repair the rotator cuff tears. Claimant returned to

work on May 18, 2023. Claimant has shown she is entitled to temporary total disability benefits from March 2, 2023 through May 17, 2023.

69. Testimony and evidence inconsistent with the above findings is not credible and/or not persuasive, and/or not relevant.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley,* 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO,* 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office,* 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO,* 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the

conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441, P.2d 21 (Colo. 1968).

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

B. Compensability

Two theories of the case were advanced by Claimant. A specific injury which happened on October 14, 2022 or October 15, 2022; or that Claimant suffered an occupational disease.

The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM 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.

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

"Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co., supra.* An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. See *Triad Painting Co, supra*; *Hubbard v. City Market*, W.C. No. 4-934-689-01, ICAO (Nov. 21, 2014). The "arising out of" element is narrower and requires Claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez,* 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment.

A claimant is required to prove by a preponderance of the evidence that an 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.*

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014).

A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015). Moreover, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Finn v. Indus. Comm'n*, 437 P.2d 542 (Colo. 1968); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017); *Sanchez v. Honnen Equip. Co*., W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce the need for medical treatment or disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

The Medical Treatment Guidelines (MTGs), contained in Workers' Compensation Rule of Procedure 17, 7 CCR 1101-3, provide that health care providers shall use the Guidelines adopted by the Director of the Division of Workers' Compensation. Sec. 8-42-101(3)(b), C.R.S. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the Colorado Court of Appeals noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. The Guidelines are regarded as accepted professional standards for care under the Workers'

Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in making determinations. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005). The ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (Jan. 25, 2011). The Guidelines, however, do not constitute evidentiary rules, and an expert's compliance with them does not dictate whether the expert's opinions are admissible, or whether they may constitute substantial evidence supporting a fact finder's determinations. Rather, compliance with the Guidelines may affect the weight given by the ALJ to any particular medical opinion. *Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (February 23, 2009); *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009; *In re Claim of Foust*, 102120 W.C. No. 5-113-596, I.C.A.O. (October 21, 2020). However, the Guidelines are not definitive and the ALJ need not utilize the medical treatment guidelines as the sole basis for determinations of benefits. Sec. 8-43-201(3), C.R.S. See also *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009); *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150, I.C.A.O. (May 5, 2006), affirmed *Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (NSOP); *In re Claim of Reyes*, W.C. No. 4-968-907-04, I.C.A.O. (December 4, 2017)

Claimant has established that it was more likely than not that she sustained a compensable injury arising from the course and scope of her employment with Employer on October 15, 2022 when she was operating BN[Redacted], which had a hard to manage emergency brake. She pulled on the brake lever and felt pain in her neck and shoulder. The lever was at her side, approximately three inches above her thigh level and at least six inches away from her body and she had to use her upper arm extended at or above shoulder level, externally rotating her arm, while her shoulder was shrugging, when her rotator cuff tore. Claimant was credible in her description that she felt pain while operating the emergency brake and that she had not had symptoms like these before the October 15, 2022 shoulder injury. Further, Claimant's description was consistent and supported by this ALJ's observation of the Claimant's demonstration of the motions she used to operate the emergency brake. Claimant did have an underlying asymptomatic impingement syndrome which was aggravated at the time of the October 15, 2022 incident. While Claimant's initial symptoms included neck pain, this was determined to be caused by the overcompensation related to use of the trapezius and adjunct muscles of the cervical spine, as Claimant was unable to properly utilize her shoulder and arm. Claimant did not sustain a neck injury and any symptoms of neck pain resolved with physical therapy and the subsequent rotator cuff surgery. Dr. Reiter was persuasive and credible in his opinion that the Claimant's awkward movement in having to use the emergency brake, caused the rotator cuff tear. He explained that Claimant performed multiple motions done in an awkward position with her arm externally rotated and adducted to pull the brake handle, which were sufficient to cause the injury to Claimant's rotator cuff. Further, Dr. Black was also credible and persuasive that Claimant sustained a work related injury in the performance of her job as a driver.

While Dr. Ciccone and Dr. Olsen may have been credible in certain regards, they were not persuasive. Both Dr. Ciccone and Dr. Olsen relied on SN's[Redacted] job assessment without making a sufficient analysis of Claimant's circumstances and underlying asymptomatic preexisting weakness, failing to take into consideration all

factors affecting Claimant, such as how many years she had been working the job without significant problems and the force necessary to actually operate the emergency brake on BN[Redacted], as opposed to other buses and did not have the benefit of having a demonstration by Claimant of the movements required to operate the emergency brakes on BN[Redacted]. Nothing in SN's[Redacted] analysis indicates that she considered the hard to handle emergency brake or discussed that the test was performed on that same vehicle, considered Claimant's height, or other factors, such as age, gender, BMI, which are necessary to make a full determination. In fact, SN[Redacted] stated that Claimant never exerted forces of greater than 5 lbs., yet the medical records document that she exerted approximately 20 lbs. of force while externally rotating her extended upper arm. Further, Employer's records credibly showed that Claimant, as a bus driver, had to occasionally assist individuals onto and off the bus, perform repetitive motions, and occasional lifting up to 40 pounds. While she noted that Claimant occasionally used her upper extremities to push/pull, while "setting/releasing emergency brake," she did not assess the pounds of force needed to do so. She also stated that Claimant used both left and right hand to operate the brake. She predominately used the cumulative trauma MTGs to assess the risks of exposure. SN's[Redacted] evaluation is found not persuasive. Further, neither Dr. Olsen nor Dr. Ciccone examined Claimant or discussed in sufficient detail the multiple other factors that might have had an impact on the Claimant's weakened rotator cuff that made her susceptible to this work injury. What was credible in Dr. Olsen's testimony was that the shoulder was a critical zone, and that age and overhead use decreased the blood supply to the critical zone, causing weakness of the shoulder tissue. PA Feldman, Dr. Reiter and Claimant's surgeon, Dr. Black all credibly and persuasively opined that Claimant's shoulder injury was caused by Claimant's work related activities, over the contrary opinions of Dr. Olsen and Dr. Ciccone in this matter. Further, Claimant was persuasive and credible. Claimant has proven by a preponderance of the evidence that she sustained a compensable work related injury on October 15, 2022.

While there is evidence that Claimant may have sustained an occupational disease, instead of a specific incident, this ALJ finds to the contrary. Here, there was a specific time, place and cause of Claimant's injury. Claimant was operating the emergency brake while driving a particular bus in the course of her work for employer, and the operation of the hard emergency brake caused her left shoulder injury on October 15, 2022. This ALJ finds that whether Claimant correctly perceived the extent of the shoulder injury at the time that it happened was not significantly germane to the issue of compensability.

C. Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals*

Office, 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colo. Springs School Dist.*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

"Authorization" refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005). Further, a claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission*, 701 P.2d 168, 170 (Colo. App. 1985); see also, *Brickell v. Business Machines, Inc.,* 817 P.2d 536. Lastly, an insurer may, by their conduct, waive the right to object that the medical provider was not an authorized provider. *Wielgosz v. Denver Post Corporation*, W. C. No. 4-285-153, (ICAP, December 3, 1998).

Claimant reported her injury to her supervisor and, after the paperwork was completed, Employer scheduled her to see a provider at CCOM. Claimant was attended by Dr. Reiter and PA Feldman at CCOM. Dr. Reiter referred Claimant for an MRI and to Dr. Black. Claimant proceeded with care in accordance with that prescribed by her authorized providers, including surgical repair of her rotator cuff tears, physical therapy, massage therapy and medications as well as the MRI ordered by Dr. Reiter. All this care was authorized, reasonably necessary and related to the October 15, 2022 work related injury to her left shoulder.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. Campbell v. IBM Corporation, supra. Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. Coates, Reid & Waldron v. Vigil, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. Ebersbach v. United Food & Commercial Workers Local No. 7, W.C. No. 4-240-475 (ICAO, May 7, 2007).

From the detailed check history issued by Employer, Claimant earned a total of $38,475.46 the 32 weeks from pay period ending (PPE) April 8, 2022 through PPE October 21, 2022. This ALJ considered other computational alternatives to calculate the average weekly wage and rejected them. The Claimant's fair approximation of her wage

loss and diminished earning capacity was based these earnings. Claimant's average weekly wage was $1,202.35 for her October 15, 2022 work related injury.

E. Temporary disability benefits

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

Claimant had surgery under Dr. Black, an authorized treating physician, on March 2, 2023 for her left shoulder rotator cuff tears related to the October 15, 2022 work related injury. Claimant was credible when she testified that she was unable to return to work until May 18, 2023. Claimant has shown that she is entitled to temporary total disability benefits from March 2, 2023 through May 17, 2023. Further, Claimant is entitled to statutory interest of eight percent (8%) on all benefits not paid when due. Benefits are calculated as follows:

Name:	DeAnn Quintana
Bi-Weekly benefit amount that should have been paid:	1603.14
Bi-weekly amount that has been paid:	0
Beginning date of unpaid benefits:	03/02/2023
Ending date of unpaid benefits:	05/18/2023 **5/18/2023**
Date benefits were or will be paid:	11/09/2023 **11/9/2023 11/9/2023**
Annual Interest rate:	8
Number of days benefits are due:	78.00
Number of days benefit not paid when due:	175
Total bi-weekly benefits accrued through 5/18/2023	$8,931.78
Total interest accrued through 5/18/2023	$414.03
Total benefits and interest accrued	$9,345.81
Daily interest after 11/9/2023	$2.05

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a compensable work related injury to her left shoulder on October 15, 2022.

2. Respondents shall pay for all authorized, reasonably necessary and related medical care for her left shoulder injury, including CCOM, Dr. Black, and the Summit Group of providers, pursuant to the Colorado Fee Schedule.

3. Claimant's average weekly wage is $1,202.35 and her TTD rate is $801.57.

4. Respondents shall pay TTD benefits from March 2, 2023 through May 17, 2023 in the amount of $8,931.78 plus interest of $414.03, for a total of $9,345.81 in indemnity and interest benefits. Respondents shall pay interests through the day that benefits are issued to Claimant.

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

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

DATED this 9th day of November, 2023.

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-203-210-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable industrial injury to his leg/thigh area during the course and scope of his employment with Employer on April 4, 2022.

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

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits.

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

FINDINGS OF FACT

1. On February 1, 2022 Claimant began working for Employer as a Receiver. Claimant asserts that he sustained an industrial leg/thigh injury on April 5, 2022 when he tripped on uneven concrete in the recycling area of Employer's facility. However, the record reveals he did not work on April 5, 2022. Claimant subsequently amended the alleged date of injury to April 4, 2022.

2. Upon receiving notice of the alleged injury, Employer initiated its standard accident investigation protocol and prepared a written report authored by Safety Coordinator [Redacted, hereinafter ES]. The investigation involved reviewing camera footage of the premises on the days in question, examining timecards, conducting employee interviews and obtaining co-worker statements.

3. The Accident Investigation Report determined that camera footage "does not support the alleged incident." Importantly, Claimant arrived at work limping on April 4, 2022. Specifically, the Accident report noted "Camera footage shows the EE exciting the passenger side of a white vehicle and limping into work at 12:12pm on 4/4/22." The report documented that from 12:14pm to 3:07pm Claimant "can be seen limping in the recycling area while cutting wires, sweeping, moving bins about, attending the daily safety meeting, and sorting bins." Moreover, the report concludes that Claimant "cannot be seen tripping and falling at any point in time during the partial shift he worked on 4/4/22." Finally, the Accident report noted that, when "management saw that [Claimant] was limping and spoke to him about it in the office, the EE is said to have told management that he hit [h]is leg on a table at home and he was not injured at work."

4. The record includes a medical report from Swedish Medical Center dated March 31, 2022 or five days before the alleged work incident. The document specifies that Claimant presented "with pain to his left thigh after hitting it on the table."

5. ES[Redacted] testified at the hearing in this matter. He explained the following:

a. He reviewed video footage on both April 4, 2022 and April 5, 2022;

b. He prepared the Employer Accident Investigation Report;

c. It is standard protocol at Employer to review video, conduct interviews, and take employee statements when someone alleges an industrial accident at work;

d. Employer has cameras all over the premises that run 24/7 including in the receiving area where Claimant contends he was injured on April 4, 2022;

e. The video does not reflect that Claimant tripped or fell as alleged on April 4, 2022. Rather, the video recorded Claimant coming into work already limping on April 4, 2022 before his shift ever began;

f. The reason Claimant was taken to the office was because co-workers saw him limping when he came to work on April 4, 2022. Employer then provided a fit for duty form for Claimant to complete. If he claimed at the time he sustained an injury at work, he would have filled out the proper Workers' Compensation paperwork based on company policy;

g. Employees for Employer are not discouraged from reporting injuries when they occur at work, but rather are encouraged to report them no matter how small.

6. The record also reveals a number of witness statements regarding the incident. Store Manager [Redacted, hereinafter KW] commented that she noticed Claimant was limping at work on April 4, 2022. She asked Claimant what had happened and he responded that he struck his leg on a table at home. Claimant denied that he injured his leg at work. Similarly, supervisor [Redacted, hereinafter DA] asked Claimant whether he had injured his leg at work on April 4, 2021. Claimant answered that he did not injure his leg at work but pulled a muscle at home.

7. Claimant did not appear for the hearing July 11, 2023 hearing in this matter. Claimant received the opportunity to have his deposition taken, but elected not to proceed. Claimant therefore offered no testimony at hearing, deposition, or otherwise.

8. Claimant has failed to establish it is more probably true than not that he suffered a compensable industrial injury to his leg/thigh area during the course and scope of his employment with Employer on April 4, 2022. The totality of the evidence reflects that Claimant did not sustain a work injury during the course and scope of his employment with Employer. ES[Redacted] conducted an investigation by reviewing camera footage of the premises on the days in question, examining timecards, conducting employee interviews and obtaining co-worker statements. The surveillance video as documented in the Accident Investigation Report

reveals that Claimant was limping when he arrived at Employer's facility on April 4, 2022. The video also demonstrates that Claimant did not trip and fall at any time during his work shift on April 4, 2022.

9. ES'[Redacted] credible testimony is consistent with the Accident Investigation Report and video footage that Claimant arrived at work on April 4, 2022 already limping and did not trip or fall while performing his job duties. Furthermore, statements from co-workers establish that Claimant injured his leg at home and not while working for Employer. Importantly, a March 31, 2022 report from Swedish Medical Center specifies that Claimant presented "with pain to his left thigh after hitting it on the table." Therefore, the premises video, testimony of ES[Redacted], statements of co-workers and Accident Investigation Report demonstrate that Claimant did not sustain an industrial injury while working for Employer. Rather, the evidence strongly suggests that Claimant injured himself prior to April 4, 2022 outside of work. Accordingly, Claimant has failed to demonstrate that his work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. His claim is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

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

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

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

8. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable industrial injury to his leg/thigh area during the course and scope of his employment with Employer on April 4, 2022. The totality of the evidence reflects that Claimant did not sustain a work injury during the course and scope of his employment with Employer. ES[Redacted] conducted an investigation by reviewing camera footage of the premises on the days in question, examining timecards, conducting employee interviews and obtaining co-worker statements. The surveillance video as documented in the Accident Investigation Report reveals that Claimant was limping when he arrived at Employer's facility

on April 4, 2022. The video also demonstrates that Claimant did not trip and fall at any time during his work shift on April 4, 2022.

9. As found, ES'[Redacted] credible testimony is consistent with the Accident Investigation Report and video footage that Claimant arrived at work on April 4, 2022 already limping and did not trip or fall while performing his job duties. Furthermore, statements from co-workers establish that Claimant injured his leg at home and not while working for Employer. Importantly, a March 31, 2022 report from Swedish Medical Center specifies that Claimant presented "with pain to his left thigh after hitting it on the table." Therefore, the premises video, testimony of ES[Redacted], statements of co-workers and Accident Investigation Report demonstrate that Claimant did not sustain an industrial injury while working for Employer. Rather, the evidence strongly suggests that Claimant injured himself prior to April 4, 2022 outside of work. Accordingly, Claimant has failed to demonstrate that his work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. His claim is thus denied and dismissed.

ORDER

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

Claimant's request for Workers' Compensation benefits is denied and dismissed.

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

DATED: November 9, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $2,337.14.

2. The issue of Temporary Total Disability (TTD) benefits for the period August 22, 2021 through October 4, 2021 has been resolved. Claimant also withdrew the issue of reinstatement of vacation hours, sick time, and PTO.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to recover Temporary Partial Disability (TPD) benefits for the period October 5, 2021 through August 20, 2023 except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of WCRP 5-5(B) by filing a medical-only General Admission of Liability (GAL) on March 29, 2022.

FINDINGS OF FACT

1. Claimant works as a Truck Driver for Employer. On August 21, 2021 Claimant sustained a work-related injury to his lower back after lifting boxes and bags.

2. Claimant testified that Employer did not direct him to a physician for treatment after he reported the injury. He thus visited personal physician Frances C. Hindt, M.D. at Kaiser Permanente. Dr. Hindt originally took him off work until October 5, 2021 for severe pain when walking, standing, and resting.

3. Claimant returned to Dr. Hindt for an examination on September 27, 2021. She noted Claimant's lumbar MRI revealed multilevel degenerative disc disease and facet osteoarthropathy. Dr. Hindt diagnosed Claimant with spinal stenosis of the lumbar spine with neurogenic claudication. She permitted Claimant to return to work, but expressed the following concerns, "I do think it is okay for him to return to work now cautiously. If he does have more pain upon return to work I want him to stop and take a step back." Dr. Hindt commented that Claimant's work consists of heavy lifting in a dock and he has been unable to perform his job since August.

4. Subsequent visits to Kaiser reveal that Claimant continued to suffer from aggravating factors including bending, lifting, sitting, driving, transitioning positions,

walking, and standing. Claimant underwent physical therapy and received injections for his lower back condition.

5. On January 11, 2022 Claimant underwent an Independent Medical Examination (IME) with John Burris, M.D. After conducting a physical examination, Dr. Burris concluded Claimant likely sustained a minor soft tissue strain of the lumbosacral spine on August 21, 2021.

6. At the time of the initial evaluation, Dr. Burris did not have Claimant's medical records. He subsequently performed a medical records review on March 11, 2022 and issued an addendum report. Dr. Burris determined the medical records supported his opinions as expressed in his original IME report. After reviewing a lumbar MRI, Dr. Burris explained that Claimant only suffered from multilevel degenerative changes.

7. Dr. Burris also testified at the hearing in this matter. He commented that there were no positive objective findings during his physical examination, Claimant told him he had returned to unrestricted duty, and there were no formal restrictions assigned by Claimant's providers. Dr. Burris thus concluded Claimant could return to regular duty employment. Nevertheless, Dr. Burris acknowledged that Claimant's Kaiser physicians advised him to "watch what he lifts, and he is able to self-monitor his activities at work to avoid heavy lifting." Dr. Burris also agreed that Claimant reported he was following the advice of his Kaiser physicians to watch what he lifts. Moreover, Claimant told Dr. Burris that "this event had made him realize that he cannot continue to engage in such a physically demanding job." Finally, Dr. Burris was not aware of any medical records that Claimant had symptoms, restrictions, or limitations in his activities before he was injured on August 21, 2021.

8. Since the injury of August 21, 2021 Claimant has been performing his job differently and "being cautious." Claimant noted he cannot lift like he used to, and has to monitor his lifting activities. He uses the forklift more often and obtains help from coworkers for lifting heavy materials. Claimant remarked that he is only able to walk or stand for a certain amount of time before his back becomes tight and he must sit down. Moreover, Claimant commented the back injury limits bending and stooping because he has to spread his legs to pick up items from the ground to relieve the pressure on his back. He summarized the injury has, "really inhibited me from doing my work at 100 percent."

9. Claimant seeks TPD benefits of $30,900.44 as documented in modified Exhibit 9 for the period October 5, 2021 through August 20, 2023 because his earnings have been lower than his AWW of $2,337.14. When Claimant returned to work for the period October 5, 2021 through August 20, 2023, he did not receive the full hours he had been working prior to his lower back injury. As Claimant specified "I was getting same rate of wage, but I wasn't getting the full overtime hours that would have changed that rate." Claimant explained that he does not have control over how many overtime hours he receives. He remarked that, in some instances, he is required to take the overtime. However, he sometimes has the choice of whether or not to accept overtime. Notably, Claimant has

not refused overtime hours after his return to work because of his back injury, and "absolutely" takes the hours if offered. Claimant remarked he was unaware whether the overtime hours have changed because his work duties moved to a different job site.

10. The differences between Claimant's AWW and weekly earnings are documented in Claimant's modified Exhibit 9. Moreover, Claimant's Exhibit 7 outlines the per week calculation of TPD benefits during the relevant period. Claimant's Exhibit 8 provides the supporting pay stubs. Claimant acknowledged that he is not entitled to receive benefits for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022. Specifically, Claimant withdrew any claim for TPD benefits for the weeks of January 13, 2022 and October 20, 2022 even though he only missed one day in each of those weeks for an unrelated issue, *i.e.,* a CDL exam or a shoulder exam. He also withdrew any request for TPD benefits during the weeks that he either was out with Covid-19 or suspected Covid-19, *i.e.* December 6, 2021 and July 11, 2022.

11. In Insurer's claim notes, Claims Adjuster [Redacted, hereinafter LM] remarked on November 4, 2021 that Claimant's claim was "medical only" for a lower back injury. However, on the following day the claims notes reflect that there was a "Type Change From 'Medical Only' To 'Indemnity.'" The claim was then labeled a "NEW IND CLAIM," and the adjuster changed from LM[Redacted] to [Redacted, hereinafter BS]. [Redacted, hereinafter SK] Claimant Management Adjuster [Redacted, hereinafter EY] testified that "NEW IND CLAIM" means "new indemnity claim."

12. On March 28, 2022 BS[Redacted] wrote in the claim notes that "we recommend admitting to the claim and filing a GAL. Claimant was out of work for a matter of weeks but has since returned. Therefore, temporary indemnity exposure is minimal."

13. Respondents finally filed a General Admission of Liability (GAL) on March 29, 2022 that was for medical benefits only. The document noted "[t]emporary and permanent benefits are denied until such time it is deemed otherwise in accordance with Rule 5-5(B). If temporary and/or permanent indemnity benefits are sustained, an amended admission will be issued." In an email on the same day between Respondents' former attorney and Claimant's former attorney, Respondents' counsel wrote,

> Attached is a GA filed today. It is medical only, and we will amend for indemnity. I had originally recommended a medical only GA based on our emails last week, and this was filed earlier today prior to yours and my conversation. It will be amended to account for the temporary indemnity period, however at this time the claim rep does not have the wage information from the employer to assess the TTD period/AWW. We are working to get that asap but wanted to at least get a medical only GA filed. In light of this, will Claimant withdraw the app for hearing?

14. On March 28, 2023 Claimant filed an Application for Hearing (AFH) seeking AWW, TPD, TTD and penalties. On April 12, 2023 Respondents filed a Response to the AFH asserting that Claimant was not owed any TPD or TTD benefits.

15. Despite the March 29, 2022 correspondence between counsel and Claimant's March 28, 2023 AFH, Respondents did not file an amended GAL that admitted for indemnity benefits or an AWW until July 19, 2023. While Respondents acknowledged TTD benefits from August 22, 2021 through October 4, 2021, they also terminated all temporary benefits as of October 4, 2021 due to an alleged return to full wages/full hours of work.

16. EY[Redacted] testified she began working on Claimant's file on March 1, 2023 after she took over the matter from BS[Redacted]. She commented that, as a seasoned adjuster for SK[Redacted], she is familiar with both the statute and the rules. EY[Redacted] agreed that, if an injured worker misses more than three working shifts because of an admitted work injury, the injury is an indemnity or lost-time claim. Furthermore, if an adjuster is aware that an injured worker has missed more than three working shifts, then a GAL should not be filed as a medical-only admission. EY[Redacted] noted that it would be standard procedure for a new claims adjuster to be assigned when there has been a switch from a medical-only claim to an indemnity claim.

17. Claimant has demonstrated it is more probably true than not that he is entitled to recover TPD benefits for the period October 5, 2021 through August 20, 2023 except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022. Initially, on August 21, 2021 Claimant sustained a work-related injury to his lower back after lifting boxes and bags. Because Employer did not direct him to a medical provider, he sought treatment with personal physician Dr. Hindt at Kaiser. By September 27, 2021 Dr. Hindt permitted Claimant to return to work, but expressed concerns due to Claimant's heavy lifting, and encouraged him to exercise caution. She noted "[i]f he does have more pain upon return to work I want him to stop and take a step back." Subsequent visits to Kaiser reveal that Claimant continued to suffer from aggravating factors including bending, lifting, sitting, driving, transitioning position, walking, and standing. Claimant underwent physical therapy and received injections for his lower back condition.

18. In contrast, IME physician Dr. Burris concluded that Claimant could return to regular duty employment. However, Dr. Burris acknowledged that Claimant's Kaiser physician advised him to "watch what he lifts, and he is able to self-monitor his activities at work to avoid heavy lifting." Moreover, Claimant credibly testified that his lifting abilities have been limited since his work injury and he more often uses a forklift. Claimant also remarked that he is only able to walk or stand for a certain amount of time before his back becomes tight and he must sit down. Finally, Claimant commented that his back injury limits bending and stooping and has, "really inhibited me from doing my work at 100 percent." Therefore, despite Dr. Burris' opinion, the record reveals that Claimant's lower back injury has limited his ability to perform his regular job duties.

19. As a result of his August 21, 2021 industrial injury, Claimant's earnings have been lower than his AWW of $2,337.14. When Claimant returned to work for the period October 5, 2021 through August 20, 2023 he did not receive the full hours, including overtime, he had been working prior to his lower back injury. The differences between

Claimant's AWW and weekly earnings are documented in Claimant's modified Exhibit 9. Fewer overtime hours caused a reduction in wages that was causally connected to Claimant's lower back injury. The effects of the injury placed Claimant at a competitive disadvantage relative to other employees in procuring overtime hours. As a result, Respondents are required to pay TPD benefits based on the difference between Claimant's AWW and his actual earnings during the period October 5, 2021 through August 20, 2023 except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022. Based on Claimant's impaired earning capacity and reduction in hours due to his August 21, 2021 work injury, he is entitled to receive TPD benefits in the total amount of $30,900.44 as documented in modified Exhibit 9.

20. Claimant has established it is more probably true than not that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of WCRP 5-5(B) by filing a medical-only GAL on March 29, 2022. Despite the mandatory language of Rule 5-5(B), Respondents filed a medical-only GAL on March 29, 2022 without explanation. Moreover, Respondents violation was objectively unreasonable because it was not based on a rational argument in law or fact. Therefore, Claimant is entitled to an award of penalties for the period from March 29, 2022 until July 19, 2023 for a total of 478 days.

21. The record reveals that the day before Insurer filed a medical-only GAL, the adjuster knew it was a lost-time claim. Specifically, in Insurer's claim notes, adjuster LM[Redacted] remarked on November 4, 2021 that Claimant's claim was "medical only" for a lower back injury. However, on the following day the claims notes reflect that there was a "Type Change" from "Medical Only" to an indemnity claim. The adjuster specifically knew Claimant had missed a number of weeks of work because of the work injury. The filing of a medical-only GAL under the circumstances constituted a violation of Rule 5-5(B). Insurer had notice of the problem and promised to address it on the same day the medical-only GAL was filed on March 29, 2022. Respondents' former attorney specified in an e-mail that the medical-only GAL would be amended "to account for the temporary indemnity period, however at this time the claim rep does not have the wage information from the employer to assess the TTD period/AWW." Nevertheless, Insurer did not fix the problem and admit for TTD benefits until July 19, 2023 or almost 16 months later. Moreover, Respondents did not cure the violation within 20 days of when Claimant filed the AFH on March 28, 2023. Instead, Respondents filed a Response to the AFH asserting that Claimant was not entitled to any TPD or TTD benefits.

22. EY[Redacted] credibly explained she began working on Claimant's file on March 1, 2023 after she took over the matter from BS[Redacted]. She agreed that, if an injured worker misses more than three working shifts because of an admitted work injury, the injury is an indemnity or lost-time claim. Furthermore, if an adjuster is aware that an injured worker has missed more than three working shifts, then a GAL should not be filed as a medical-only admission. EY[Redacted] noted that it would be standard procedure for a new claims adjuster to be assigned when there has been a switch from a medical-only claim to an indemnity claim.

23. Respondents filed a medical-only GAL on March 29, 2022 and waited approximately 16 months to file an amended GAL that admitted for indemnity benefits and an AWW. While Respondents acknowledged TTD benefits from August 22, 2021 through October 4, 2021 in the amended GAL, they also terminated all temporary benefits as of October 4, 2021 due to an alleged return to full wages/full hours of work. The record reveals that Respondents conduct in failing to file an amended GAL for approximately 16 months while aware that a medical-only GAL constituted a Rule violation, was objectively unreasonable because it was not based on a rational argument in law or fact. Insurer was aware that Claimant had missed more than three working shifts but still filed a GAL as a medical-only admission. Based on Respondents violation of Rule 5-5(B) and unreasonable conduct, Claimant has established the right to a penalty of $25 per day from March 29, 2022 through July 19, 2023 for a total of 478 days. The total penalty equals $11,950. A penalty of $11,950 is sufficient to penalize Respondents' conduct in violating Rule 5-5(B) and encourage future compliance without being excessively punitive. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

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).

Temporary Partial Disability Benefits

4. Section 8-42-106(1), C.R.S. provides for an award of TPD benefits based on the difference between a claimant's AWW at the time of injury and earnings during the continuance of the disability. Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (TPD benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). Once a claimant establishes that the injury has caused "disability" in the sense that the injury impairs a claimant's ability to perform his regular duties, the right to temporary disability benefits is measured by a claimant's wage loss. *See Black Roofing Inc. v. West*, 967 P.2d 195 (Colo. App. 1998). Further, "economic unemployment or underemployment" is not a claimant's "fault" and does not serve to sever the causal relationship between the injury and the wage loss. This is true because the physical restrictions caused by the injury affect a claimant's prospects for finding alternative employment. *J.D. Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989); *Kaminski v. Grand County Roofing & Sheet Metal, Inc.,* WC 4-525-562 (ICAO, Mar. 21, 2003). Section 8-42-106(2), C.R.S. provides that TPD benefits shall continue until either of the following occurs: "(a) The employee reaches maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

5. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to recover TPD benefits for the period October 5, 2021 through August 20, 2023 except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022. Initially, on August 21, 2021 Claimant sustained a work-related injury to his lower back after lifting boxes and bags. Because Employer did not direct him to a medical provider, he sought treatment with personal physician Dr. Hindt at Kaiser. By September 27, 2021 Dr. Hindt permitted Claimant to return to work, but expressed concerns due to Claimant's heavy lifting, and encouraged him to exercise caution. She noted "[i]f he does have more pain upon return to work I want him to stop and take a step back." Subsequent visits to Kaiser reveal that Claimant continued to suffer from aggravating factors including bending, lifting, sitting, driving, transitioning position, walking, and standing. Claimant underwent physical therapy and received injections for his lower back condition.

6. As found, in contrast, IME physician Dr. Burris concluded that Claimant could return to regular duty employment. However, Dr. Burris acknowledged that Claimant's Kaiser physician advised him to "watch what he lifts, and he is able to self-monitor his activities at work to avoid heavy lifting." Moreover, Claimant credibly testified that his lifting abilities have been limited since his work injury and he more often uses a forklift. Claimant also remarked that he is only able to walk or stand for a certain amount of

time before his back becomes tight and he must sit down. Finally, Claimant commented that his back injury limits bending and stooping and has, "really inhibited me from doing my work at 100 percent." Therefore, despite Dr. Burris' opinion, the record reveals that Claimant's lower back injury has limited his ability to perform his regular job duties.

7. As found, as a result of his August 21, 2021 industrial injury, Claimant's earnings have been lower than his AWW of $2,337.14. When Claimant returned to work for the period October 5, 2021 through August 20, 2023 he did not receive the full hours, including overtime, he had been working prior to his lower back injury. The differences between Claimant's AWW and weekly earnings are documented in Claimant's modified Exhibit 9. Fewer overtime hours caused a reduction in wages that was causally connected to Claimant's lower back injury. The effects of the injury placed Claimant at a competitive disadvantage relative to other employees in procuring overtime hours. As a result, Respondents are required to pay TPD benefits based on the difference between Claimant's AWW and his actual earnings during the period October 5, 2021 through August 20, 2023 except for the weeks of December 6, 2021, January 13, 2022, July 11, 2022 and October 20, 2022. Based on Claimant's impaired earning capacity and reduction in hours due to his August 21, 2021 work injury, he is entitled to receive TPD benefits in the total amount of $30,900.44 as documented in modified Exhibit 9.

Penalties

8. 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).

9. 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….

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

11. 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).

12. The Colorado Division of Workers' Compensation Rules of Procedure Rule 5-5 addresses admissions of liability. Rule 5-5(B) specifically provides that "[a]n admission filed for medical benefits only shall state the basis for denial of temporary and permanent disability benefits within the remarks section of the admission."

13. As found, Claimant has established by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of WCRP 5-5(B) by filing a medical-only GAL on March 29, 2022. Despite the mandatory language of Rule 5-5(B), Respondents filed a medical-only GAL on March 29, 2022 without explanation. Moreover, Respondents violation was objectively unreasonable because it was not based on a rational argument in law or fact. Therefore, Claimant is entitled to an award of penalties for the period from March 29, 2022 until July 19, 2023 for a total of 478 days.

14. As found, the record reveals that the day before Insurer filed a medical-only GAL, the adjuster knew it was a lost-time claim. Specifically, in Insurer's claim notes, adjuster LM[Redacted] remarked on November 4, 2021 that Claimant's claim was "medical only" for a lower back injury. However, on the following day the claims notes reflect that there was a "Type Change" from "Medical Only" to an indemnity claim. The adjuster specifically knew Claimant had missed a number of weeks of work because of the work injury. The filing of a medical-only GAL under the circumstances constituted a violation of Rule 5-5(B). Insurer had notice of the problem and promised to address it on the same day the medical-only GAL was filed on March 29, 2022. Respondents' former attorney specified in an e-mail that the medical-only GAL would be amended "to account for the

temporary indemnity period, however at this time the claim rep does not have the wage information from the employer to assess the TTD period/AWW." Nevertheless, Insurer did not fix the problem and admit for TTD benefits until July 19, 2023 or almost 16 months later. Moreover, Respondents did not cure the violation within 20 days of when Claimant filed the AFH on March 28, 2023. Instead, Respondents filed a Response to the AFH asserting that Claimant was not entitled to any TPD or TTD benefits.

15. As found, EY[Redacted] credibly explained she began working on Claimant's file on March 1, 2023 after she took over the matter from BS[Redacted]. She agreed that, if an injured worker misses more than three working shifts because of an admitted work injury, the injury is an indemnity or lost-time claim. Furthermore, if an adjuster is aware that an injured worker has missed more than three working shifts, then a GAL should not be filed as a medical-only admission. EY[Redacted] noted that it would be standard procedure for a new claims adjuster to be assigned when there has been a switch from a medical-only claim to an indemnity claim.

16. As found, Respondents filed a medical-only GAL on March 29, 2022 and waited approximately 16 months to file an amended GAL that admitted for indemnity benefits and an AWW. While Respondents acknowledged TTD benefits from August 22, 2021 through October 4, 2021 in the amended GAL, they also terminated all temporary benefits as of October 4, 2021 due to an alleged return to full wages/full hours of work. The record reveals that Respondents conduct in failing to file an amended GAL for approximately 16 months while aware that a medical-only GAL constituted a Rule violation, was objectively unreasonable because it was not based on a rational argument in law or fact. Insurer was aware that Claimant had missed more than three working shifts but still filed a GAL as a medical-only admission. Based on Respondents violation of Rule 5-5(B) and unreasonable conduct, Claimant has established the right to a penalty of $25 per day from March 29, 2022 through July 19, 2023 for a total of 478 days. The total penalty equals $11,950. A penalty of $11,950 is sufficient to penalize Respondents' conduct in violating Rule 5-5(B) and encourage future compliance without being excessively punitive. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

ORDER

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

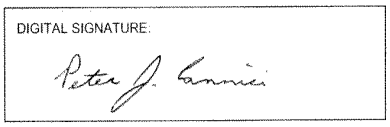
1. Claimant shall receive TPD benefits in the total amount of $30,900.44 as documented in modified Exhibit 9.

2. Respondents shall pay a penalty of $25 per day from March 29, 2022 through July 19, 2023, or 478 days, totaling $11,950. The amount is sufficient to penalize Respondents' conduct in violating Rule 5-5(B) and encourage future compliance without being excessively punitive. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

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

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

DATED: November 9, 2023.



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

ISSUES

- Whether Respondents produced clear and convincing evidence to overcome the MMI determination of Dr. Dwight Caughfield?

- If Respondents overcame Dr. Caughfield's MMI determination, whether they also established, by clear and convincing evidence, that Dr. Caughfield erred in assigning Claimant 13% cervical spine impairment.

FINDINGS OF FACT

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

1. Claimant is employed as a field service technician for Employer. While in the field, Claimant uses a large bucket truck to complete his work duties. (Respondents' Hearing Exhibit (RHE) B, p. 19). On October 24, 2022, Claimant was involved in a roll over motor vehicle accident after being struck by a vehicle that unexpectedly pulled out in front of him. *Id*.

2. Emergency personnel responded to the scene of Claimant's accident. (RHE F, p. 109). Claimant was evaluated by EMT, [Redacted, hereinafter RS]. *Id.* While Claimant accepted EMS care, he refused transport to the hospital, agreeing instead to follow-up in the emergency room (ER) via personal vehicle.[1] *Id.*

3. Claimant presented to the ER at St. Francis Medical Center for further evaluation. (RHE D, p. 88, 91). He was evaluated by both Physician Assistant (PA) Kelly Marie Torres and Dr. Christopher Thomas Layton. *Id.* at pp. 88-95. Claimant underwent a CT of the head, neck and facial bones given his report of head trauma without loss of consciousness and right-sided neck pain. *Id.* at pp. 88, 91. Claimant's CT of the head and facial bones were read as "normal", i.e. without evidence of skull or facial fracture and no intracranial hemorrhage. *Id*. at pp. 88-89. The CT of the neck demonstrated no acute spinal fractures. There was an incidental finding of a "[c]hronic C7 spinous process tip fracture deformity" and "[m]ild but increased left C2-C3 facet arthropathy". *Id*. at p. 89. A focused physical examination revealed Claimant's neck to be supple, without midline tenderness; however, there were a "few scattered abrasions on the left lateral and base of the neck" from the seatbelt and tenderness over the sternocleidomastoid muscle extending down to the right shoulder. *Id.* at p. 92.

[1] Claimant testified he declined ambulance transport because he was able to walk but noted he had "a lot of head pain" at the scene. (Hrg. Tr. p. 15, ln. 14-19).

4. Dr. Layton noted that Claimant was found to have "soft tissue injuries but no other significant trauma. (RHE D, p. 90). Moreover, Dr. Layton opined that there was "no evidence of any significant TBI (traumatic brain injury). *Id*. Claimant was treated with anti-inflammatories and muscle relaxants for his symptoms and discharged from the ER. *Id.* at p. 90, 95.

5. Claimant was evaluated the day after the accident (10/25/2022) by PA Mendy Peterson at Concentra Medical Centers (Concentra). (RHE C, pp. 27-33). During this encounter, Claimant reported "pain pretty much everywhere" but noted most of the pain was in the following delineated locations: "right scalp, right shoulder, left knee, right wrist, lumbar area, and hips." *Id*. Claimant did not specifically indicate that he had neck pain. The physical examination of the cervical spine noted there was "normal lordosis, no tenderness and full range of motion." Among other things, Claimant was assessed with a closed head injury, a right shoulder strain, and neck strain. Claimant was then referred for physical therapy and given work restrictions that precluded him from driving a company vehicle "due to functional limitations" caused by decreased range of motion in the neck. *Id*. at pp. 28-30.

6. Claimant retuned to Concentra on October 28, 2022 with complaints of blurriness in the right eye, headaches and neck pain. He was referred for an ophthalmology evaluation. (RHE C, p. 37). PA Peterson noted that Claimant would be seen by the attending physician at his next visit. *Id.* at p. 39. She also limited Claimant to four hours of desk work per day and continued to preclude his driving company vehicles due to limited range of motion in the neck. *Id*. She anticipated that Claimant would reach maximum medical improvement on November 20, 2022. *Id*.

7. Claimant saw Dr. Marcie Wilde at Concentra on November 2, 2022. (RHE C, p. 41). Dr. Wilde noted that Claimant had suffered a "mild TBI without LOC" (loss of consciousness). *Id.* During this appointment, Claimant reported persistent "confusion, headache, trouble [with] concentration, sensitivity to light and sleep". *Id.* Claimant reported attending physical therapy noting that he felt that it had been beneficial. *Id.* No mention of pain or functional limitation concerning the cervical spine were documented in Dr. Wilde's 11/2/2022 report. Indeed, the only musculoskeletal pain noted was limited to the left hip and examination of the cervical spine revealed a "normal lordosis, no tenderness and full range of motion". *Id*. at pp. 42-43. Dr. Wilde renewed Claimant's order for PT for the lumbar spine, the neck and the right shoulder. *Id*. at pp. 43-44. No changes were made to Claimant's work restrictions. Id. at p. 46.

8. Dr. Wilde focused her treatment to Claimant's low back and hips during his November 9, 2022 appointment. Dr. Wilde, who is an osteopathic medicine specialist, performed osteopathic manipulative treatment to the right ASIS (anterior superior iliac spine) and PSIS (posterior superior iliac spine) and noted further that Claimant "[c]ontinues to have marked struggles with symptoms from head injury. *Id*. at pp. 50-51. Physical therapy was continued as was Claimant's restriction on driving company vehicles. *Id*. at p. 51, 53.

9. By his November 16, 2022 follow-up appointment, Claimant had resumed driving. (RHE C, p. 55). PA Peterson noted that Claimant was "approximately 50% toward meeting the physical requirements of his job". *Id.* at p. 58.

10. Claimant returned to Concentra on November 30, 2022, where he was reevaluated by Dr. Wilde. (RHE C, p. 61). Claimant reported persistent headaches and feeling "foggy" and a little lightheaded. *Id*. He also reported no improvement with his neck pain, complaining that it felt like it need to "pop". Id. at p. 62. While the range of motion in his neck was "better than before", Claimant reported sensitivity to touch on the lateral side of the neck which intensified his headaches. *Id.* at p. 61. Claimant was started on Ergotamine-Caffeine tablet for his headaches and given a referral for a chiropractic evaluation for his neck strain complaints. *Id*. at p. 66. Claimant was anticipated to reach MMI in two months. *Id*. at p. 68.

11. Claimant's first chiropractic visit with Dr. Lance Weidner took place on December 13, 2022. (CHE 8, p. 231). Dr. Weidner documented that Claimant was there because of an injury to his neck and right eye with a concussion and headaches. *Id.* Physical examination was completed and provocative testing done. *Id.* at p. 235. Claimant was noted to have a positive cervicocerebral vascular test which caused dizziness, headache and visual changes, which Dr. Weidner opined was an "absolute" contra-indication for cervical manipulation. *Id*. at p. 236. Accordingly, Dr. Weidner referred Claimant back to Dr. Wilde to rule out vertebral artery or other vascular injury from his MVA. *Id.*

12. Claimant returned to Dr. Wilde the following day, December 14, 2022. (RHE C, p. 70). She noted Dr. Weidner raised concern for a possible vascular disorder given Claimant's positive cervicocerebral vascular test with dizziness, headache, and visual change. *Id*. at p. 71. Dr. Wilde ordered a CT scan of the head and brain with contrast. *Id.* at p. 74. She also ordered an arteriogram of the neck. *Id.* at p. 75. Finally, Dr. Wilde placed Claimant's PT on hold pending the results of Claimant's additional imaging. *Id*. Dr. Wilde renewed Claimant's driving restriction due to reduced range of motion in the neck and opined that MMI was not anticipated for another two months. *Id.* at p. 77.

13. Claimant returned to Concentra on December 28, 2022 with complaints of a migraine headache. (RHE C, p. 78). PA Peterson documented that Claimant was not a good candidate for chiropractic care, and that he had completed his last PT session two weeks prior. *Id.* at p. 79. PA Peterson noted that Claimant had deferred medications to help with his persistent headaches and demanded a referral to a neurologist and for an MRI, which PA Peterson noted were not indicated given Claimant's normal physical examination. *Id*. PA Peterson noted that Claimant became irate stating that he thought the treatment process was "getting ridiculous" and that he would let his "attorney handle this from here on out." *Id.* PA Peterson characterized Claimant as being "angry and evasive", noting further that Claimant's objective findings [did] not support his subjective complaints" and it appeared that he was amplifying his symptoms. *Id*. at p. 82. She noted that Claimant had reached a period of stability and was capable of full duty work. Claimant was placed at MMI, without impairment and

released to full duty work. *Id*. at p. 85. At the time of MMI, it was anticipated that Claimant may experience flares of pain or loss of function, but that these flares would not require treatment beyond conservative home measures. Id at p. 83. Dr. George Johnson signed off on the report and completed a WC 164 form. *Id.*; CHE 4, p. 28. At the time he was placed at MMI, Claimant had undergone work-ups and treatment:

- Ophthalmology evaluation;
- CT scans of head and neck;
- Physical therapy for neck, back and shoulder, including dry needling;
- Chiropractic – although he was noted to be not a candidate as his findings of positive Georges' test resulting in ptosis, headache, dizziness, and visual changes;
- Osteopathic manipulation

14. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Johnson's opinions regarding MMI and impairment on January 12, 2023. (CHE 4, p. 10).

15. Claimant objected to Respondents FAL requested a Division Independent Medical Examination (DIME). Dr. Dwight Caughfield was identified as the DIME doctor and he completed the requested examination on April 25, 2023. (RHE B). Dr. Caughfield issued a report outlining his opinions concerning MMI and impairment on May 8, 2023. Dr. Caughfield diagnosed Claimant with work-related occipital neuralgia following blunt head trauma, chronic daily headaches, and cervical pain. Id. at p. 21. After a review of the medical records, taking a history from Claimant, and personally examining him, Dr. Caughfield opined that Claimant was not at MMI for his work-related injuries. *Id*. In support of his opinion, Dr. Caughfield noted:

> Chronic daily headaches (both cervicogenic and migraines) are addressed under the Mild Traumatic Brain Injury Guidelines per Cervical injury guidelines page 9 2nd paragraph [Refer to the Mild Traumatic Brain Injury Medical Treatment Guidelines (MTGs) for information on cervicogenic headache] He has undergone treatments to include passive and active physical therapy, cervical mobilizations, as well as dry needling but his headaches persist. He has returned to full duties and is independent in ADLs but reports having to go to bed early to manage his headaches indicating he has not returned to his pre-injury level of function. The Mild Traumatic Brain Injury treatment guidelines page 69 indicate further treatment require functional impairment for further procedures and treatment commended [sic]. Since he does report headaches that require him to go to bed early for relief, I believe further evaluation and treatment per the treatment algorithm are merited.
>
> Further recommended treatments include medication trials (such as Amitriptyline) and evaluation for diagnostic blocks. mTBI guidelines

> discuss diagnostic nerve blocks (Page 47 E.2.f) which can be beneficial to establish a greater occipital neuralgia while cervical guidelines Section 9.a.iv page 45 discuss medial branch blocks for upper cervical pain which can also be involved in his daily headaches.
>
> I do not feel he has reached MMI until further treatment trials for his chronic headaches have been completed to include a course of medication trials. Chiropractic manipulation, and possible right C2-C3 medial branch blocks/greater occipital nerve block. An MRI of the upper cervical spine is appropriate prior to manipulation and injections given the complaints of dizziness when his neck pops (Possible vertebrobasilar pathology as contraindication to manipulation cervical spine injury guidelines page 34).
>
> He should also be screened for psychological risk factors prior to injections per recommendation 106 page 46 of the cervical injury treatment guidelines.

(RHE B, p. 21).

16. Dr. Caughfield provided a provisional whole person impairment rating of 5% for Claimant's ongoing headaches and a 13% rating for his cervical spine: 4% for Table 53 and 9% for range of motion loss of the cervical spine. *Id.* at 21-22. Dr. Caughfield provided these ratings because his primary complaint remained his daily headaches that require him to go to bed earlier than normal for relief, but Claimant was also having significant upper neck pain, especially on extension suggesting possible facet syndrome. *Id.* at p. 21. Dr. Caughfield opined that although Claimant was able to perform his job, he was performing it in a modified, sedentary capacity, and that his headaches were still interfering with his functional abilities. *Id.* Dr. Caughfield concluded the ongoing, functionally interfering conditions require further treatment as merited per the mTBI headache treatment guidelines as outlined in section J." *Id.*

17. Respondents disagreed with the opinions of Dr. Caughfield and filed an application for hearing to overcome his MMI determination and opinions regarding permanent impairment. They also sought the opinions of Dr. Lawrence Lesnak. Indeed, Dr. Lesnak completed an independent medical examination (IME) at Respondents request on July 17, 2023. (RHE A, pp. 3-16). After taking a history from Claimant and completing a physical examination[2] and a records review, Dr. Lesnak opined that while Claimant probably sustained a mild closed head injury as a result of his MVA, there was no "medical evidence to support that [he] sustained any specific injuries to his cervical spine" related to the October 24, 2022 accident. *Id*. at p. 14.

[2] The cervical examination performed by Dr. Lesnak showed full active range of motion in all planes, negative Spurling's maneuver and Lhermitte's sign. Cervical facet joint loading activities on the left produced no symptoms, on the right, it caused some right-sided suboccipital tenderness. (RHE A, p. 12).

Indeed, Dr. Lesnak added that at the time of his IME there was no "clinical evidence of any symptomatic cervical spine pathology or any medical diagnosis involving the cervical spine that would in any way pertain to [Claimant's] work-related injury claim of 10/24/2022. *Id.*

18. Regarding Claimant's head injury, Dr. Lesnak noted that while Claimant may have "residual intermittent right greater occipital neuritis/neuralgia (which he could not reproduce during examination), he had reached MMI for this injury because dry needling for his headaches had been tried without significant relief and because the medical records document that he "declined any prescription medications that were offered to him previously". (RHE A, p. 14). Regarding Dr. Caughfield's treatment recommendations, Dr. Lesnak noted that Claimant may likely decline additional injection type treatments given his experience with dry needling. Nonetheless, Dr. Lesnak felt it may be appropriate to offer Claimant a greater occipital nerve branch block trial, which he opined should be done on a post MMI maintenance basis. Id. at pp. 14-15.

19. As noted above, Dr. Lawrence Lesnak testified by deposition on September 18, 2023. He testified that in the context of an emergency evaluation following a motor vehicle accident where a patient complains of headache, completion of cervical and head CTs are routine and there completion in this case did not necessarily mean that Claimant sustained a cervical spine injury. Dr. Lesnak testified these scans can assist in checking for reasons/causes for headaches. (Depo Tr. p. 20, ll. 5-19; RHE D, pp. 88-89). As noted above, the physical examination at ER shortly after the accident indicated the neck was "supple," which Dr. Lesnak testified meant there was no tenderness or range of motion abnormalities. He further clarified that the physical examination showed a couple of small abrasions on the neck, but no evidence that would support a diagnosis of a neck strain. (Depo Tr. p. 38, ll. 4-10; RHE D, p. 89).

20. Dr. Lesnak testified the initial cervical CT scan obtained in the ER on the date of Claimant's accident did not show any evidence of acute trauma or injury. Rather, he explained the study demonstrated an old C-7 spinous process tip fracture that was unrelated to the car accident long with facet arthropathy, which was age related and to be expected in a patient of Claimant's age. (Depo. Tr. p. 20-21).

21. Dr. Lesnak testified that the second cervical CT scan was not performed for neck pain, but for headaches and head pressure. He noted the reason for obtaining this second study was the providers wanted to make sure that there was nothing in the cervical spine causing the claimant's headaches. (Depo. Tr. p. 21-22). Based upon the evidence presented, including Dr. Wilde's December 14, 2022 report, the ALJ finds Dr. Lesnak's characterization regarding the reason Dr. Wilde ordered a second CT scan of the neck is misleading. The evidence presented persuades the ALJ that Dr. Wilde ordered a second CT scan of the neck to rule out a vascular injury caused by Claimant's MVA rather than headaches and head pressure. Indeed, Dr. Wilde's December 14, 2022 report supports a finding that she ordered a CT of the *brain* because of "eye pressure" and "intractable acute post-traumatic headache" due to a motor vehicle accident. (RHE C, pp. 74-75)(Emphasis added).

22. Dr. Lesnak testified that through the majority of Claimant's course of treatment, his main complaint was suboccipital pain and pressure, which he noted was different in character from neck pain. He identified suboccipital pain as located at the base of the head and not indicative of neck injury or even neck symptoms. (Depo. Tr. p. 22-23). Claimant testified that, as of the hearing, his sole complaint was that of ongoing headaches, that started in the lower right part of his skull wrapping up to his ear and top of his head on the right side. (Hrg. Tr. p. 35, ln. 1-16).

23. Dr. Lesnak testified that in addition to Claimant's negative imaging, the medical records documented no reproducible objective findings or any positive provocative maneuvers involving the cervical spine to suggest that Claimant injured his neck. He testified the entirety of Claimant's evaluations at Concentra paired with the imaging supported a finding that there was no impairment of the cervical spine. (Depo. Tr. p. 24-25).

24. Dr. Lesnak testified that Dr. Caughfield erred in assigning impairment for the cervical spine as Claimant had no medical diagnosis under Table 53 of the *AMA Guides* that would qualify him for an impairment rating. According to Dr. Lesnak, without that diagnosis, there was no basis for providing an impairment rating for the neck, regardless of causality. (Depo. Tr. p. 25-26).

25. Dr. Lesnak testified that based on his evaluation of Claimant, the fact that the medical records from Concentra documented consistent full pain-free range of motion of the neck, and that there were two cervical CT scans that showed no evidence of any type of injury or trauma-related pathology, Claimant had a "more than adequate workup for someone who doesn't have complaints of specific neck pains." (Depo. Tr. p. 23, ll. 14-23). The ALJ interprets this testimony to infer that Dr. Lesnak believes that had Claimant suffered a neck injury during the October 24, 2022 MVA, he would be at MMI for any injury sustained.

26. Regarding Claimant's persistent headaches, Dr. Lesnak testified that while Claimant continued to have headaches, these headaches do not affect his MMI status. Rather, where a claimant had a permanent impairment for headaches (below, he notes 5% whole person impairment for episodic neurologic conditions), Dr. Lesnak testified that one would anticipate ongoing headaches that are episodic. (Depo. Tr. p. 18-19). Accordingly, Dr. Lesnak testified that even if Claimant wanted to try a medication trial or injections as referenced by Dr. Caughfield, both of these modalities could be pursued on a maintenance basis. (Depo. Tr. p. 14, ll. 2-16). Because this treatment would not change the claimant's underlying anatomic condition and would not be expected to result in improvement in Claimant's function (given that he had returned to work and was performing normal activities), Dr. Lesnak agreed that Claimant had reached a point of stability from a medical standpoint." (Depo. Tr. p. 9, ll. 7-13). Accordingly, Dr. Lesnak opined that Dr. Caughfield erred in concluding that Claimant not at MMI simply because Claimant could try these modalities. (Depo. Tr. p. 17, ll. 4-18). Dr. Lesnak concurred with the December 28, 2022 date of MMI as assigned by Dr. Johnson. (Depo. Tr. p. 26, ll. 8-12).

27. While he disagreed with the assessed provisional impairment of 13% whole person for a cervical spine injury[3], Dr. Lesnak fully agreed with the assignment of 5% whole person impairment for Claimant's headache condition that slightly interfered with his daily living. (RHE A, p. 15; Depo. Tr. p. 26, ll. 16-23).

28. Claimant testified that he continues to suffer from persistent relentless headaches and neck pain. (Hrg. Tr. pp. 20-23). He described his pain as being located deep inside the base of the skull and radiating upwards, circling behind his right eye. (Hrg. Tr. p. 22, ll. 4-20). He believes that his headaches may be emanating from his neck. *Id.* at p. 21. Claimant testified that he is more than willing to try different medications and undergo additional care that may help alleviate his symptoms. *Id.* at p. 23. Claimant testified that he did not decline additional treatment or medications during his December 28, 2022 appointment with PA Peterson. Rather, he noted that he spoke to Dr. Wilde about the caffeine pills and reported to her that they were not providing any relief. (Hrg. Tr. p. 18, ll. 9-13). No other medication, aside from Ibuprofen, was attempted. *Id.* Claimant was then asked about PA Peterson's record stating Claimant was deferring any additional medications for his headaches. *Id.* at 19. According to Claimant, he informed PA Peterson that he was continuing to have headaches. *Id*. at p. 19, ll. 20-22. Claimant asked what could be done for the headaches and she asked him what he would like her to give him. *Id*. at ll. 22-23. Claimant then said, "You're the doctor. I don't know." *Id.* at ll. 23-24. Claimant testified at this point, the conversation turned "snippy" and he "got a little angry" because he was still having headaches and was given no additional treatment options. Id. at p. 20, ll. 1-22.

29. The ALJ credits the reports and opinions of PA Peterson and Dr. Johnson to find that Claimant reached MMI for the sequela related to his October 24, 2022 industrial injury on December 28, 2022. Based upon the evidence presented, the ALJ finds that Respondents have clearly and convincingly overcome the MMI determination of Dr. Caughfield.

30. The ALJ credits the medical record, particularly the ER report and the PT records as well as the DIME report of Dr. Caughfield to find that Claimant suffered a cervical spine strain as a consequence of his October 24, 2023 MVA. Indeed the record evidence supports a finding that Claimant suffered a medically documented "soft tissue lesion" in the cervical spine resulting in "six months of medically documented pain and rigidity with or without muscle spasm, associated with *none to minimal* degenerative changes on structural tests". (AMA Guides to the Evaluation of Permanent Impairment,

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[3] Here, Dr. Lesnak testified that the Division IME clearly erred by assigning impairment (provisional) for a cervical condition. Noting that Claimant had full pain-free range of motion in the records and during his physical examination combined with any identifiable trauma related pathology identified on CT imaging, Dr. Lesnak reiterated his opinion that there was no permanent medical diagnosis under Table 53 of the *AMA Guides* that would qualify Claimant for or support any cervical impairment. Consequently, Dr. Lesnak testified that Dr. Caughfield erred in assigning such cervical impairment. (Depo. Tr. p. 24-26).

Third Edition (Revised), Table 53, II. B, p. 80). As presented, the evidence persuades the ALJ that Claimant experienced secondary range of motion loss in the cervical spine as a consequence of his cervical spine strain. The contrary opinions of Dr. Lesnak are not persuasive. Accordingly, Respondents have failed to establish, by clear and convincing evidence, that Dr. Caughfield's cervical spine impairment rating is highly probably incorrect.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo. App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME Opinion of Dr. Caughfield Regarding MMI and Impairment

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). Careful review and comparison of Dr. Hall's written report and oral testimony with the balance of the more persuasive medical record convinces the ALJ that Claimant reached MMI for the effects of his industrially based injuries on December 28, 2022 as opined by Dr. Johnson.

F. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. The requirement or need for periodic care after MMI to prevent deterioration of a claimant's condition does not vitiate a finding of MMI. *See Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). To affect a finding of MMI, the requirement for future care must "significantly improve the condition." § 8-40-201(11.5), C.R.S. The mere "possibility of improvement" shall not affect a finding of MMI. *Id.*

G. The Act requires Respondents to provide treatment which is reasonable and necessary to *cure* and *relieve* the claimant from the effects of an injury. § 8-42-101(1)(a), C.R.S. However, the obligation to provide treatment to *cure* the condition terminates when the claimant reaches MMI. *Corley v. Bridgestone Americas, Inc.* W.C. No. 4-993-719-004 (Feburary 26, 2020). *Grover* allows for an award of ongoing medical benefits after MMI where the treatment will be necessary to *relieve* the effects of the industrial injury. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). While there is no bright line test to distinguish treatment designed to *cure* versus that which is designed to *relieve*, the panel has previously noted that it is not the type of treatment that is significant but the reason for the treatment. *See Hayword v. UNISYS Corp.,* W.C. No. 4-230-686 (July 2, 2002). The fact that the treatment may have an incidental effect on increasing functionality does not define whether a treatment is curative or relieving. *See McCardie v. Transit Mix Concrete*, W.C. No. 4-964-260-0001

(October 1, 2019) (noting that a spinal cord stimulator aimed at addressing pain levels and improving function can be maintenance care aimed at relieving the effects of the work injury).

H. Here, the weight of the persuasive evidence demonstrates that it is highly probable that the Division IME physician erred in determining that Claimant had not reached MMI. Dr. Caughfield recommended chiropractic treatment, medication trials, and injections prior to placement at MMI.[4] However, the totality of the evidence shows that both the ATP and a reviewing chiropractor determined unequivocally the claimant was not a candidate for chiropractic care. Moreover, while Claimant denies indicating that he rejected medication trials and may be willing to try this and additional injection therapy (despite significant evidence that he did not care for trigger point injections, which provided no relief), Dr. Lesnak persuasively testified these modalities would not improve Claimant's condition and could be provided as maintenance care as such treatment might temporarily relieve the claimant's symptoms. See, *Corley, supra* (finding a neurotomy was treatment aimed at relieving the claimant's symptoms and maintaining MMI status rather than treatment designed to cure the condition). As presented, the evidence persuades the ALJ that Dr. Caughfield's recommended treatment modalities are not designed to cure, but rather temporarily relieve Claimant's persistent symptoms. Indeed, in this case, Dr. Caughfield's "recommendations" are silent as to whether the treatments will "cure" versus "relieve" Claimant's alleged complaints. He discusses options using speculative language such as "can be beneficial" while also recommending permanent impairment recognizing that Claimant may have headaches that slightly interfere with daily living on a permanent basis. That Dr. Caughfield hoped for more function (he believes further treatment is merited because the claimant still goes to bed early for relief), does not alone dictate that the recommendations are "curative." *McCardie*, *supra*.

I. Based on the totality of the evidence presented, including the persuasive testimony of Dr. Lesnak, the ALJ agrees with Respondents contention that Claimant was properly placed at MMI on December 28, 2022 as the ALJ concludes that Dr. Caughfield's recommended treatment properly classified as maintenance care aimed at maintaining MMI status rather than curing Claimant's condition. Accordingly, Respondents have overcome Dr. Caughfield's MMI determination by clear and convincing evidence. Claimant reached MMI for the effects of his industrial injury as of December 28, 2022.

J. Where the ALJ determines that the DIME physician's opinion has been overcome, the question of a claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols.

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[4] Dr. Caughfield does not appear to assess that any cervical condition is not at MMI; rather, that he does "not feel that [Claimant] has reached MMI until further treatment trials for his chronic headaches have been completed." All recommended treatment then relates to Claimant's persistent headaches rather than to management of a neck injury. (RHE B, p. 21).

Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon a preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). In this case, Respondents, relying principally on the testimony of Dr. Lesnak, contend that there are no physical findings on examination and/or imaging that supports Dr. Caughfield's conclusion that Claimant suffered cervical pathology that qualified him for impairment under Table 53 diagnosis and without a Table 53 diagnosis, Claimant is also not entitled to impairment for reduced range of motion. Respondents assert further that at the time Claimant reached MMI, only two months had passed since the date of injury. Accordingly, Respondents contend that Dr. Caughfield erred, as a matter of law, in concluding that Claimant qualified for a Table 53 II.B rating since Claimant failed to show that he suffered six months of documented pain and rigidity prior to MMI. The ALJ is not convinced.

K. In this case, the undersigned concludes that Dr. Caughfield's impairment rating for spinal disorders, i.e. 4% from Table 53, II, B of the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (*Revised*), hereinafter the "AMA Guides", is supported by the record. Contrary to Dr. Lesnak's testimony, the written record, particularly the PT records are replete with references to neck pain, tenderness, myofascial involvement, restricted movement and the need for driving restrictions due to limited cervical range of motion. As presented, the evidence persuades the ALJ that Dr. Lesnak relied on the erroneous premise of full, pain-free range of motion of the cervical spine. While it is true that PA Peterson and Dr. Wilde documented normal exam of the cervical spine with full range of motion, their notes contradict themselves on this issue. Indeed, Claimant was diagnosed with a neck strain and was given driving restrictions *specifically due to loss of range of motion in Claimant's neck*. *Id.* at 91. (Emphasis added). Moreover, PT was ordered, which therapy focused on treatment of the neck among other things. It is evident from the evidence presented, that Dr. Lesnak did not review or simply ignored the content of the physical therapy records, as they contradict the foundation for his opinion. (See e.g., CHE 7, pp. 18-24, 38-42, 62-67, 113-117, 124-127). Claimant's physical therapy note from October 28, 2022, further contradicts the notion of full, pain-free range of motion. (CHE 7, p. 105). Indeed, the physical therapist obtained actual range of motion measurements on October 28, 2022, and Claimant's range of motion was reduced in flexion, extension, right side bending, left side bending, right rotation, and left rotation. *Id.* Consequently, the ALJ finds Dr. Lesnak's opinions regarding the condition of Claimant's neck unpersuasive.

L. Concerning Respondents suggestion that Claimant is not entitled to spinal impairment because "there is no evidence the claimant sustained six months of pain and rigidity to support a cervical rating under Table 53(II)(b)", the ALJ finds the case of *McLane Western Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999) instructive. In *McLane* the claimant injured her low back approximately five months before she was determined to be at MMI. Her treating physician therefore determined she had no ratable impairment. However, the DIME doctor saw her a few months later and documented her complaints of low back pain and rigidity which was then in excess of six months duration. He therefore provided a 5% rating pursuant to

Table 53 II, and an additional 4% for range of motion deficits. The respondents argued that because six months of pain had not have been experienced by the claimant prior to attaining MMI, Table 53, as a matter of law, was not available as a source for an impairment rating. The *McLane Western* decision rejected this argument and approved of the DIME's rating. In the present case, Respondents similarly contend that because Claimant did not suffer medically documented pain for the six months after his injury, and prior to MMI, no impairment rating could be assessed under Table 53 as a matter of law. In other words, Respondents maintain that the MMI date is determinative of whether Claimant has shown six months of documented pain for the purposes of applying Table 53. As noted, the decision announced in *McLane* rejects the contention that the AMA Guides require that the documented pain occur prior to MMI and subsequent Panel decisions from the Industrial Claims Appeals Office have consistently applied interpretations of Table 53 identical to those in *McLane Western*. See, *Martinez v. MCI Communications*, W.C. No. 4-207-987 (July 24, 1996); *Velasquez v. Roaring Fork Redi-Mix*, W.C. No. 4-324-686 (September 4, 1998); *Jackson v. RBM Precisions Metal Products*, W.C. No. 4-377-460 (May 15, 2000); *Lopez v. Cargill Meat Solutions*, W.C. No. 4-757-408 (September 9, 2010); *Lopez v. Evangelical Lutheran Good Samaritan Society*, W.C. No. 4-972-365-01 (August 16, 2016), and *Wallace v. Phil Long Ford Motor City*, W.C. No. 5-106-788-001 (September 22, 2020).

M. In this case, the evidence supports a conclusion that during his April 25, 2023 DIME, approximately six months after his October 24, 2022 MVA, Claimant reported continued "constant upper neck and suboccipital pain similar to what he experienced after his MVA. He also demonstrated range of motion loss similar to that he was determined to have previously as documented in his PT records. Based upon the evidence presented, the ALJ concludes that there is sufficient support for Dr. Caughfield's assignment of cervical spine impairment pursuant to Table 53, II. B in this case. Moreover, while Dr. Lesnak apparently found no range of motion deficits during his examination on July 17, 2023, the ALJ infers that the difference of opinions between Dr. Caughfield and Dr. Lesnak concerning the existence of ratable cervical spine impairment, based upon range of motion loss, is likely due to the passage of time and/or examination techniques. See *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ free to credit one medical opinion to the exclusion of a contrary medical opinion). While Dr. Caughfield and Dr. Lesnak differ regarding the existence of cervical range of motion loss, a professional difference of opinion between medical experts does not rise to the level of clear and convincing evidence that is required to overcome Dr. Caughfield's opinions concerning impairment. See generally*, Gonzales v. Browning Farris Indust. of Colorado,* W.C. No. 4-350-356 (March 22, 2000), Consequently, Respondents have failed to meet their required legal burden to set the cervical spine impairment determination aside. This ALJ adopts Dr. Caughfield's impairment rating to find and conclude that Claimant is at MMI with 17% whole person impairment.

ORDER

It is therefore ordered that:

1. Respondent's request to set aside the MMI determination of Dr. Caughfield is GRANTED. As determined above, Claimant is at MMI with 17% whole person impairment as determined by Dr. Caughfield. Respondent shall pay permanent partial disability (PPD) benefits consistent with the 17% whole person impairment rating assigned by Dr. Caughfield.

2. Any and all issues not determined herein are reserved for future decision.

DATED: November 9, 2023

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-210-685-002

STIPULATIONS

1. The parties stipulated on the record that Respondents have not filed a general admission on the claim.

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury on May 7, 2022, arising out of and in the course of his employment with Respondent-Employer.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits.

3. Claimant's average weekly wage.

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 7, 2022, to present.

FINDINGS OF FACT

1. Claimant began working for Respondent-Employer on April 13, 2022, as a heavy equipment operator. Claimant worked at [Redacted, hereinafter CM] at an elevation of approximately 11,000 feet above sea level. Claimant would work seven days on followed by seven days off. Each seven-day series of shifts would be either day shifts or night shifts, alternating between each series. Claimant earned $30.00 per hour plus a project allowance of $7.00 per hour. Claimant testified that his average weekly wage was $1,747.69.

2. On May 7, 2022, Claimant was working a night shift, his fourth shift that week. Claimant was admitted to St. Anthony Summit Hospital Emergency Department later that night for complaints of mid and low back pain. Claimant reported that he had been sitting in the cab of his truck in the driver seat with his seatbelt on when a large loader dropped a pile of heavy rocks into the bed of the truck, causing him to get jolted in his seat. X-rays were performed of Claimant's lumbar spine. They showed multilevel degenerative changes of the lumbar spine, but no acute osseous abnormalities. On physical exam, the attending physician noted no

evidence of torso trauma or extremity injury. The attending physician noted that Claimant was hypoxic with 82% saturation. Claimant declined supplemental oxygen or any further treatment. He was discharged that same night.

3. Claimant returned to the Emergency Room two days later complaining of a fever, fatigue, and memory issues, decreased urine output consistent with acute kidney injury, and symptoms consistent with encephalopathy. The attending physician noted Claimant to be hypoxic and tachypneic and was placed on supplemental oxygen. The physician suspected sepsis. A chest X-ray showed multifocal pneumonia, and a CT scan showed what appeared to be infectious infiltrates. Claimant was given antibiotics. Initially, the attending physician was concerned of sepsis that was possibly urinary or pulmonary in origin, though the urinalysis was not consistent with an infection. Ultimately, Claimant was diagnosed with severe sepsis, acute hypoxemic respiratory failure, and pulmonary embolism. Although his diagnosis was sepsis, and Claimant had elevated white blood cell counts, tests performed with blood cultures and sputum cultures for Influenza, legionella, streptococcus, and COVID-19 did not reveal any specific infections. He was intubated and placed in the intensive care unit.

4. On May 19, 2022, Claimant underwent repeat chest X-rays that showed multiple pulmonary embolisms with a clot primarily in his right lung. The embolisms were treated with anticoagulation. He was extubated on May 27, 2022. On June 1, 2022, Claimant developed a peritoneal hemorrhage in his abdomen resulting from the anticoagulants. Claimant was taken off the anticoagulation and an IVC filter was placed on June 3, 2022, to prevent a blood clot from reaching his lungs.

5. Claimant was transferred to an inpatient rehabilitation facility on June 9, 2022, and transferred to Elkhorn Valley Rehab Hospital on June 23, 2022. While at the facility, Claimant complained of uncontrolled back pain, right foot and leg weakness and tingling in the groin, and neuropathic pain. Claimant was diagnosed with right lower extremity weakness due to lumbosacral plexopathy. Claimant underwent a lumbar MRI. The MRI of the lumbar spine showed the retroperitoneal hematoma “extends along the R lateral margin of the L1-L5 vertebral bodies. Exiting R L1-L4 nerve roots seen at the medial margin or abutting the R retroperitoneal hematoma collection.” The attending physician, Dr. Michele Mohr, felt Claimant’s right lower extremity symptoms were related to Claimant’s hematoma.

6. Claimant was discharged from Elkhorn Valley Rehab Hospital on July 9, 2022, and began care at Casper Home Health. Claimant followed up with his primary care doctor, Dr. Christina Jara on July 21, 2022. She noted that since being out of the hospital, Claimant had developed right leg weakness and pain and numbness and that Claimant had been falling. Dr. Jara felt that Claimant’s pain complaints were related to the hematoma. She reasoned that the MRI showed the right L1-L4 nerve roots at the medial margin or abutting the right retroperitoneal hematoma collection.

7. Claimant was evaluated at Casper Orthopedics on August 15, 2022, for meralgia parasthetica. Claimant underwent X-rays and an EMG of his lumbar spine. The X-rays showed "a mild asymmetric collapse at the L3-4 level. There is disc height loss at the L4-5 level. The SI joints reveal degenerative changes." The EMG showed right sided "traumatic lumbosacral plexopathy."

8. On October 11, 2022, Claimant was evaluated by Dr. Jara at Banner Health. Dr. Jara stated Claimant's injuries "seemed to be a work-related injury and he could have had either a compression or traction injury given the movement of the truck at the time of that injury. He is not fit to go back to work at his current condition."

9. On October 13, 2022, Claimant was examined by Dr. Gessel at Casper Orthopedics. Dr. Gessel stated Claimant "has sustained a significant neurologic injury from a work-related injury in May of 2022. His neurologic injury is causing significant functional impairment . . . and requires further treatment and workup to fully determine and characterize the injury."

10. On October 28, 2022, Claimant returned to Casper Orthopedics for follow-up. Claimant had MRIs performed on his lumbar spine which showed a "disc bulge with central protrusion at L4-5" and "a disc osteophyte complex that is causing lateral recess narrowing at L2-3 and that is likely catching the traversing L3 nerve root and also at L4-5 and L3-4." Dr. Gessel stated about Claimant's right lower extremity numbness and weakness, "we are trying to figure out how much is related to lumbosacral plexopathy versus lumbar radiculopathy."

11. On November 30, 2022, Claimant received a right L3-4 and L4-5 transforaminal epidural steroid injection. Claimant said the injection made his pain go from "8/10 to 5/10" and "helped a bunch of his symptoms for approximately 2 to 3 weeks." Dr. Gessel stated "for his back pain itself, I think he is also getting some pain secondary to facet arthritis and that was likely worsened by the work injury as well."

12. On January 3, 2022, Dr. Gessel stated Claimant was under his care for "what seems to now be a lumbosacral plexopathy, which he sustained while working at [Redacted, hereinafter TM] . . . He also has back pain that correlated with the time of his injury at TM[Redacted]. I suspect that injury has worsened the back arthritis he has, and that is causing his low back pain. We are treating that separate from the lumbosacral plexopathy, but both are being caused by that initial injury."

13. On January 11, 2023, Dr. Gessel stated "John has sustained a work-related traumatic lumbosacral plexopathy leading to significant right leg weakness which is causing right quadriceps atrophy."

14. Dr. Ogin determined that Claimant's right leg weakness and numbness were the direct result of a lumbosacral plexus injury due to the retroperitoneal hematoma, which was in turn the result of Claimant's anticoagulation treatment for multiple

pulmonary emboli during his hospitalization for pneumonia and sepsis. Dr. Ogin relied on Claimant's distribution of symptoms, the MRI, and electrodiagnostic studies that were more consistent with a pathology at the lumbosacral plexus rather than in the lumbar spine.

15. Dr. Ogin could not identify any connection between Claimant's development of pneumonia and Claimant's alleged injury on May 7, 2021, though, he speculated that it may have been related to underlying COPD coupled with an infectious source.

16. On March 8, 2023, Claimant underwent his own independent medical examination with Dr. John Hughes. Dr. Hughes noted that Claimant had "no past history of lumbar spine injuries or problems" and "no history of pulmonary disease prior to May 7, 2022," and that Claimant also had no history of smoking. In reviewing Claimant's records, Dr. Hughes opined, "it is clear that he sustained lumbar spinal injuries as a result of vehicular jarring that occurred May 7, 2022," and that the retroperitoneal hematoma "appears to be the proximate cause of [Redacted, hereinafter SN] right lumbosacral plexopathy." Dr. Hughes opined Claimant was "not yet at MMI with respect to his spine injuries of May 7, 2022," and "medical evaluation and treatment to date under the direction of Dr. Gessel appears to me to be reasonable, necessary and related to his lumbar spine injuries of May 7, 2022." Dr. Hughes assessed Claimant's lumbar spine impairment to be 18% whole person impairment and recommended Claimant receive continued therapies and injections.

17. Regarding Claimant's onset of pneumonia, Dr. Hughes did not specifically opine on its cause:

> "A perplexing fact is SN[Redacted] hypoxemia of May 8, 2022. He has no history of prior pulmonary disease and was listed by Dr. Doucette as a never smoker; however, it is clear that 2 days later, SN[Redacted] was admitted for acute respiratory failure with hypoxia. He subsequently underwent a complex course of inpatient and intensive care unit medical care, happily resulting in resolution of his pulmonary condition."

18. Dr. Ogin later testified at hearing as well. Dr. Ogin testified that Claimant was diagnosed with thoracic and lumbar back pain and hypoxia, for which he was prescribed Hydrocodone, a medication known to cause drowsiness. Regarding Claimant's hypoxia, Dr. Ogin testified that it had the potential to cause various health issues, including cardiac problems, stroke, loss of consciousness, memory difficulties, and cognitive impairment.

19. Dr. Ogin further testified that Claimant's health deteriorated when he sought emergency care again on May 10, 2022, for septic pneumonia, and that Claimant experienced a severe complication due to his use of blood thinners, resulting in a

retroperitoneal hematoma. Dr. Ogin emphasized that Claimant's pneumonia and its associated complications were unrelated to the workplace injury.

20. Dr. Ogin also testified regarding the possibility of lumbosacral plexopathy and noted that such conditions could manifest traumatically. However, he disagreed with the assertion that the traumatic jostling in the truck was the primary cause of Claimant's lumbosacral plexopathy. Instead, he emphasized that Claimant's extended hospitalization, bed rest, minimal physical activity, and a series of falls were significant factors contributing to his back pain. Dr. Ogin was clear in his opinion that Claimant's leg symptoms were a result of the retroperitoneal hematoma and unrelated to a back injury.

21. Respondents also obtained an expert opinion from Robert T. Lynch, P.E., to evaluate the matter from an forensic engineering perspective. Mr. Lynch issued a report in which he estimated the forces exerted on Claimant at the time of the alleged accident. Mr. Lynch credibly opined, based on the size of the truck and the estimates of the loads dropped into the bed of the truck, that the acceleration that Claimant would have experienced while in his seat was less than 2.3g.[1] Mr. Lynch further clarified that the acceleration would have been mitigated by Claimant's seat cushion and the suspension system. Based on this, Mr. Lynch concluded that there was no significant "jarring" of the haul truck as described by Claimant.

22. Mr. Lynch later testified at hearing largely consistently with his report. He admitted on cross-examination that he had not personally visited the site or equipment involved. When asked about whether Mr. Lynch should have considered the other dirt in the loader and not just the largest boulder, Mr. Lynch explained that the boulder would have caused a greater acceleration than the distributed impact of the dirt, so his analysis was focused on the boulder itself. Regarding the crack in the windshield, Mr. Lynch explained that the spiderweb crack radiating out from the middle of the windshield was more consistent with a rock hitting the windshield rather than from a vibratory source, which would have resulted in a crack radiating from the edge of the windshield, working its way in. The Court finds Mr. Lynch's analysis to be credible and persuasive.

23. Respondents also obtained an expert opinion from Dr. Robert Nobilini, Ph.D, to provide a biomechanical analysis of the mechanism of injury alleged by Claimant. Dr. Nobilini explained in his report that the acceleration experienced by Claimant during the incident was well within the range of accelerations that are incurred during everyday, non-injurious activities of daily living, and well within the range of decelerations considered safe. He later testified at hearing that his opinions were based on the forces and acceleration calculated by Mr. Lynch. Dr. Nobilini also explained that the forces experienced by the truck due to downward acceleration would not be the same as those experienced by Claimant inside the cab of the

[1] The unit "g" is a unit of acceleration equal to that which is experienced by an object at the Earth's surface as a result of the Earth's gravitational pull.

truck. Furthermore, he opined that the acceleration Claimant would have experienced would be insufficient to cause injury. The Court finds Dr. Nobilini's analysis to be credible and persuasive.

24. On June 27, 2023, Claimant testified at hearing. Claimant testified he sustained a work-related injury on May 7, 2022. Claimant began working for TM[Redacted] in April 2022. Claimant stated before he could begin working for Employer, he had to undergo a preemployment physical and fit-to-work test. Claimant testified the preemployment physical and testing were performed at Cedar Health in Casper, Wyoming. The testing included checking Claimant's breathing, hearing, vision, and an x-ray on his back. Claimant testified he was cleared to begin working following the examination.

25. Claimant testified he worked for Employer as a heavy equipment operator. Claimant testified his job duties for operating the haul truck included a pre-shift inspection of the truck, filling out a pre-shift inspection report, loading the truck with the mined materials, and then driving the truck to dump the materials. Claimant testified he had extensive experience as a heavy equipment operator and had worked at mines the past 25 years operating a variety of large equipment vehicles including haul trucks, bulldozers, and excavators.

26. Claimant testified to the nature of his schedule and pay structure by Employer because Claimant's schedule was unconventional. Claimant testified he was shuttled in to begin his work in Climax, Colorado on the morning of Wednesday, May 4, 2022, and he began working in the mines that night. Claimant testified he would work 7 P.M. to 7 A.M. each night for seven days in a row. Following a week of work, Claimant testified Employer would then pay to fly employees home and employees would have seven days off. Claimant testified even while employees were in their rest week, they were always considered employed by Employer. Claimant explained Employer's pay structure ran a pay period from Sunday to Saturday with work initiating on a Wednesday so employees would get four and three days each week of the pay period. Claimant testified he worked 48 and then 36 hours alternating on the normal schedule. Claimant testified he was paid $37.00 an hour for 40 hours, along with time and a half for the eight hours of overtime one week in addition to $37.00 for 36 hours the next week. Claimant testified to the accuracy of his pay records admitted as Claimant's Exhibit 16. Claimant testified his average weekly wage was $1,747.69.

27. Claimant testified to the events that occurred May 7, 2022, the day Claimant sustained his workplace injury. Claimant testified he followed his normal job duties for operating the haul truck including performing a pre-shift inspection and report. Claimant put on his seatbelt and proceeded to the loading unit and had performed several loads without incident prior to the injury. Claimant additionally testified that he had experience as a mechanic and his understanding of the gas-charged struts of haul trucks and how the gas charge can impact the pressure a load applies to the truck. Claimant testified a large boulder was dropped in the truck which caused

the truck to bounce and shake. Claimant testified the truck's windshield was shattered resulting from "the thrust of the rock" and "the bouncing the truck." Claimant called the operator of the excavator dropping loads into his truck on the radio immediately after his windshield shattered. Despite the shattered windshield, Claimant testified his truck continued to be loaded and stated "when you are in an accident, you should shut down right then. He shouldn't have kept loading the truck." Claimant testified he felt the onset on pain about thirty minutes later. Claimant testified he was jostled around when the load with the large boulder was dumped in his truck.

28. Following the incident of Claimant's workplace injury, Claimant testified he immediately called his supervisor, [Redacted, hereinafter JB], and relayed the incident with the broken windshield. Claimant told JB[Redacted] he needed to have his back examined due to the pain and JB[Redacted] took him to get medical treatment at St. Anthony Summit Medical Center.

29. At St. Anthony Summit Medical, Claimant testified he told the doctor he had back pain, he had been wearing his seat belt, and that his truck was jolted when the boulder fell. Claimant testified the doctor gave him medication, X-rays on his back, and informed Claimant his breathing level was low. Claimant testified the doctor wanted to put Claimant on oxygen, but he declined. Claimant testified he was discharged and returned to his hotel room where he slept for two days until he was asked to return to the clinic to be reevaluated. Claimant testified upon reevaluation at the clinic, the doctor examining him sent him to the emergency room and he was transported by ambulance.

30. Claimant testified that on May 10, 2022, he returned to Summit Medical with many health issues including bad memory, back pain, leg pain and numbness in his right leg, fever, and breathing problems. Claimant testified he was suffering septic pneumonia. Claimant testified "it was all going so fast" as he was intubated and stated "I was code blue. I was dead there for a while- then they revived me." Claimant testified he was "life-flighted" to St. Anthony's Hospital where Claimant stated "I was in a coma for two weeks, and then I was in intensive care for another two weeks. And then I did three weeks or so in therapy, and then I transferred to Elkhorn Rehabilitation Hospital and did another three weeks of therapy." Additionally, Claimant testified he had no prior contributory health issues such as smoking, pulmonary disease, COPD, asthma, heart issues, or other breathing issues.

31. Claimant testified he was unable to walk without crutches and his knee would give out without a warning. Claimant testified he had been unable to work due to his injuries and he was told by Employer HR that the company "doesn't have any jobs for a one-legged man." Claimant testified he was still unable to walk without crutches and used a leg brace and he was additionally suffering back pain, a numb leg, and sleep disturbances. The ALJ finds Claimant's testimony credible.

32. The Court finds Dr. Ogin's medical opinions as expressed in his report and testimony to be more persuasive than those of Dr. Hughes.

33. The Court finds that Claimant has not proven that it is more likely than not that Claimant sustained a low back injury on May 7, 2022. Although Claimant complained of back pain on May 7, 2022, and in fact sought treatment, the Court finds, based on the testimony of Mr. Lynch and Dr. Nobilini, that the forces involved in the incident were benign and insufficient to cause a low back injury requiring medical treatment. That is, the Court finds that Claimant experienced forces resulting from an acceleration of less than 2.3g, which would have been mitigated by Claimant's seat cushion and the suspension system, and which was well within the range of accelerations that are incurred during everyday, non-injurious activities of daily living, and well within the range of decelerations considered safe.

34. The Court finds that Claimant has not proven that it is more likely than not that his pneumonia, sepsis, and associated conditions arose out of and in the course of his employment on May 7, 2022. The Court finds that there is a near consensus among Claimant's treating and examining physicians that Claimant's pneumonia and sepsis arose from an infectious source. Although it is possible that Claimant contracted the infection at work, there is no credible evidence to that effect. Dr. Ogin credibly testified that Claimant's inhalation of dust would not have caused an infection. Claimant did not provide any credible evidence of how such an infection would have developed in the workplace. Absent such evidence, the Court finds that Claimant has not proven that it is more likely than not that his pneumonia, sepsis, and associated symptoms arose out of and in the course of his employment.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App.

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

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

Compensability

An injury must "arise out of and occur in the course of" employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S. *See also Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). An injury "arises out of" the employment when it is sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. *Popovich*, 811 P.2d at 383.

As found above, Claimant has not proven by a preponderance of the evidence that he injured his low back on May 7, 2023. Although Claimant complained of back pain on May 7, 2022, and in fact sought treatment, the forces involved in the incident were benign and insufficient to cause a low back injury requiring medical treatment. Claimant experienced forces resulting from an acceleration of less than 2.3g, which would have been mitigated by Claimant's seat cushion and the suspension system, and which was well within the range of accelerations that are incurred during everyday, non-injurious activities of daily living, and well within the range of decelerations considered safe. Therefore, as found above, it is more likely than not that Claimant did not sustain a low back injury on May 7, 2022.

Claimant has also not proven that it is more likely than not that his pneumonia, sepsis, and associated conditions arose out of his employment on May 7, 2022. As found above, there is a near consensus among Claimant's treating and examining physicians that Claimant's pneumonia and sepsis arose from an infectious source. Although it is possible that Claimant contracted the infection at work, there is no credible evidence to that effect. Dr. Ogin credibly testified that Claimant's inhalation of dust would not have caused an infection. Claimant did not provide any credible evidence of how such an infection would have developed in the workplace. Absent such evidence, Claimant has not proven that it is more likely than not that his pneumonia, sepsis, and associated symptoms arose out of and in the course of his employment.

Therefore, the Court concludes that Claimant has not met his burden to prove that it is more likely than not that he sustained an injury on May 7, 2022, arising out of and in the course of his employment.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation for a date of injury of May 7, 2022, 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 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 10, 2023.

Stephen J. Abbott
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 the medical treatment he received for his low back condition was reasonable medical treatment necessary to maintain Claimant at maximum medical improvement ("MMI")?

FINDINGS OF FACT

1. Claimant was employed by Employer as a ski instructor. Claimant testified he sustained an injury to his low back on January 5, 2014 while skiing with clients. As a result of the low back injury, Claimant underwent two low back operations to his L4-L5 region. Claimant testified that the first operation helped partially, but he needed a second operation in February 2019 after the first operation failed.

2. According to the medical records, Claimant underwent a left sided L4-5 hemilaminectomy, facetectomy, foraminotomy and microdiscectomy on September 16, 2015. Claimant subsequently underwent an L4-5 laminectomy of L4-5 fusion on January 29, 2019.

3. Claimant was placed at MMI by Dr. Gisleson on September 26, 2019. Claimant was provided with an impairment rating of 21% whole person on January 17, 2020 by Dr. Lorah. With regard to post-MMI medical treatment, Dr. Lorah noted Claimant was not scheduled for neurosurgical follow up and recommended ongoing use of cyclobenzaprine for at least the next 12 months and an additional 10 to 15 physical therapy visits over the next 12 months to be used at Claimant's convenience and would be helpful in case of a flare. Dr. Lorah noted Claimant may be a candidate of Gabapentin or Lyrica if it was determined to be appropriate by his treating physicians. Dr. Lorah also recommended that Claimant continue his home exercise program, maintain a healthy weight and work on core strength and flexibility.

4. Respondent filed a final admission of liability ("FAL") on April 11, 2020 admitting for the 21% whole person impairment along with maintenance medical treatment.

5. Claimant testified that after being placed at MMI, he had five flare ups of his low back pain. Claimant testified he treating three of these flare ups at home and sought medical treatment for the other two. Claimant testified his first flare up of his low back condition occurred when he was shooting baskets and felt a twinge in his lower back and he jumped to put up a layup. The medical records document that Claimant sought treatment on March 23, 2021 after he had an acute exacerbation of the low back while playing basketball two months ago when he was reaching out for a rebound and felt something give on his right side of his back. Dr. Gisleson noted that Claimant had

been doing physical therapy but unfortunately continued to experience radicular symptoms down the legs past the knee along with additional feelings of weakness in his legs. Dr. Gislason recommended additional evaluation for nerve pain and prescribed gabapentin, anti-inflammatories and Flexeril.

6. Claimant received treatment with Dr. Campian on referral from Dr. Gisleson on April 7, 2021. Dr. Campian noted Claimant's complaints of low back pain radiating to both knees through the back after he jumped while playing basketball and landed funny. Dr. Campian noted Claimant's history of a low back injury at work and recommended Claimant treat his back pain with prednisone, a repeat MRI and physical therapy.

7. Claimant underwent an x-ray of his lumbar spine on April 7, 2021 that showed normal alignment and L4-L5 posterior fusion without evidence of surgical complication.

8. Claimant testified at hearing that he ended up getting a shot of Toradol and was able to get back to baseline.

9. Claimant testified that he had a second flare up of his low back pain when he was standing up from the toilet and felt a pop in his back. Claimant testified he tried to treat this flare up at home, but had additional pain when he was getting out of his truck three months later.

10. According to the medical records, Claimant returned to his physical therapist in April 2023 and reported a recent exacerbation of his symptoms. The physical therapist noted that often times a seemingly innocuous position or movement can flair up symptoms and it can take weeks to return to baseline. According to the records, Claimant underwent seven (7) physical therapy appointments between April 21, 2023 and May 26, 2023.

11. Claimant then sought treatment for this flare on June 28, 2023 with Dr. Giselson. Claimant reported at that time that he had ongoing issues with his low back from December 2022 when he was getting off a toilet seat and felt a twinge in his low back with persistent right sided discomfort and right sided radiculopathy. Dr. Gisleson noted Claimant had a known history of impingement at L4-L5 with previous lumbar spinal surgery and fusion. Dr. Gisleson recommended that Claimant use a muscle relaxer to relieve his muscle spasm, continue physical therapy and consider x-rays to determine if there has been any shift in his hardware and consider an MRI if there was no improvement.

12. Claimant testified at hearing that he was able to eventually get back to his baseline level of pain and function in 2023 after medical treatment including physical therapy and medications prescribed by Dr. Gisleson.

13. Respondent obtained an independent medical examination ("IME") with Dr. Cebrian on August 23, 2023. Dr. Cebrian reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his

IME. Dr. Cebrian noted Claimant's history of a low back injury while employed with Employer and subsequent surgeries. Dr. Cebrian noted that after Claimant was placed at MMI, he was doing well until early 2021 when he aggravated his back while playing basketball. Claimant reported to Dr. Cebrian that he received some physical therapy until June 2021 and improved.

14. Dr. Cebrian noted that Claimant had ongoing discomfort and was given Baclofen, a muscle relaxer by Dr. Gisleson. Claimant reported to Dr. Cebrian that in December 2022, he got off the toilet and had increased pain throughout January and February. Claimant reported to Dr. Cebrian that he then had another incident when he was getting out of his truck and had increased symptoms. Claimant reported that he continued to go to physical therapy and was performing stretching, but would only improve to a certain point. Claimant reported ongoing symptoms that included numbness in both feet, with numbness in the lateral right leg along with occasional sciatica that would go down both legs to the mid hamstrings.

15. Dr. Cebrian opined in his report that Claimant had a peripheral polyneuropathy that was not claim related as there is not a mechanism for a lumbar spine injury to cause a peripheral polyneuropathy. Dr. Cebrian opined that Claimant did not have any new findings of radiculopathy at other levels of his lumbar spine, and noted that Claimant's injury was at his L4-5 level. Dr. Cebrian opined in his report that further medical care was no longer medically reasonable, necessary and related to the claim of January 5, 2014 and recommended the closure of all maintenance care and Grover medications. Dr. Cebrian opined that Cliamant had a non-claim related intervening event while playing basketball in January of 2021.

16. Dr. Cebrian testified at hearing in this matter consistent with his IME report. Dr. Cebrian testified that based on his review of the records and the medical history he received from Claimant, Claimant was doing well until the 2021 basketball incident which resulted in medication and treatment for Claimant's low back condition. Dr. Cebrian testified that it was his opinion that the basketball incident was an intervening event that cause the Claimant to need medical treatment.

17. The ALJ credits Claimant's testimony at hearing and finds that Claimant has proven that it is more likely than not that the medical treatment he received after getting up off the toilet in 2022 represents reasonable medical care necessary to maintain Claimant at MMI and related to Claimant's January 5, 2014 work injury. The ALJ credits Claimant's testimony regarding the basketball incident in 2021 and finds that this incident does not represent an intervening injury that severs Respondent's liability for ongoing maintenance medical care. The ALJ notes that Claimant's medical treatment in this case, including ongoing physical therapy and additional medications prescribed by Claimant's treating physician, are consistent with the maintenance medical treatment recommendation made by Dr. Lorah in his January 17, 2020 report and admitted to by Respondent in the April 11, 2020 FAL.

18. The ALJ credits Claimant's testimony at hearing and finds that the basketball incident was a minor incident that caused a flare in Claimant's symptoms

related to his January 5, 2014 work injury and resulted in the need for maintenance medical treatment. The ALJ therefore does not credit the opinion of Dr. Cebrian that the basketball incident was an intervening injury that severed Respondent's liability for ongoing maintenance medical treatment. The ALJ notes that the medical records do not document under objective evidence of Claimant's underlying condition being changed as a result of the basketball incident, and finds that the evidence does not establish that Claimant sustained an intervening injury based on the minor incident that occurred while playing basketball as described in Claimant's testimony and reflected in the medical records.

19. The ALJ further credits the testimony of Claimant at hearing and finds that the medical treatment Claimant received from Dr. Gislason after a flare of Claimant's symptoms when getting up from a toilet represents reasonable medical treatment necessary to maintain Claimant at MMI. Specifically, the ALJ credits the testimony of Claimant that his symptoms related to the workers' compensation injury and subsequent surgeries were flared by the incident in December 2022 and resulted in Claimant needing to undergo treatment with Dr. Gislason and physical therapy sessions before returning to his baseline level that he was at when placed at MMI.

CONCLUSIONS OF LAW

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

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

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

4. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent

further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

5. As found, Claimant has proven by a preponderance of the evidence that the medical treatment he received after the flare up of his symptoms in December 2022 was reasonable medical treatment necessary to maintain Claimant at MMI. Therefore, Respondent is liability for the cost of the medical treatment incurred by Claimant including his treatment with Dr. Gislason in June 2023 and the physical therapy sessions related to treatment of Claimant's flare of his low back symptoms.

ORDER

It is therefore ordered that:

1. Respondent is liable for the medical treatment Claimant received that was reasonable and necessary to maintain Claimant at MMI, including the physical therapy Claimant undeiwent in April and May 2023 and the treatment with Dr. Gislason pursuant to the Colorado Medical Fee Schedule.

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

DATED: November 13 2023

Keith E. Mottram
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. W.C. 5-179-036-003

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he was an employee of Employer [Redacted, hereinafter RS] on July 9, 2021.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonably necessary medical benefits as a result of his July 9, 2021 accident.

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

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) or Temporary Total Disability (TTD) benefits for the period July 9, 2021 through July 9, 2022.

5. Whether Employer [Redacted, hereinafter AB] has proven by a preponderance of the evidence that it was insured by [Redacted, hereinafter LM] in the state of Colorado on July 9, 2021.

FINDINGS OF FACT

1. [Redacted, hereinafter CG] worked for Employer RS[Redacted] as a Cutter. His position involved installing granite and stone countertops. CG[Redacted] acknowledged that on July 9, 2021 he was not a managerial employee of RS[Redacted] with the authority to hire employees.

2. Claimant lived with CG[Redacted]. CG[Redacted] explained that Claimant was looking for a job and asked whether RS[Redacted] was hiring. He offered Claimant the opportunity to visit the RS[Redacted] jobsite to see if he "liked the job."

3. [Redacted, hereinafter AR] is the owner of RS[Redacted]. AR[Redacted] explained that he was solely responsible for the hiring and firing of employees. He commented that he never hired Claimant to work for RS[Redacted]. In fact, he did not know Claimant and had never spoken to Claimant. He emphasized that CG[Redacted] was not a supervisory employee and had no authority to hire new employees.

4. On July 9, 2021 CG[Redacted] brought Claimant to the RS[Redacted] job site. Claimant did not complete any paperwork before visiting the location. Moreover, AR[Redacted] was unaware that Claimant was visiting the job site. CG[Redacted] commented that no one told him to bring anyone with him to the location.

5. Claimant acknowledged that he never spoke to, or met with, AR[Redacted].

He never had any conversations with AR[Redacted] concerning anticipated wages. Importantly, AR[Redacted] did not know Claimant was at the jobsite on July 9, 2021. Claimant explained that AR[Redacted] was teaching him about the job.

6. After lunch on July 9, 2021 Claimant was attempting to move six or seven slabs of stone that weighed approximately 600 pounds each. However, the slabs fell on Claimant's right leg and caused a fracture of the medial femoral condyle and the proximal fibula. Claimant was transported to a hospital and underwent surgical repair on July 10, 2021. Claimant testified he believed he was an employee of RS[Redacted] on July 9, 2021 because "[i]f I wouldn't have gotten injured, it was a job that was going to be given to me."

7. Prior to the date of Claimant's injury RS[Redacted] had been hired by Employer AB[Redacted] as a subcontractor. On August 20, 2020 Respondent Insurer LM[Redacted] issued Workers' Compensation [Redacted, hereinafter PN] to AB[Redacted] for the policy period August 20, 2020 until August 20, 2021 (the policy). Item 3.A. of the policy specified insurance coverage applied to the Workers' Compensation Laws of the states of Texas and Florida. Item 3.C. of the policy noted, "Other States Insurance" applies to all states except North Dakota, Ohio, Washington, and Wyoming, in addition to Texas and Florida. Pursuant to Part Three at paragraph 4, the "Other States Insurance" clause provides, "[i]f you have work on the effective date of this policy in any state not listed in Item 3.A of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days." Under Part Three B, the insured is required to advise LM[Redacted] "at once if you begin work in any state listed in Item 3.C. of the information page." Claims Manager for LM[Redacted] [Redacted, hereinafter MP] testified LM[Redacted] was not notified of Claimant's July 9, 2021 accident until sometime in September 2021.

8. On September 17, 2021 LM[Redacted] issued a coverage denial letter to ATB. The letter specified that all the conditions of Part Three- "Other States Insurance," had not been satisfied. There was no thus insurance coverage for Claimant's claim in Colorado. The LM[Redacted] investigation had revealed that AB[Redacted] was working in Colorado prior to the inception date of the policy. LM[Redacted] also had not been notified of AB's[Redacted] work in Colorado within 30 days. Therefore, LM[Redacted] denied coverage.

9. Claimant has failed to demonstrate it is more probably true than not that he was an employee of RS[Redacted] when he was injured on July 9, 2021. Initially, CG[Redacted] explained that Claimant was looking for a job and asked whether RS[Redacted] was hiring. He offered Claimant the opportunity to visit the RS[Redacted] jobsite to see if he "liked the job." AR[Redacted] was not a supervisory employee and had no authority to hire new employees. AR[Redacted] explained that, as the owner of RS[Redacted], he was solely responsible for the hiring and firing of employees. He remarked that he never hired Claimant. In fact, he did not know Claimant and had never spoken to Claimant.

10. On July 9, 2021 CG[Redacted] brought Claimant to the RS[Redacted] jobsite. Claimant was attempting to move six or seven slabs of stone weighing approximately 600 pounds each when they fell and injured his right leg. Although Claimant was injured on the RS[Redacted] jobsite on July 9, 2021, there is a dearth of evidence in the record that he was an employee of RS[Redacted]. Claimant failed to prove that on July 9, 2021 he was performing services for RS[Redacted] under a contract of hire. Specifically, AR[Redacted] and Claimant had never spoken and the parties did not execute a valid contract of hire. Claimant was simply at the RS[Redacted] jobsite to determine whether he might pursue a job opportunity with the company. He did not have a "meeting of the minds" with AR[Redacted].

11. Based on the credible testimony of CG[Redacted] and AR[Redacted], Claimant had not been hired by RS[Redacted]. The record reveals there was no written documentation, consideration, or mutual agreement. Because there were additional requirements before Claimant could begin formal employment with RS[Redacted], there was no valid employment contract. Claimant was thus not an employee of RS[Redacted] on July 9, 2021 and his claim for Workers' Compensation benefits is denied and dismissed.

12. Employer AB[Redacted] has failed to prove by a preponderance of the evidence that it was insured by Insurer LM[Redacted] in the state of Colorado on July 9, 2021. On September 17, 2021 LM[Redacted] issued a coverage denial letter to AB[Redacted] because the conditions of Part Three- "Other States Insurance" in the insurance policy were not satisfied. The LM[Redacted] investigation revealed that AB[Redacted] was working in Colorado prior to the inception date of the policy. LM[Redacted] had not been notified of AB's[Redacted] work in Colorado within 30 days as required by the insurance agreement. Based on AB's[Redacted] failure to notify LM[Redacted]l that it was working in Colorado as required for coverage under the policy, AB[Redacted] was not insured on July 9, 2021. Finally, AB[Redacted] has not produced any additional evidence that it was insured for Workers' Compensation coverage in Colorado on July 9, 2021.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the

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

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

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

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

6. Generally, an “employee” is a person performing services under a contract of hire whether express or implied. §§ 8-40-201(6), 8-40-202(b); 8-40-203(1)(b); 8-41-301(1)(a), C.R.S.; *Aspen Highlands Skiing Corp. v Apostolou*, 866 P.2d 1384 (Colo. 1994). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. See *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. 1957); *Tressell v. Alpha Therapy Services, LLC.*, W.C. No. 4-322-755 (ICAO, Dec. 15, 1999). Where the parties ascribe different meanings to a material term of the contract and the term is ambiguous, the parties have not “manifested mutual assent.” There is thus no “meeting of the minds” and no valid contract exists. *Dell v. Jaz Con, LLC*, W.C. No. 4-777-941 (ICAO, Nov. 4, 2009); *see Sunshine v. M.R. Mansfield Realty, Inc.*, 575 P.2d 847 (Colo. 1978). Whether parties enter into a contract is a factual determination for the ALJ. *I.M.A., Inc. v. Rocky Mountain Airways, Inc.,* 713 P.2d 882 (Colo. 1986).

7. In *Younger v. City and County of Denver,* 810 P.2d 647 (Colo. 1991) the Colorado Supreme Court concluded that no employment contract was created by an applicant participating in pre-employment testing when the successful completion of the tests merely qualified a pool of candidates for final selection. The claimant voluntarily

applied for a position as a police officer and was taking the test for her own benefit so that she would be eligible for employment. If the claimant had successfully completed the physical agility test she would still have been required to pass background checks, polygraph tests, and a medical examination merely to qualify for the pool of candidates. The Court thus concluded there was no mutual agreement between the parties sufficient to create an employer-employee relationship that would justify an award of Workers' Compensation benefits. *Id.* Similarly, in *Lopez v. Colorado State University*, (W.C. No. 4-772-544 (ICAO, Dec. 29, 2009), the Panel upheld the ALJ's determination that a contract of hire did not exist when the claimant suffered an injury while performing a pre-employment physical. Because the applicant failed to complete additional requirements including production of a valid picture ID, bank account, and Social Security card, there was no contract.

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he was an employee of RS[Redacted] when he was injured on July 9, 2021. Initially, AR[Redacted] explained that Claimant was looking for a job and asked whether RS[Redacted] was hiring. He offered Claimant the opportunity to visit the RS[Redacted] jobsite to see if he "liked the job." AR[Redacted] was not a supervisory employee and had no authority to hire new employees. AR[Redacted] explained that, as the owner of RS[Redacted], he was solely responsible for the hiring and firing of employees. He remarked that he never hired Claimant. In fact, he did not know Claimant and had never spoken to Claimant.

9. As found, on July 9, 2021 AR[Redacted] brought Claimant to the RS[Redacted] jobsite. Claimant was attempting to move six or seven slabs of stone weighing approximately 600 pounds each when they fell and injured his right leg. Although Claimant was injured on the RS[Redacted] jobsite on July 9, 2021, there is a dearth of evidence in the record that he was an employee of RS[Redacted]. Claimant failed to prove that on July 9, 2021 he was performing services for RS[Redacted] under a contract of hire. Specifically, AR[Redacted] and Claimant had never spoken and the parties did not execute a valid contract of hire. Claimant was simply at the RS[Redacted] jobsite to determine whether he might pursue a job opportunity with the company. He did not have a "meeting of the minds" with AR[Redacted].

10. As found, based on the credible testimony of CG[Redacted] and AR[Redacted], Claimant had not been hired by RS[Redacted]. The record reveals there was no written documentation, consideration, or mutual agreement. Because there were additional requirements before Claimant could begin formal employment with RS[Redacted], there was no valid employment contract. Claimant was thus not an employee of RS[Redacted] on July 9, 2021 and his claim for Workers' Compensation benefits is denied and dismissed.

11. As found, Employer AB[Redacted] has failed to prove by a preponderance of the evidence that it was insured by Insurer LM[Redacted] in the state of Colorado on July 9, 2021. On September 17, 2021 LM[Redacted] issued a coverage denial letter to AB[Redacted] because the conditions of Part Three- "Other States Insurance" in the

insurance policy were not satisfied. The LM[Redacted] investigation revealed that AB[Redacted] was working in Colorado prior to the inception date of the policy. LM[Redacted] had not been notified of AB's[Redacted] work in Colorado within 30 days as required by the insurance agreement. Based on AB's[Redacted] failure to notify LM[Redacted] that it was working in Colorado as required for coverage under the policy, AB[Redacted] was not insured on July 9, 2021. Finally, AB[Redacted] has not produced any additional evidence that it was insured for Workers' Compensation coverage in Colorado on July 9, 2021.

ORDER

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

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

2. AB[Redacted] was not insured for Workers' Compensation coverage in Colorado on July 9, 2021.

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

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

DATED: November 15, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge

Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. W.C. No. 5-141-572

1. Whether Claimant overcame the DIME and established by clear and convincing evidence that he is not at MMI, or if at MMI, that he is entitled to a higher impairment rating.
2. Whether Claimant's condition has worsened since being placed at MMI and his claim reopened.
3. Whether Claimant is entitled to TTD and/or TPD.
4. Whether Respondent is entitled to an offset for Claimant's receipt of short-term disability benefits.
5. Medical benefits.
    a. Whether the treatment Claimant received was authorized.
    b. Whether the treatment Claimant received was reasonably necessary to treat Claimant from the effects of his work injury.
    c. Reimbursement to Claimant and his medical providers for the medical treatment he received.
6. Average weekly wage.

II. W.C. No. 5-183-168

1. Whether Claimant suffered a compensable injury on August 31, 2021.
2. Whether Claimant is entitled to TTD and TPD.
3. Whether Respondent is entitled to an offset for Claimant's receipt of short-term disability benefits.
4. Medical benefits.
    a. Whether the treatment Claimant received was authorized.
    b. Whether the treatment Claimant received was reasonably necessary to treat Claimant from the effects of his work injury.
    c. Reimbursement to Claimant and his medical providers for the medical treatment he received.
5. Average weekly wage.

FINDINGS OF FACT

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

Unrelated Back Injury

1. Claimant underwent low back surgery at L5-S1 in 2018 and 2019. (Ex. Q). This surgery was not under the workers' compensation system. (Hearing Transcript (hereinafter "Hrg. Tr."), p. 128 ll 6-11).

Admitted Work Injury

2. On June 3, 2020, Claimant sustained an admitted work injury when he was pinned or crushed by a gate while working for Employer at the [Redacted, hereinafter TL] in Canon City, Colorado. (Hrg. Tr., pp. 88 ll 23-25, 89 ll 1-2).
3. Claimant was provided a designated provider list that same day. (Ex. D, p. 49-50).
4. After the accident, Claimant went to the emergency room and underwent a CT scan of his chest, abdomen, and pelvis. The CT scan did not show any significant findings. (Ex. 3, p. 37). (*See generally* Ex. 3 and K).
5. On June 8, 2020, Claimant presented to Dr. Reasoner, at Centura Urgent Care, a designated provider. (Hrg, p. 129). At this appointment, Claimant complained of pain along his sternum that he rated at 5/10. Dr. Reasoner diagnosed Claimant with acute costochondritis and a chest wall contusion. (Ex. 3, p. 37-42).
6. On June 15, 2020, Claimant returned to Dr. Reasoner at Centura. At this appointment, Claimant reported he was having "mild episodic discomfort" but reported new right lower quadrant and periumbilical discomfort. It was noted that the CT scan of his chest, abdomen, and pelvis from June 3rd showed no acute findings. Claimant stated he was not using any pain medication. On exam, there was no distention in his abdomen, no mass, negative Murphy's and McBurney's sign, no hernia was present. But despite the development of right lower quadrant and periumbilical discomfort, which developed after Claimant's work accident, Dr. Reasoner placed claimant at maximum medical improvement (MMI) without any permanent impairment. (Ex. 3, pp. 43-48).
7. The ALJ finds that Claimant was timely provided with a designated provider list and selected Dr. Reasoner, at Centura, as the authorized treating provider for the June 3, 2020, injury.
8. On June 26, 2020, Claimant presented to the emergency room stating at about 7:30 p.m. that night he felt a pop in his umbilicus, but he was able to "pop it back in" but it has been painful since and radiates towards the right. (Ex. 3, p. 55). Claimant reported he had been helping his wife make dinner at the time. (Ex. G, p. 142).
9. The June 27, 2020, report notes the CT scan showed uncomplicated umbilical hernia and slight swirling of the right upper quadrant mesenteric vessels without signs of bowel obstruction or ischemia. (Ex. 3, p. 53).
10. On July 10, 2020, and despite the findings of the CT scan finding a hernia, a Final Admission of Liability consistent with Dr. Reasoner's MMI report. (Ex. 1, pp. 7-20).

Claimant's Initial DIME on November 2, 2020, with Dr. Higginbotham

11. On November 2, 2020, Claimant underwent a Division Independent Medical Exam (DIME) with Dr. Thomas Higginbotham. (Ex. 3, pp. 72-86). Dr. Higginbotham reviewed Claimant's medical records and examined Claimant. He noted Claimant was evaluated by Dr. Botolin at his request as she was his previous general surgeon. He noted Dr. Botolin's report from July 2, 2020, showed "minimal abdominal discomfort," that the "abdominal CT showed no evidence of obvious internal hernia," and Dr. Botolin reassured Claimant that the "instrumentation from his L5-S1 fusion was not disrupted from the crush event." (Ex. 3, p. 78). Claimant informed Dr. Higginbotham that his L5-S1 fusion has not bothered him since the work-related event, "what has concerned him is periumbilical pain and swelling about the midline of the abdomen and above the umbilicus." (*Id.*). Claimant reported that "he experiences chronic pain about both lower extremities stemming from his low back conditions." (*Id*. at 80). Claimant stated his chest was "fine now." (*Id*. at 81). On exam, Dr. Higginbotham found no umbilical hernia, but found a moderate-large ventral protrusion about the midline of the abdomen. (*Id*.).

12. Dr. Higginbotham diagnosed torso crush injury, ventral hernia, periumbilical hernia (presently reduced/absent), diffuse abdominal pains, and resolved traumatic costochondritis. (*Id*. at 82). Dr. Higginbotham opined Claimant was not at MMI and recommended he return to the general surgeon for "reconfirmation of ventral hernia" and "discussion of treatment options." (*Id.* at 83). According to the initial DIME report, Claimant did not make any complaints of right lower quadrant pain. (*See generally* Ex. 3, pp. 73-84).

13. On December 29, 2020, and after the DIME report of Dr. Higginbotham, Claimant's claim was re-opened via a General Admission of Liability. (Ex. 1, pp. 5-6).

14. On January 27, 2021, Claimant underwent surgery with Dr. Botolin for a ventral hernia repair with mesh. (Ex. L, pp. 275-276).

15. On March 4, 2021, Claimant returned to Dr. Botolin. At this follow-up appointment, which was over a month after surgery, all of Claimant's symptoms had resolved and he was off pain medication. Thus, a work release was provided. (Ex. L, p. 274).

16. On March 9, 2021, Claimant was seen by his primary care physician Dr. Pennington – who noted Claimant had "no abdominal tenderness." (Ex. I, p. 212).

17. On May 10, 2021, Claimant was evaluated by PA Quakenbush, at Centura, because of a request of the insurance carrier. (Ex. K, p. 269). It was noted Dr. Botolin, the surgeon, released Claimant to full unrestricted work duty on March 10, 2021. Claimant reported he had been doing well but was "having some return of previously noted abdominal wall weakness symptoms" specifically "mid ventral abdominal wall weakness with straining" (Ex. K, pp. 269, 271). Claimant requested a return to Dr. Botolin. Claimant's full duty release continued. (*Id*. at 272). There was no mention of right lower quadrant pain during this medical visit. (*Id.*).

18. On May 21, 2021, Claimant was involved in a non-work-related motor vehicle accident. Claimant testified he was the driver of the vehicle and had his seatbelt on. (Hrg. Tr., p. 130 ll 9-15). The ALJ notes that the area in which the seatbelt would hit appears to be his right side and appears to be in the same area in which Claimant indicates his pain is

located and reportedly received the nerve block injection which relieved his pain. (Hrg. Tr., p. 111).

19. On August 6, 2021, an ultrasound was performed, and it showed no gross evidence of hernia or fascial wall defect. (Ex. R, p. 360).

20. On August 27, 2021, Claimant returned to his treating provider and was seen by PA-C Quakenbush. The August 6, 2021, ultrasound, with and without Valsalva maneuvers, was discussed and noted no gross evidence of hernia or fascial wall defect. Claimant, however, reported "stabbing abdominal pain." (Ex. K, p. 265). Thus, Claimant was to return to Dr. Botolin for re-evaluation for further surgery. (*Id*.).

Alleged August 31, 2021, Injury

21. On August 31, 2021, Claimant climbed a ladder to go to the roof regarding issues with a swamp cooler for his job. He assessed the situation, climbed back down the ladder, went to the shop to get parts and returned to repair the swamp cooler. After coming back down the ladder he reported that he felt a sharp burning, stabbing sensation just above his belly button where he understood the mesh implant to be. (Hrg. Tr., pp 104 ll 8-23, 105 ll 4-8).

22. Claimant reported a new injury from the August 31st incident and was provided a designated provider list by the employer on the same day. (Ex. D, pp. 51-53).

23. On September 1, 2021, Claimant presented to Centura Urgent Care for evaluation related to the August 31st incident. (Ex. K, pp. 258-263). Claimant reported he "did not have a significant event of pain such as a pop or swelling." Claimant stated he believed this was related to a prior workers' compensation injury where he was injured in a gate and that he was trying to visit with his surgeon for that claim. (*See id*., p. 259-260). On exam, there was no swelling, no palpable defect, and no significant tenderness. (Ex. K, p. 262). Work-relatedness was "undetermined." (*Id*. at 258).

24. Claimant testified he spoke to the workers' compensation claim adjuster, [Redacted, hereinafter MT], regarding the August 31st claim and told her that it was the same pain in the same spot that he had been dealing with for months prior to August 31st incident. (Hrg. Tr., p. 135 ll 7-18).

25. On September 7, 2021, Claimant returned to the ATP to follow-up regarding the August 31st incident. It was noted his history did not reveal any specific new injury. (Ex. K, p. 249). His "minimal" pain was once again noted to be "mid abdominal." (*Id*. at 250, 251). On exam, there was no inguinal tenderness, and he was able to flex and rotate his hips without limitation or pain. (*Id*. at 251). He was to return on October 7, 2021. (Ex. K, p. 257). Work-relatedness continued to be undetermined. (*Id*.). Work restrictions were 5 lbs. lifting, carrying, pushing, pulling were recommended. (*Id*.).

26. The ALJ finds that Claimant was timely provided with a designated provider list for the August 31, 2021, alleged work injury and again selected the Centura Urgent Care center as the ATP for care related to that incident.

27. Claimant testified that Dr. Botolin said she did not need to see him after the ultrasound results were negative. (Hrg. Tr., p. 132 ll 1-13; *see also* Ex. M, p. 306).

28. A Notice of Contest was filed for the August 31, 2021, claim (Ex. 2, p. 33), but the June 3, 2020, claim was still under a General Admission of Liability dated December 29, 2020. (Ex. 1, p. 5).

29. Claimant, however, did not return to his ATPs at Centura Urgent Care after September 7, 2021. (Hrg. Tr., pp. 135 ll 19-25, 136 ll 1-2). Moreover, there is a lack of credible and persuasive evidence that he was refused treatment for non-medical reasons under his June 2020 claim.

30. Rather than seek ongoing treatment under his June 2020 Claim with Centura, Claimant sought an evaluation and treatment with his primary care provider (PCP), Kaiser, on October 27, 2021. At this visit, Claimant reported "central abdominal pain." (Ex. M, p. 306). On exam, mid-line tenderness was noted, there is no mention of right lower quadrant pain. (*Id*. at 307). He was referred to general surgery for a second opinion. (*Id*. at 305).

31. Claimant testified he did not get permission from the claim adjuster, MT[Redacted], to treat or evaluate with his PCP Dr. Pennington or Kaiser. (Hrg. Tr., p. 138 ll 7-18).

32. Claimant saw Dr. Hess, a surgeon at Kaiser, on November 10, 2021. (Ex. M, pp. 301-302). Dr. Hess' report indicates notes from Kaiser documents a "fairly extensive past medical history including chronic fatigue, chronic pain disorder, history of lumbar compression fracture, type 2 diabetes, and nerve pain and migraines." (*Id*. at 301). Claimant reported ongoing pain in his "upper abdomen," with no mention of right lower quadrant pain. (*Id*. at 302). On exam, there was no obvious defects palpable, with "diffuse tenderness with palpation of the upper midline abdomen" with no evidence of recurrent hernia. (*Id*.). Dr. Hess recommended a CT scan to evaluate for recurrence of the hernia, but he felt exploratory surgery to remove the mesh would be high risk with uncertain benefit considering his pain. (*Id*.).

33. Claimant testified Dr. Hess did not recommend any surgery. (Hrg. Tr., pp. 136 ll 12-25, p. 137 ll 1-7).

34. Despite receiving a surgical evaluation, which is what Claimant testified that Centura Urgent Care was waiting for before seeing him again, Claimant still did not return to the ATP after this evaluation.

35. In November 2021, Claimant moved to Cheyenne Wyoming. (Hrg. Tr., p. 88 ll 19-22). He did not, however, advise the insurer at this time that he was moving and needed a new designated provider.

36. Claimant's wife found Dr. Tierney a surgeon, in Loveland Colorado, at UCHealth via a Google search and that he was a doctor that dealt with difficult abdominal issues. (Hrg. Tr., pp. 137 ll 11-25, p. 138 ll 1, and Ex. H, p. 194).

37. On December 27, 2021, Claimant was evaluated by Dr. Tierney. Claimant reported he believed he had a recurrent hernia. (Ex. H, p. 203). Dr. Tierney did not feel Claimant had a recurrent hernia. He thought the abdomen exam was more consistent with diastasis recti, but recommended a CT scan to better evaluate Claimant's complaints. (*Id*. at 202, 203).

38. Claimant testified that Dr. Tierney did not recommend any surgery. (Hrg. Tr., p. 138 ll 2-6).

39. Claimant also testified he did not obtain permission from the claim adjuster to be evaluated or to treat with Dr. Tierney. (*Id*. at ll 19-22).

40. On January 14, 2022, Claimant underwent an abdominal CT scan for "recurrent upper abdominal wall pain." The CT scan showed nothing to suggest a recurrent abdominal wall hernia. (Ex. R, pp. 357-358).

41. On February 1, 2022, Claimant presented to Dr. Khoi Le at Banner Health. Claimant reported that he was told he does not have a hernia and there is nothing to be done by the surgeon who performed the robotic assisted hernia repair (Dr. Botolin) and a second general surgeon (Dr. Tierney) at Loveland MCR. (Ex. N, p. 330). Dr. Le reviewed the CT scan report and noted the mesh was in place and Claimant has diastases, without evidence of a hernia. (*Id*.). Claimant reported he cannot sit for long periods of time, cannot walk long distances, and is otherwise hindered in his daily activity secondary to the pain in his diastases. (*Id*.). On exam, Claimant had obvious diastases present in the mid to upper abdomen. (*Id*.). Dr. Le thought it best to refer Claimant to a plastic surgeon for plication and other techniques for repair of the symptomatic diastases. Dr. Le provided work restrictions of 20-30 lbs. until his repair. (*Id*. at 331).

42. On February 3, 2022, Claimant was seen by Dr. Nathan Narasimhan, plastic surgeon with Banner Health. Dr. Narasimhan advised Claimant that pain can be difficult to treat and that surgery could be done with open approach but that this may not have a significant impact on his pain and recommended an evaluation with pain management. (Ex. N, p. 327).

43. On February 7, 2022, Claimant presented to his PCP at Kaiser. He requested a referral for his "Spine Pain" (Ex. M, p. 292). A referral was made for neurosurgery, noting a "history of spinal fracture at L5 and radicular vs. neuropathic symptoms. Had posterior fusion at L5/S1 but with persistent radiculopathy. Would like to consider ablation if this is an option." (*Id*. at 291).

44. On February 22, 2022, Claimant was evaluated by Kaiser pain management physician, Dr. Patrick Russell, for bilateral foot pain. (Ex. M, p. 280). It was noted Claimant had underlying spondylolisthesis and is now status post fusion, but Claimant reported the surgery "was not helpful" therefore persistent radiculopathy would be in the differential. (*Id*. at 281). The treatment plan included consideration for a spinal cord stimulator. (*Id*.).

45. Claimant received short term disability benefits from October 1, 2021, through February 27, 2022 totaling $3,094.27. (Ex. P, p. 340).

46. On April 7, 2022, Claimant underwent diagnostic laparoscopy with Dr. Le. Adhesions were found attached to the mesh and were removed. It was decided to leave the mesh in place. (Ex. N, p. 317-318). No recurrent hernia or other acute trauma was identified.

47. Claimant did not deny that he also found Dr. Le at Banner Health through a Google search. (Hrg. Tr., pp. 138 ll 23-25, 139 ll 1-8). He testified that Dr. Le referred him to Dr. Narasimhan, who referred him back to Dr. Le. (*Id*. at 139 ll 9-21). Claimant testified he did not get permission from the claim adjuster to treat or evaluate with Banner Health, or Dr. Le, or Dr. Narasimhan. (*Id*. at 140 ll 9-17).

Subsequent Employer – June 14, 2022

48. On June 14, 2022, Claimant started working for Belfour Beatty Military Housing Management. (Hrg. Tr., p. 148 ll 22-25). Claimant obtained health insurance for himself and his wife through [Redacted, hereinafter BR]. (Hrg. Tr., pp. 149 ll 20-25, 150 ll 1-5; *see* Ex. B).

49. Without advising the Employer of his move to Wyoming or new job, Claimant advised Employer of his voluntarily resignation/retirement effective July 1, 2022, via email. (Ex. D, p. 48).

Follow-up DIME – July 14, 2022

50. On July 14, 2022, Claimant returned for a follow-up DIME with Dr. Higginbotham in regard to the June 3, 2020, claim. (Ex. A, pp. 13-26). Dr. Higginbotham reviewed Claimant's medical records and took a verbal history from Claimant. Claimant reported he underwent surgery with Dr. Le in April 2022. He reports the surgery was planned earlier but rescheduled because of a family medical emergency of Dr. Le. (*Id*. at 18). Claimant reported that Dr. Le informed him that a "silver dollar-size scar was on the underside of the middle of his large mesh and had to be broken up and was likely accounting for his abdominal pains." (*Id.*). Claimant reported pain with his right lower quadrant but all other abdominal pain improved or was gone. (*Id*.). Claimant also reported he contracted COVID in June 2021. (*Id*. at 19). Claimant described persistent twinges of abdominal discomfort since being released to full duty after surgery in January 2021. (*Id*.). Claimant reported that he experienced continued swelling about the mid-abdomen especially when sitting up from supine or when bending forward or lifting weight greater than 35 lbs. (*Id*.).

51. Claimant testified that he reported all of his ongoing problems to Dr. Higginbotham at the July 14, 2022, DIME, including that he had an incident at work on August 31, 2021, in which he had increased pain and that he thought his current pain may be due to another adhesion. (Hrg. Tr., pp. 140 ll 18-25, 141 ll 1-22).

52. Dr. Higginbotham found Claimant reached MMI as of July 14, 2022. (*Id.* at 21). He found no mental/behavioral condition that warranted impairment consideration. (*Id*.). Dr. Higginbotham provided Claimant a 5% whole person rating under AMA *Guides*, chapter 10, Table 6, Class I p. 196. (*Id*.). In support of the impairment rating, Dr. Higginbotham specifically noted that Claimant "has a palpable defect in his abdominal wall and a slight protrusion at the site of defect with increased abdominal pressure that was regularly reducible." (*Id*. at 22). Dr. Higginbotham recommended maintenance care for follow-up with the last general surgeon (Dr. Le) one year from the surgery.

53. A Final Admission of Liability was filed on August 10, 2022, in the June 3, 2020, claim consistent with Dr. Higginbotham's report, which admitted for maintenance care. (Ex. A).

54. Claimant testified his wife found Dr. Jason Caswell online and referred him. (Hrg. Tr., p. 142 ll 9-16). Claimant testified he did not get permission from the claim adjuster to treat or evaluate with Dr. Caswell. (*Id*. at ll 17-24).

55. On November 1, 2022, Claimant presented to Dr. Caswell. Dr. Caswell noted Claimant had lysis of adhesions due to abdominal pain resulting from ventral surgery with mesh, "however his pain at this point is different. It is described as vague, right sided mostly" which Claimant likened to "having his guts ripped out." (Ex. O, p. 335). Claimant also

reported a burning and pulling sensation in his upper abdominal region. (*Id*.). Dr. Caswell's report indicates Claimant reported his symptoms started after a work-related injury "necessitating multiple intra-abdominal surgeries culminating with a small bowel resection and ventral herniorrhaphy with mesh." (*Id*.) He also noted that Claimant said that his pain is getting progressively worse and more severe. (*Id*.) In order to assist in determining the cause of Claimant's abdominal pain, Dr. Caswell performed an injection with a local anesthetic around Claimant's ilioinguinal nerve. Subjectively, the injection significantly reduced Claimant's pain. As a result, Dr. Caswell referred Claimant to Dr. Jeremy Gates, surgeon, for evaluation of potential adhesions and to Dr. Natalie Winter, pain management, for permanent ablation. (*Id*. at 334).

56. On November 7, 2022, Respondents sent a letter to Claimant advising him that they had recently learned that he moved to Wyoming and because of such, they were designating a new authorized treating provider. Respondents designated Dr. Robert Dupper at Workwell Occupational Medicine in Loveland Colorado. Claimant testified that he received the letter from Respondent about designation of a doctor in Loveland, Colorado, but that he chose not to see that provider. (*See* Hrg. Tr., pp. 114 ll 15-25, 115 ll 1-2; and Ex. C). As a result, Claimant decided to continue seeking treatment from unauthorized providers.

57. On December 22, 2022, Claimant obtained an Independent Medical Examination (IME) with Dr. John Hughes. (Ex. 3, pp. 126-132). Dr. Hughes agreed with Dr. Higginbotham that Claimant should be re-evaluated by a general surgeon. In fact, this was the primary reason for which Dr. Hughes concluded that Claimant was not at MMI (*Id*. at 131); however, Dr. Hughes himself did not see any indication to proceed with abdominal surgery nor did he recommend any additional treatment that was necessary to get Claimant to MMI. (*Id*.). Dr. Hughes did not diagnose Claimant with a nerve injury related to the June 3, 2020, injury. While he was aware of Claimant's reported pain following the described August 31, 2021, incident, he also did not conclude that the August 2021 incident resulted in a new injury. (*See* Ex. 3, pp. 126-132). Dr. Hughes disagreed with the assignment of a 5% whole person rating and believed that objective pathology described by Dr. Higginbotham justified a Class 2 categorization rather than a Class 1 as provided by Dr. Higginbotham. (*Id*. at 131). Dr. Hughes noted Claimant also reported that 3 weeks ago he was involved in installing two dishwashers and a microwave and that he "was jacked up that week." (*Id*. at 129).

58. On January 2, 2023, Claimant presented to Dr. Jeremy Gates at Cheyenne Regional Medical Center for a "a third surgical opinion regarding an abdominal wall hernia versus scar tissue within the peritoneal cavity." (Ex. F, p. 118). Claimant reported that he had a "door" at a business he was working at strike him in the chest and abdomen in 2020 causing a crush injury. (*Id*.). Claimant reported that after his hernia repair in 2021 he developed "a burning sensation of the abdominal wall to the right of midline as well as a burning sensation in the right inguinal region." (*Id*. at 119). Dr. Gates noted the prior two surgeons (initial surgeon and Dr. Le) stated there was no hernia. (*Id*.). Dr. Caswell performed an ilioinguinal nerve block and Claimant reported that all of his right inguinal symptoms resolved. (*Id*.). Claimant was requesting repeat surgical intervention for lysis of adhesions as the cause of his burning sensation of the right hemiabdomen. (*Id*.). On exam, Dr. Gates noted a "small rectus diastases present with no evidence of herniation."

(*Id*. at 121). Dr. Gates concluded that based on Claimant's reports and physical examination he would not offer surgical intervention and discussed that any additional surgery within the peritoneal cavity would cause additional scarring. (*Id.).*

59. Claimant testified that he did not get permission from the claim adjuster to treat or evaluate with Dr. Gates. (Hrg. Tr., p. 143 ll 20-22).

60. On February 1, 2023, Claimant presented to Dr. Natalie Winter for pain management evaluation. (Ex. F, pp. 103-117). Dr. Winter discussed that a lot of Claimant's pain was consistent with myofascial pain in his right lower abdomen, with evidence of several trigger points. (*Id*. at 108). She strongly suggested physical therapy to help with the myofascial trigger points and trigger point injections to help with pain relief as he does physical therapy. (Id. at 109). Claimant "was not sure he wanted to go that route." (*Id*.).

61. Claimant testified he did not get permission from the claim adjuster to treat or be evaluated by Dr. Winter. (Hrg. Tr., p. 143 ll 7-10).

62. On February 24, 2023, Claimant underwent an IME with Dr. Kathleen D'Angelo at the request of Respondent. (Ex. G). In Dr. D'Angelo's report, she includes an extensive review and summary of medical records. Dr. D'Angelo concluded that Claimant did not sustain a new injury on August 31, 2021. (*Id*. at 181). Dr. D'Angelo noted that Claimant had reported abdominal pain since his return to regular duty in March 2021 and his symptoms of pain did not change after the August 2021 incident. (*Id*.). She also agreed with Dr. Higginbotham that Claimant reached MMI for the June 3, 2020, injury as of July 14, 2022. (*Id.* at 182). Based on her physical exam, she agreed the appropriate impairment rating is 5% whole person rating pursuant to Class I p. 196 of the *AMA Guides*, as similar to Dr. Higginbotham she noted a slight protrusion in her physical exam, which is also consistent with Dr. Gates' examination in which he noted a "small rectus diastases." (*Id*. at 183-184).

63. On March 2, 2023, Dr. Hughes issued a case review. In essence, his opinions remained the same.

64. The ALJ is more persuaded by the consistent opinions of Drs. Higginbotham, D'Angelo, and Gates that Claimant's abdominal protrusion is small, over any opinion to the contrary.

65. The ALJ is also persuaded by Dr. D'Angelo's opinion that Claimant was properly placed at MMI as of July 14, 2022, as found by Dr. Higginbotham. The ALJ is further persuaded by Dr. D'Angelo's opinion that the August 31, 2021, incident did not result in a separate injury. This opinion is supported by the operative report of Dr. Le who, upon exploratory surgery did not find evidence of any recurrent hernia or other trauma, only adhesions to the mesh implant. The ALJ is also persuaded by Dr. D'Angelo's report that Claimant did not suffer a worsening of condition since she found that Claimant remained at MMI as of July 14, 2022.

66. Claimant's wife started receiving her own health insurance through her own employer on March 1, 2023. (Hrg. Tr., p. 150 ll 6-18).

67. Dr. Caswell then referred Claimant to Dr. George Girardi, another pain management specialist.

68. On March 20, 2023, Claimant saw Dr. Girardi. Dr. Girardi noted Claimant's current complaint as "low back pain with right groin pain and bilateral lower extremity pain." (Ex. H, p. 189). He noted an ilioinguinal nerve block gave him a fair amount of relief in the groin but did not affect his lower extremities. (*Id*.). Dr. Girardi assessed "back pain with bilateral leg pain which I think is multifactorial. I do think a big component is due to failed back surgery syndrome." (*Id*.). On exam, Dr. Girardi noted Claimant was "quite tender to palpation in his lumbar sacral area" and had "discomfort with any type of movements in his lower extremities." (*Id*. at 190-191). Visit diagnoses were: "Primary: Chronic pain syndrome" and "postlaminectomy syndrome of lumbar spine." (*Id.* at 193). The plan was for scans of his thoracic and lumbar spines and potentially trial him for spinal cord stimulator. (*Id*. at 189).

69. Claimant testified he did not get permission from the claim adjuster to treat or evaluate with Dr. Girardi. (Hrg. Tr., p. 144 ll 8-10).

70. On April 20, 2023, Claimant returned to Dr. Girardi's office. The history of Claimant's pain syndrome included: "back pain which has not responded to 3 months of appropriate conservative therapy…the pain is interfering with functional activities, the pain is radicular in it does extend into lower abdomen and lower extremities in a dermatomal pattern, the patient's low back is exacerbated by extension…the patient is suffering with neurological deficit…" (Ex. 3, p. 209). Assessment included lumbar radiculopathy. (*Id*. at 210). Claimant was referred to Dr. Corcoran for psychological evaluation before spinal cord stimulator trial. (*Id*. at 211).

71. On May 13, 2023, Claimant helped a co-worker at BR[Redacted] move an empty water heater, which weighed approximately 100-130 lbs., after which he had 10/10 pain. (Hrg. Tr., pp. 144 ll 21-25, 145 ll 1-16).

72. On May 16, 2023, Claimant saw Corcoran for psychological evaluation. He determined Claimant could proceed with a trial of a spinal cord stimulator and surgery to implant the stimulator if indicated. (*Id*. at 216).

73. Claimant testified that he did not get permission from the claim adjuster for evaluation or treatment with Dr. Corcoran. (Hrg. Tr., p. 144 ll 17-20).

74. On or about July 10, 2023, Claimant sent an email to Dr. Girardi's office requesting that he change his reports to indicate that the primary reason for the spinal cord stimulator was "chronic lower right abdominal pain due to work-related crush injury on 6/3/20" and the secondary reason was "bilateral nerve damage in feet due to failed back surgery in 2018/2019". (Ex. 3, p. 239-240).

75. Despite this request, the August 28, 2023, report from Dr. Girardi's office still documents treatment for active problems: "1. Postlaminectomy syndrome of lumbar region; 2. Lumbar radiculopathy, chronic; 3. Status post insertion of spinal cord stimulator, 4. Chronic pain syndrome." (Ex. H, p. 186).

76. During his testimony, Dr. Caswell stated Dr. Girardi is the subject matter expert and he trusted him explicitly. (Hrg. Tr., pp. 70 ll 18-25, 71 ll 1-3).

77. The ALJ finds that it remains Dr. Girardi's opinion that the spinal cord stimulator is due to treatment of lumbar radiculopathy due to failed back surgery, which is unrelated to either the June 2020 claim or the August 2021 alleged claim. The ALJ find Dr. Girardi's opinion

is consistent with Dr. Russell's opinion regarding Claimant's bilateral foot pain could be related to persistent lumbar radiculopathy and a spinal cord stimulator could be considered. The ALJ is more persuaded by these medical opinions than any opinion to the contrary and finds the need for the spinal cord stimulator and treatment related to same is not causally related to either the June 2020 or August 2021 claims.

Claimant's Additional Testimony

78. Claimant testified that the bills dated November 15, 2021, and December 20, 2021 from Centura Health were paid by workers' compensation. (Hrg. Tr., pp. 146 ll 4-124, 151 ll 5-9).

79. He also testified that since working at BR[Redacted] he has missed time from work unrelated to his work injury. (Hrg. Tr., p. 149 ll 4-11).

Testimony of Dr. Caswell

80. Dr. Caswell also testified at the hearing. In essence, Dr. Caswell testified that after taking a patient history and evaluating Claimant, he thought that Claimant's abdominal pain might be due to a nerve injury that occurred when the door crushed Claimant. Therefore, he decided to perform a diagnostic nerve block to determine whether Claimant's pain was nerve related. Based on the Claimant's subjective response to the nerve block-that the nerve block significantly reduced his pain for a short period of time-Dr. Caswell concluded that the Claimant's abdominal pain is due to a nerve injury.

81. During his testimony, Dr. Caswell also indicated that his opinion is also supported by his contention that Claimant's prior surgery, or surgeries, alleviated Claimant's nerve pain. Dr. Caswell testified that when Claimant underwent surgery, he was given a nerve block, and that block would have also alleviated Claimant's nerve pain – like the injection he performed. That said, a review of the medical records does not indicate that the Claimant's pain was only temporarily relieved by the nerve block performed during his first surgery. Instead, the medical records establish that Claimant's pain was relieved for weeks after the surgery, thus countering the opinion of Dr. Caswell.[1]

82. Moreover, despite Dr. Caswell stating that it was his opinion that Claimant's suffered a nerve injury during the June 2020 work accident, he still referred Claimant to a surgeon to see if the pain was being caused by adhesions. (*See* Ex. 3, p. 122). Thus, even Dr. Caswell did not conclusively think the Claimant's subjective response to the injection established Claimant's pain complaints were due to a nerve injury.

83. While Dr. Caswell's opinions seem reasonable on the surface, the ALJ does not find his opinions to be highly persuasive when considering the competing evidence and opinions contained in the record. Claimant has seen several physicians and surgeons, and the

[1] As found, on January 27, 2021, Claimant underwent surgery with Dr. Botolin for a ventral hernia repair with mesh. On March 4, 2021, approximately 5 weeks later, Claimant returned to Dr. Botolin and indicated that all of his symptoms had resolved and that he was off pain medications. Then, on March 9, 2021, Claimant was seen by his primary care physician Dr. Pennington – who noted Claimant had "no abdominal tenderness." Thereafter, almost 15 weeks later, Claimant returned for treatment and saw PA-C Quakenbush. Claimant reported he had been doing well but was "having some return of previously noted abdominal wall weakness symptoms" specifically "mid ventral abdominal wall weakness with straining." But, there was no mention of right lower quadrant pain during this medical visit.

ALJ does not find that Dr. Caswell is the only one who has been able to make a proper diagnosis and find the pain generator. As a result, the ALJ does not find Dr. Caswell's opinions to rise to the level of clear and convincing evidence that Claimant is not at MMI because he suffered a non-diagnosed nerve injury that still requires treatment. Moreover, the ALJ does not find his opinion persuasive evidence to find that Claimant's condition has worsened.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. W.C. No. 5-141-572-006

1. Whether Claimant overcame the DIME and established by clear and convincing evidence that he is not at MMI, or if at MMI, that he is entitled to a higher impairment rating.

a. Maximum Medical Improvement

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

In this case, Dr. Higginbotham, the DIME physician, evaluated claimant twice – first on November 2, 2020, then in follow-up on July 14, 2022. At the first DIME appointment, Claimant reported pain and discomfort about the mid-abdominal areas and denied any numbness or tingling sensations. Claimant reported that his chest was "fine" and non-tender. Dr. Higginbotham noted the June 3, 2020, study did not mention an umbilical hernia. At the November 2, 2020, DIME appointment, Dr. Higginbotham opined Claimant had a readily noticeable, moderately large, ventral hernia evidence with Valsalva maneuver for which he had not been properly evaluated and was not at MMI. Claimant subsequently returned for treatment, including a ventral hernia repair with mesh implant in January 2021 with Dr. Botolin, to whom he reported complete resolution of all his symptoms in March 2021. Additionally, Claimant saw the ATP on May 10, 2021, several months after the surgery, and reported return of abdominal wall weakness, but no lower right quadrant pain. Claimant subsequently underwent "exploratory" surgery with Dr. Le in April 2022 at which time a mesh adhesion was identified, and lysis performed, but no acute trauma or recurrent hernia was identified that could relate to the August 31, 2021, incident.

Claimant returned for a follow-up DIME with Dr. Higginbotham on July 14, 2022. Claimant reported continued swelling in the mid-abdomen, he reported persistent twinges of abdominal discomfort. According to Claimant's testimony, he also reported to the DIME all of his ongoing problems to Dr. Higginbotham at the July 14, 2022, DIME, including that he had an incident at work on August 31, 2021, in which he had increased pain and that he thought his current pain may be due to another adhesion. According to the follow-up DIME report, Claimant did not mention any lower right quadrant pain.

Since the July 14, 2022, follow-up DIME, Claimant has been evaluated by several physicians for abdominal pain. Dr. Hughes performed an IME on behalf of Claimant. Dr. Hughes concluded that Claimant was not at MMI just because he felt Claimant should

have a surgical re-evaluation. Claimant did have a surgical evaluation with Dr. Gates, who did not recommend any surgical intervention. In neither of his reports did Dr. Hughes conclude that Claimant had a nerve injury related to the work accident that required additional treatment prior to being placed at MMI. Dr. Caswell is the only physician who opined Claimant may have suffered a nerve injury proximately related to the June 2020 work accident. However, Dr. Caswell has not opined that Claimant is not at MMI or that additional medical treatment, including injections and/or physical therapy as recommended by Dr. Winter, would not be appropriate maintenance care. Additionally, a second pain management specialist, Dr. Girardi, opined that a spinal cord stimulator was appropriate for the primary diagnosis of failed low back surgery, despite Claimant's request for him to change his opinion to reflect the purpose of the spinal cord stimulator was for his abdominal pain. The ALJ finds the opinions of Drs. Hughes and Caswell at most amount to mere differences of opinion that do not rise to the level of clear and convincing evidence to support a finding that Claimant is not at MMI.

As a result, the ALJ finds and concludes Claimant has failed to overcome by clear and convincing evidence the DIME opinion regarding MMI.

b. Impairment Rating

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The question of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

In this case, the DIME Dr. Higginbotham assigned a 5% whole person impairment rating pursuant to the AMA *Guides* Chapter 10, Table 6, Class I of page 196. The ALJ takes judicial notice that Class I of Table 6 "Classes of Hernial Impairment" on page 196 of the AMA *Guides to the Evaluation of Permanent Impairment*, 3rd Ed. Revised allows for a 0-5% whole person impairment rating. Respondent's IME Dr. D'Angelo's physical examination of Claimant in February 2023 indicates a "slight protrusion" and Dr. Gates' physical examination of Claimant in January 2023 noted a "small rectus diastases," which the ALJ finds consistent with the DIME's findings of a "slight protrusion" and basis for his determination of a 5% whole person rating in this matter.

Claimant's expert, Dr. Hughes Dr. Hughes disagreed with the assignment of a 5% whole person rating and believed that objective pathology described by Dr. Higginbotham

justified a Class 2 categorization rather than a Class 1 as provided by Dr. Higginbotham and therefore entitled Claimant to a 10% whole person rating.

In this case, the ALJ finds that the difference of opinion between the DIME physician and Dr. Hughes is merely a difference of opinion and does not rise to the level of clear and convincing evidence. Plus, Dr. Higginbotham's impairment rating is also supported by Dr. D'Angelo.

As a result, the ALJ finds and concludes Claimant has failed to prove the DIME's 5% whole person impairment rating is "highly probably" incorrect. The ALJ finds Claimant has failed to overcome the DIME opinion regarding permanent impairment by clear and convincing evidence.

2. Whether Claimant's condition has worsened since being placed at MMI and his claim reopened.

To reopen a workers' compensation claim, a claimant must demonstrate that he has experienced a change in condition which is causally related to, or a natural consequence of, the admitted injury. *Justiniano v. Indus. Claim Appeals Office*, 410 P.3d 659, 661 (Colo. App. 2016). The power to reopen under the provisions of §8-43-303, C.R.S. is permissive and left to the sound discretion of the ALJ. *Renz v. Larimer County School Dist. Poudre R-1*, 924 P.2d 1177, 1181 (Colo. App. 1996).

In the June 2020 claim, Claimant testified, and the medical records document, that Claimant was still symptomatic with reports of abdominal pain at the time of the follow-up DIME. Nevertheless, the DIME physician concluded Claimant was at MMI as of July 14, 2022. Claimant was seen by several physicians after the DIME appointment, including a surgeon, none of whom opined Claimant's condition was worse than it was at the time of the DIME and finding of MMI nor that his condition required additional surgery related to the June 2020 injury.

Moreover, the ALJ does not find that Claimant's own IME with Dr. Hughes supports a finding that Claimant's condition is worse since the follow-up DIME appointment. While it is true that additional treatment, including injections and physical therapy, have been recommended by unauthorized providers to treat Claimant's ongoing symptoms, this recommended treatment does not establish a worsened condition. To the extent Claimant argues that the need for the spinal cord stimulator surgery is evidence of a worsened condition, the ALJ does not find this argument persuasive as the physician who recommended the spinal cord stimulator, Dr. Girardi, specifically noted the spinal cord stimulator was due to persistent lumbar radiculopathy due to failed low back surgery, which is not causally related to the June 2020 claim. This opinion is also supported by the February 22, 2022, report of Dr. Russell at Claimant's PCP at Kaiser, who evaluated Claimant's bilateral foot pain and opined that it could be caused by persistent radiculopathy and that a spinal cord stimulator may be considered.

Based on the above, the ALJ finds and concludes that Claimant has failed to prove by a preponderance of the evidence that he suffered a worsening of condition causally related to the June 2020 work injury.

3. **Whether Claimant is entitled to TTD and/or TPD.**

Because Claimant remains at MMI as of July 14, 2022, and Claimant's condition has not worsened, Claimant is not entitled to additional temporary disability benefits.

4. Whether Respondents are entitled to an offset.

Evidence regarding the offset for Claimant's receipt of short term and/or long-term disability benefits was not fully developed at hearing and in the proposed orders. For example, there is a lack of evidence to determine who financed, and to the extent financed, Claimant's short and/or long-term disability benefits. Moreover, the payment of short-term disability from October 1, 2021, through February 27, 2022, does not cover a period in which temporary disability benefits were admitted and paid to Claimant, as set forth in the Final Admission of Liability. Additionally, the payment of long-term disability benefits from February 28, 2022, through May 11, 2022, does not cover a period in which temporary disability benefits were admitted and paid, as set forth in the Final Admission of Liability. Therefore, this issue is reserved.

5. Medical benefits.

a. Whether the treatment Claimant received was authorized.

b. Whether the treatment Claimant received was reasonably necessary to treat Claimant from the effects of his work injury.

c. Reimbursement to Claimant and his medical providers for the medical treatment he received.

Authorization of Care

The claimant shoulders the burden of proving entitlement to benefits, including medical treatment, by a preponderance of the evidence. §8-43-201, C.R.S.; *see Synder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Once a claimant has established a compensable work injury they are entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. §8-42-101, C.R.S.; *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

Section 8-43-404(5), C.R.S. affords the employer or insurer the statutory right, in the first instance, to select a physician to treat the industrial injury, and that the right of first selection does not pass to the claimant unless the employer or insurer fail to provide a physician willing to treat the injury. §8-43-404(5), C.R.S.; *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228, 229 (Colo. App. 1999), *cert. denied*.

Section 8-43-404(5)(a), C.R.S. provides that a claimant may not change physicians without permission from the employer, insurer, or ALJ. §8-43-404(5)(a), C.R.S.; *Yeck*, 996 P.2d at 229.

Respondents are only liable for authorized treatment. §8-43-404(7)(a), C.R.S. Authorization to provide medical treatment refers to a medical provider's legal authority to provide treatment to the claimant with the expectation that the provider will be compensated by the insurer for said services. *Mason Jar Rest. V. Indus. Claim Appeals Office*, 862 P.2d 1026, 1029 (Colo. App. 1993); *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006). Authorized providers include those medical personnel to whom the claimant is directly referred by the employer, as well as providers to whom an authorized provider refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3s 513 (Colo. App. 2002). Consequently, treatment is compensable under the Act where it is provided by an "authorized treating physician." *Popke v. Indus. Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). If an injured worker obtains unauthorized care, the respondents are not required to pay for it. *In Re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO June 18, 2010); *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Pickett v. Colo. State Hospital*, 513 P.2d 228 (Colo. 1973).

In this case, Claimant timely received a copy of the designated provider list from the Employer after both the June 2020 injury and alleged August 2021 injury. In both instances, Claimant sought medical treatment with Centura Urgent Care, who was on each of the Employer's designated provider lists. Centura Urgent Care thus became the authorized treating provider (ATP) for each claim. Centura Urgent Care provided evaluation and treatment to Claimant from June 8, 2020, through September 7, 2021. Despite a follow-up appointment having been scheduled for Claimant to return on October 7, 2021, Claimant testified he did not return to Centura Urgent Care because his August 31, 2021, claim had been denied by the Respondent's third-party administrator ([Redacted, hereinafter CV]) and because the ATP had wanted him to see a surgeon and Dr. Botolin would not see him because the August 6, 2021, ultrasound was negative. Despite being evaluated by two other general surgeons, Dr. Hess and Dr. Tierney, on November 21, 2021, and December 27, 2021, respectively, Claimant never returned to the ATP for re-evaluation.

To the extent Claimant argues the right of selection passed to him to choose a different treating provider due to the denial of his August 31, 2021, claim and CV's[Redacted] refusal to pay for medical benefits for that claim, the ALJ rejects this argument. This is the same argument the Court of Appeals rejected in *Yeck*, instead holding the right of selection of the physician is not conditioned on an admission of liability. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

Claimant testified that the claim adjuster did not give him permission to see any of the following medical providers: Valley Wide Health/Dr. Pennington, Kaiser/Dr. Hess, Dr. Tierney, Banner Health/Dr. Le/Dr. Narasimhan, Dr. Caswell, Cheyenne Regional Medical Center/Dr. Winter/Dr. Gates, UCHealth/Dr. Girardi, or Dr. Corcoran.

Additionally, the medical evidence documents that the treatment with these providers took place over a matter of months during routine office visits, physical

examinations, diagnostic testing and ultimately elective surgeries with Drs. Le and Girardi. None of the care was provided in an emergency room. Moreover, the surgeries Claimant underwent with Drs. Le and Girardi were scheduled and planned weeks if not months in advance. For these reasons, the ALJ is convinced that the treatment rendered by: Valley Wide Health/Dr. Pennington, Kaiser/Dr. Hess, Dr. Tierney, Banner Health/Dr. Le/Dr. Narasimhan, Dr. Caswell, Cheyenne Regional Medical Center/Dr. Winter/Dr. Gates, UCHealth/Dr. Girardi, and Dr. Corcoran, including the surgery performed by Dr. Le and the procedures related to the spinal cord stimulator by Dr. Girardi, was not emergent in nature.

Nor has Claimant established another way by which the aforementioned providers became authorized, *i.e*., there is no credible evidence Centura Urgent Care refused to treat Claimant for non-medical reasons, in fact they had a follow-up scheduled with Claimant to return on October 7, 2021, which would indicate they were willing to provide care for his work injuries. Here, Claimant presented no persuasive evidence that Centura Urgent Care refused to provide treatment for non-medical reasons. Moreover, Claimant testified that Respondent designated a provider in Loveland, Colorado to continue and monitor medical care for his June 2020 work injury after his move to Wyoming but he chose not to see that provider.

Consequently, the ALJ finds and concludes that Valley Wide Health/Dr. Pennington, Kaiser/Dr. Hess, Dr. Tierney, Banner Health/Dr. Le/Dr. Narasimhan, Dr. Caswell, Cheyenne Regional Medical Center/Dr. Winter/Dr. Gates, UCHealth/Dr. Girardi, and Dr. Corcoran, and any other provider not within the chain of referral from Centura Urgent Care, are not authorized providers. Accordingly, their care and treatment was and is also unauthorized.

Because the treatment Claimant received was not provided by an authorized provider, Respondents are not responsible for that treatment, regardless of whether it is reasonably necessary and related. As a result, the ALJ finds and concludes that Respondents are not liable for the medical treatment Claimant received from unauthorized providers.

5. Average Weekly Wage.

Claimant agreed to the admitted average weekly wage in his proposed order. Plus, additional temporary disability benefits are not being awarded. Therefore, it appears that the issue of Claimant's AWW is moot. If the issue is still in dispute, either party may file an application for hearing to resolve the issue.

II. W.C. No. 5-183-168-004

1. Whether Claimant suffered a compensable injury on August 31, 2021.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In this case, Claimant alleges an injury occurring on August 31, 2021. On that day, Claimant reported experiencing pain in his abdomen where the ventral hernia mesh placed for the June 3, 2020, injury had been placed after climbing up/down a ladder to repair a swamp cooler at work. Claimant reported to the selected ATP Centura Urgent Care related to the August 31, 2021, incident on September 1, 2021. Claimant reported he "did not have a significant event of pain such as a pop or swelling." Claimant stated he believed this was related to a prior workers' compensation injury where he was injured in a gate and that he was trying to visit with his surgeon for that claim. The ATP noted work-relatedness was "undetermined." Consistent with his report to the ATP, Claimant testified he told the claim adjuster that the August 31, 2021, experience of pain was the same pain he had been dealing with for months, as such, a Notice of Contest was filed.

Dr. D'Angelo evaluated the Claimant's complaints related to the August 31, 2021, incident and noted that Claimant had reported abdominal pain since his return to regular duty in March 2021 and his symptoms of pain did not change after the August 2021 incident. The ALJ finds this opinion to be supported by the operative report of Dr. Le who, during exploratory surgery in April 2022, did not find any evidence of recurrent hernia or other trauma, only adhesions to a mesh which were related to the January 2021 surgery and not caused by anything that would have occurred on August 31, 2021.

The ALJ is more persuaded by the opinion of Dr. D'Angelo than any opinion to the contrary. As a result, the ALJ finds and concludes that Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on August 31, 2021.

Because the August 31, 2021, claim is not compensable, the remaining issues under this claim are moot.

ORDER

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

1. Claimant has failed to overcome by clear and convincing evidence the DIME physician's determinations that he reached MMI for his June 3, 2020, claim as of July 14, 2022, or that he has sustained a 5% whole person impairment rating. As a result, his claim to overcome the DIME is denied and dismissed.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a worsening of condition that is causally related to a compensable injury. His petition to reopen W.C. No. 5-141-572 (DOI 6/3/20) is denied and dismissed.

3. Claimant's request for medical benefits in connection with unauthorized treatment from Valley Wide Health/Dr. Pennington, Kaiser/Dr. Hess, Dr. Tierney, Banner Health/Dr. Le/Dr. Narasimhan, Dr. Caswell, Cheyenne Regional Medical Center/Dr. Winter/Dr. Gates, UCHealth/Dr. Girardi, and Dr. Corcoran is denied and dismissed.

4. Claimant's claim for compensation under W.C. No. 5-183-168, for an August 31, 2021, date of injury, is denied and dismissed.

5. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: November 16, 2023

/s/ Glen Goldman

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

Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a whole person impairment to his right shoulder?
- Did Claimant prove he is entitled to TTD benefits from April 6, 2022 through November 21, 2022? In the alternative, did Claimant prove entitlement to TTD from May 24, 2022 through November 21, 2022?
- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- Relatedness and authorization of certain treatment paid by Medicaid.
- Disfigurement.

FINDINGS OF FACT

1. Claimant worked for Employer as a line cook, primarily at the grill station. In addition to cooking, he cleaned the grills and other kitchen areas. The job was physically demanding and required lifting over 50 pounds. Many tasks involved overhead activity, such as cleaning the grill hoods and stocking the freezer.

2. In March 2021, Claimant started to experience left shoulder pain while performing cleaning tasks and lifting heavy cookware. The pain gradually worsened over the next few weeks.

3. Claimant saw Dr. Jack Chapman on April 6, 2021 for a flare of chronic low back pain. He also reported severe left-sided neck pain with radiation into the left shoulder and upper arm. Dr. Chapman diagnosed cervical radiculopathy and ordered a cervical MRI.

4. Later that day, Claimant went to the St. Mary Corwin Hospital emergency department for his low back pain. He also reported left shoulder pain and his shoulder was "cold and numb." He stated the shoulder symptoms were similar to those he experienced several years before when he tore the rotator cuff in his right shoulder.

5. Claimant saw Elizabeth Skelly, NP at Southern Colorado Family Medicine (SCFM) on April 8, 2021. He reported anterior shoulder pain that had been present for a month. He attributed the shoulder pain to repetitive activities. Ms. Skelly ordered an MRI of the left shoulder.

6. On April 13, 2021, Claimant experienced a painful pop and a tearing sensation in his left shoulder while reaching for a plate at approximately eye level.

7. Claimant went to the St. Mary Corwin Hospital emergency room the evening of April 13, 2021 to have his left shoulder evaluated. He described aching, cramping, and shooting pain in the left shoulder. Examination showed tenderness and limited shoulder ROM. X-rays showed mild AC joint degenerative changes but no fracture or other acute findings. Claimant was placed in a sling, prescribed oxycodone, and discharged.

8. Claimant saw Dr. Lloyd at SCFM on April 15, 2021, "to request a letter from doctor to his employer stating that they needed to open workman's comp case." Dr. Lloyd advised Claimant that SCFM "does not do any workmans comp cases though we will continue to provide general medical care while his case is ongoing." She recommended that Claimant speak with Employer about the shoulder injury.

9. Claimant reported the injury to Employer and was referred to Concentra. There is no persuasive evidence that Claimant reported the injury before April 15, 2021.

10. The left shoulder MRI was completed on April 22, 2021. It showed partial-width tears of the subscapularis and infraspinatus tendons and a full-thickness tear of the supraspinatus tendon.

11. Concentra referred Claimant to Dr. Jennifer FitzPatrick, an orthopedic surgeon.

12. Claimant saw Dr. FitzPatrick on May 10, 2021. He described ongoing 10/10 shoulder pain and left-sided radiating neck pain. He also reported periscapular pain around the AC joint that Dr. FitzPatrick believed "may be compensatory." Dr. FitzPatrick recommended surgery.

13. Dr. FitzPatrick performed a left shoulder arthroscopic rotator cuff repair, biceps tenodesis, and distal clavicle excision on May 21, 2021 at Parkview Medical Center.

14. Claimant started post-operative therapy at Momentum Physical Therapy on June 7, 2021. He reported 9/10 pain at the initial visit in the shoulder and around his collar bone.

15. Claimant began treatment with Dr. Pollack on June 21, 2021, for his chronic pain, primarily related to his pre-existing low back condition. Claimant was referred to Dr. Pollack by his PCP. Claimant explained that Dr. FitzPatrick had initially prescribed Percocet (oxycodone) for post-surgical pain but was unwilling to continue prescribing pain medication if Dr. Pollack would also be prescribing medication for other conditions. Dr. Pollack conferred with Dr. FitzPatrick, and they decided Dr. Pollack would assume responsibility for any additional post-operative pain medication. Dr. Pollack refilled the Percocet "a few" times to allow Claimant to wean off the narcotic. Records show Claimant last refilled Percocet on July 6, 2021. That was the last prescription Dr. Pollack wrote for any injury-related symptoms. Claimant continued treating with Dr. Pollack and received Suboxone and other medications for noninjury-related chronic pain.

16. On June 30, 2021, Dr. FitzPatrick documented Claimant was still having "significant pain around the collarbone." The collarbone was tender to palpation, but Dr. FitzPatrick saw no swelling. Examination also showed pain in the trapezial region. Claimant's therapist thought some of his shoulder pain may be referred from the neck, so Dr. FitzPatrick recommended a cervical MRI to investigate the source of his shoulder symptoms.

17. The cervical MRI was completed on July 8, 2021 at Parkview Medical Center. It showed multilevel degenerative changes greatest at C6-7 with mild-to-moderate foraminal stenosis. That same date, Claimant had a lumbar MRI for noninjury-related low back issues.

18. Dr. Pollack noted on July 19, 2021 that Claimant had increased neck pain following surgery.

19. Claimant followed up with Dr. FitzPatrick on July 28, 2021. He was still having pain in the shoulder, lateral left neck, and distal clavicle. The cervical pain was reproduced with left lateral bending. Dr. FitzPatrick recommended Claimant continue PT, "including cervical spine."

20. Dr. Jack Rook performed an IME at the request of Claimant's counsel on September 28, 2021. Claimant indicated his range of motion had improved since the surgery but he still had severe left shoulder pain from his neck to the shoulder joint. He slept poorly because he could not get comfortable and could not lie on his left side. On examination, Dr. Rook noted exquisite tenderness along the anterior shoulder capsule and with palpation of the AC joint where the distal clavicle resection was done. There was moderate tenderness with spasm in the left upper trapezius and left-sided paracervical musculature. Dr. Rook opined Claimant's shoulder issues were work-related. He believed Claimant initially developed an occupational disease from work activities such as scrubbing grills, frequent heavy lifting, repetitive reaching, and mopping. These activities probably caused rotator cuff tendonitis. Claimant then suffered a traumatic rotator cuff tear on April 13, 2021 while reaching for the plate.

21. Dr. Carlos Cebrian performed an IME for Respondents on October 4, 2021. Dr. Cebrian opined the "minimal" incident on April 13, 2021 would not cause, aggravate, or accelerate a rotator cuff tear. He further opined Claimant's work did not cause an occupational disease involving the shoulder. He concluded Claimant's left shoulder complaints and need for treatment were incidental and unrelated to his work for Employer.

22. Dr. FitzPatrick ordered a repeat left shoulder MRI on October 28, 2021 to evaluate Claimant's persistent symptoms.

23. The shoulder MRI was completed on November 18, 2021. It showed mild subdeltoid bursitis with post-surgical changes and no gross evidence of recurrent rotator cuff tear. There was muscular atrophy that could be secondary to disuse.

24. Claimant attended regular PT sessions at Momentum until March 2022. Among other findings, the physical therapist repeatedly documented Claimant was "highly tender" to palpation at the attachment of the left pectoralis major.

25. Claimant was discharged from PT on March 3, 2022. At the time of discharge, Claimant reported 6/10 pain at worst with current complaints at 4/10. Claimant reported that he was confident to perform home exercises on his own.

26. A hearing was held before Judge Richard Lamphere on December 19, 2021 to determine the compensability of Claimant's injury. On February 22, 2022, Judge Lamphere issued Findings of Fact, Conclusions of Law and an Order finding the claim compensable and awarding medical benefits and TTD benefits.

27. Claimant saw PA-C Daniel Czarniawski at Concentra for a demand appointment on April 6, 2022. Mr. Czarniawski released Claimant from care. Dr. Trina Bogart at Concentra reviewed Claimant's chart and concurred that Claimant was at MMI with no impairment on April 6, 2022. Dr. Bogart also released Claimant to work with no restrictions.

28. Claimant returned to Concentra on May 7, 2022, and saw Jennifer Livingston, FNP. Claimant reported ongoing pain, range of motion deficits, and weakness affecting the left shoulder. Examination of Claimant's neck showed tenderness and muscle spasm affecting the left paraspinals and trapezius muscle. Cervical range of motion was limited. Oddly, examination of the left shoulder was described as entirely normal. Ms. Livingston stated Claimant was "at MMI but will have permanent restrictions and/or permanent partial disability." An FCE was pending, and Claimant was to be scheduled with a Level II provider for an impairment rating.

29. Claimant was evaluated by Dr. Daniel Peterson at Concentra on May 24, 2022. Claimant reported ongoing left shoulder and clavicle pain. Examination of the shoulder showed tenderness in the bicipital groove, midshaft clavicle, anterior shoulder, and lateral shoulder, with limited range of motion in all planes. Dr. Peterson determined Claimant was not at MMI, cancelled the FCE, and imposed work restrictions no lifting, carrying, pushing, or pulling more than four pounds. He referred Claimant to Dr. David Weinstein for a second opinion.

30. Claimant was involved in a motor vehicle accident on June 19, 2022, when he was struck by a vehicle moving at a high rate of speed. Claimant was transported to the emergency department, where he complained of pain in his head, neck, left chest, and left knee. CT scans of the head, cervical spine, and pelvis were negative. The provider wrote, "Patient has a mild cervical strain but no significant traumatic injury."

31. Claimant returned to SCFM on June 24, 2022, to discuss some incidental lung findings on x-rays taken after the MVA. The report states, "He has some residual aches and pains [from the MVA] but is near baseline for this."

32. On June 29, 2022, Claimant called SCFM and requested a referral to PT for the neck, lower back, and left knee. The ALJ infers this was in relation to the MVA. Claimant was referred back to Momentum PT.

33. Claimant saw Ms. Livingston at Concentra on July 5, 2022. Insurer had denied the referral to Dr. Weinstein for the second opinion regarding the clavicle pain. Claimant stated he was having "increased pain" from the MVA but did not specify the location of the increased pain. The examination findings of the left shoulder were the same as noted by Dr. Peterson on May 24, 2022 (before the MVA). Ms. Livingston referred Claimant to Dr. Kenneth Finn for a physiatry evaluation.

34. Claimant started PT at Momentum on July 7, 2022 for the MVA, and was seen by a new therapist, Cody Payne, DPT. He reported pain in multiple areas including "neck, L shoulder/arm, L side, and L knee following MVA." Claimant stated he was "pretty sure I have a concussion and whiplash." The intake form states the referral was from Claimant's primary care physician, Dr. Alexander Grover, for treatment of "MVA." There was no referral from any ATP to Momentum after the MVA. Treatment at Momentum PT on and after July 7, 2022 was unauthorized and unrelated to the work injury.

35. Claimant saw Dr. Weinstein for a second orthopedic opinion on August 15, 2022. Claimant reported constant moderate pain in the anterior and posterior aspects of his shoulder radiating up to his neck. Dr. Weinstein noted, "it appears he did have discomfort prior to his [MVA] which has significantly exacerbated his symptoms." Dr. Weinstein opined Claimant's symptoms were primarily myofascial in origin. He stated, "it is difficult to tell whether it is related to his motor vehicle accident or persistent from his original Workman's Compensation injury." Dr. Weinstein further noted, "he does have mild inflammation of the rotator cuff, which is residual from the surgery, as well as mild adhesive capsulitis, again difficult to know what his motion was prior to his motor vehicle accident." Dr. Weinstein administered a cortisone injection to Claimant's left shoulder and recommended 6 weeks of PT with myofascial treatment and joint mobilization.

36. Claimant attended several sessions of PT at Concentra in September 2022. The exam at the initial appointment showed rotator cuff weakness and multiple myofascial trigger points. Claimant was treated with therapeutic activities and dry needling.

37. Claimant saw Dr. Finn on August 22, 2022. He reported left shoulder pain with radiation to the scapula, clavicle, and left neck. Claimant told Dr. Finn he did not think the MVA had permanently aggravated the left shoulder condition. Examination showed tenderness of the left AC joint, sternoclavicular joint, and biceps grove. Dr. Finn also noted mild tenderness and spasm of the left infraspinatus. Left shoulder strength and ROM were reduced. Dr. Finn opined Claimant's residual symptoms were probably musculoskeletal in nature, but recommended a repeat MRI to be sure there was no other anatomic basis for his shoulder pain. He also indicated Claimant could consider trigger point injections in the sternoclavicular joint.

38. The left shoulder MRI was completed on September 12, 2022. It showed post-operative changes and ongoing supraspinatus and infraspinatus tearing.

39. Claimant followed up with Dr. Finn on September 20, 2022. Dr. Finn noted decreased shoulder range of motion with positive impingement signs. He recommended Claimant follow up with Dr. Weinstein.

40. Dr. Weinstein re-evaluated Claimant on October 12, 2022. He stated the rotator cuff repair had healed and Claimant's symptoms were related to left upper extremity and paracervical myofascial inflammation. He saw no indication for additional surgery and released Claimant back to Concentra to determine MMI and impairment.

41. Claimant completed an FCE on November 7, 2022. He reported 9/10 pain in the left shoulder and clavicle with pins/needles at the left side of his neck. The evaluator determined Claimant was capable of Medium level work.

42. Claimant was put at MMI on November 22, 2022 by Dr. Kathryn Murray at Concentra. Claimant described difficulty with activities that require reaching overhead or behind his back, such as donning a t-shirt, pulling up his pants, and washing his back. His sleep was poor because of inability to find a comfortable position. He also reported difficulty with recreational activities such as golfing, playing pool, bowling, and volleyball because of the shoulder. Examination showed tenderness to palpation over the left clavicle, trapezius and parascapular muscles. Dr. Murray noted rotator cuff weakness and limited range of motion. Dr. Murray assigned a 26% upper extremity rating, consisting of 18% for range of motion deficits and 10% for the distal clavicle excision. The extremity rating converts to 16% whole person. She gave Claimant permanent work restrictions of occasional lifting and carrying up to 20 pounds, and occasional pushing/pulling up to 40 pounds. Dr. Murray opined Claimant required no maintenance treatment and released him from care.

43. Respondents filed a Final Admission of Liability on February 15, 2023, admitting for a 26% scheduled impairment rating and denying maintenance medical care per Dr. Murray's report.

44. Dr. Cebrian conducted a records review and issued a report dated June 7, 2023 addressing permanent impairment. Dr. Cebrian opined that the June 19, 2022 MVA was an intervening injury that aggravated Claimant's cervical spine, left shoulder, upper back, and low back. Accordingly, Dr. Cebrian opined Claimant's current complaints involving the neck, trapezius, and shoulder blade are secondary to the motor vehicle accident rather than the work injury. He further opined that any claim-related functional impairment was limited to the left arm and did not extend to the neck or trunk, as the ongoing complaints involving these body parts were unrelated to the work injury. Dr. Cebrian also opined that the distal clavicle resection performed did not inhibit function beyond the arm at the shoulder. Finally, Dr. Cebrian opined that no further claim-related medical care was necessary.

45. Claimant proved he suffered functional impairment not listed on the schedule of disabilities. Claimant's testimony regarding the symptoms and functional impairment related to his left shoulder is credible and persuasive. Dr. Cebrian's opinion that Claimant has no injury-related functional impairment beyond the arm is not

persuasive. Claimant's testimony is supported by medical records showing shoulder-related pain affecting areas of his torso including the left clavicle, left pectoralis muscle, trapezius, and left periscapular muscles. These issues were documented before the June 19, 2022 MVA, including in Dr. Peterson's May 24, 2022 report. The most closely contemporary records after the MVA referenced "a mild cervical strain but no significant traumatic injury," and indicated he was close to "baseline" less than a week after the accident. The accident may have caused some temporary increase in Claimant's neck pain, but the persuasive evidence shows the great majority of Claimant's proximal symptoms are related to the admitted shoulder injury. Although Claimant had some documented neck pain before the work accident, the injury aggravated and perpetuated the symptoms.

46. Claimant proved TTD benefits should be reinstated effective May 24, 2022. Claimant's TTD benefits were terminated on April 6, 2022, based on Dr. Bogart's opinion that Claimant was at MMI with no restrictions. Absent a DIME, the ALJ lacks jurisdiction to question Dr. Bogart's determination that Claimant was at MMI on April 6, 2022. However, Dr. Peterson subsequently determined Claimant was not at MMI and reinstated work restrictions. Respondents have conceded that Claimant is entitled to additional TTD benefits from May 24, 2022 through November 21, 2022, when Claimant was again put at MMI.

47. Claimant failed to prove entitlement to a general award of medical benefits after MMI. No treating or examining provider has recommended any ongoing treatment related to the work injury. Dr. Cebrian's opinion that Claimant requires no maintenance treatment is persuasive. Claimant is not a candidate for surgery, additional injections, or other active interventions. He completed PT and has been instructed in a home exercise program. He has not been prescribed medication for any injury-related condition in more than a year. Although Claimant continues to have symptoms, there is no persuasive evidence he needs treatment to relieve symptoms or prevent deterioration of his condition.

48. At the hearing, Claimant demonstrated visible disfigurement consisting of: five ½-inch diameter irregularly shaped, discolored arthroscopic surgery portal scars, and a ¾-inch diameter irregularly shaped, discolored surgical scar on the left shoulder. The ALJ finds that Claimant should be awarded $1,500 for disfigurement.

MEDICAID LIEN

49. The Colorado Department of Healthcare Policy and Financing (HCPF) issued a notice to Respondents' counsel on March 9, 2023 with an extensive Medicaid lien totaling $35,668.43, as of that date. The notice stated HCPF must be reimbursed for the amounts specified by statute if a settlement is reached on the claim.

50. The Medicaid lien includes charges for treatment unrelated to the workers' compensation claim and from providers not authorized to treat under the workers' compensation claim. These include charges from Dr. Pollack, Metamorphosis Pain

Management, Broadway Pharmacy (for Buprenorphine and Naloxone), and from Momentum PT after the June 19, 2022 motor vehicle accident.

51. Claimant sought treatment at the St. Mary Corwin emergency department shortly after the work accident on April 13, 2021. This treatment was reasonably needed and authorized as "emergency" treatment for the work injury. Respondents are liable for these charges.

52. Claimant saw Dr. Lloyd at Southern Colorado Family Medicine on April 15, 2021. Although the appointment was related to Claimant's left shoulder injury, it was not emergent in nature and occurred before Employer was given notice of Claimant's injury. Accordingly, the treatment was unauthorized. Respondents are not liable for the April 15, 2021 office visit at SCFM.

53. Claimant underwent an MRI of the left shoulder on April 22, 2021 at St. Mary Corwin Medical Center. This MRI was ordered by his PCP **before** the April 13, 2021 work injury. The April 22 MRI was unauthorized and not the responsibility of Respondents.

54. Dr. Jennifer FitzPatrick is an ATP per referral from Concentra. Medicaid paid for the following office visits with Dr. FitzPatrick: May 10, September 22, October 20, and December 1, 2021, and February 9, 2022. Those visits should have been covered by Respondents.

55. Dr. FitzPatrick performed left shoulder surgery at Parkview Medical Center on May 25, 2021. PA-C Catherine Fitzgerald assisted during the surgery. Anesthesia and other ancillary services were also provided in connection with the surgery and billed separately. The surgery was reasonably needed to cure and relieve the effects of the work injury. Accordingly, Respondents must reimburse Medicaid for all surgery-related charges from May 25, 2021.

56. Dr. FitzPatrick prescribed oxycodone for post-surgical pain management. She subsequently transferred responsibility for post-operative pain medication to Dr. Pollack. Medicaid paid for oxycodone prescriptions filled on May 25, June 7, 15, 22, and 30, and July 6, 2021 through Catholic Health Initiatives. Respondents must reimburse Medicaid for these charges.

57. Dr. FitzPatrick referred Claimant to post-operative physical therapy at Momentum Physical Therapy. Claimant treated with multiple therapists, including Kaitlin McGrath, Cydne Rossi, Kasey Ro, Justin Dirks, and Nathan Baratta. Respondents must reimburse Medicaid for these PT sessions at Momentum between June 7, 2021 and March 3, 2022.

58. Claimant had a cervical MRI on July 8, 2021 at Dr. FitzPatrick's request. The purpose of the MRI was to investigate whether Claimant's neck pain was related to the work accident or noninjury-related conditions. This diagnostic evaluation was reasonably needed and causally related to the industrial injury.

59. A repeat left shoulder MRI was performed on November 18, 2021 at Dr. FitzPatrick's request. The MRI was initially interpreted by Dr. Krynn Stegelmeier. The November 18, 2021 MRI was reasonably needed and causally related to the work accident.

60. Claimant had another left shoulder MRI on September 12, 2022 at Dr. Finn's request. This MRI should have been covered by Respondents.

CONCLUSIONS OF LAW

A. Whole Person Impairment

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc.*, W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius or scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved he suffered functional impairment not listed on the schedule. Claimant has consistently reported symptoms and associated functional limitations affecting multiple areas proximal to the glenohumeral joint, including his left clavicle, pectoral muscle, trapezius, scapula, and paracervical muscles. The surgery performed by Dr. FitzPatrick objectively changed the anatomy of structures beyond the arm, including the clavicle. Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008); *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). These symptoms interfere with his ability to perform routine activies, and contributed to the imposition of significant permanent work restrictions. Admittedly, the question of causation is confounded by the June 2022 MVA. But the aforementioned issues were documented before the MVA, including in Dr. Peterson's May 24, 2022 report. While the accident may have caused some temporary increase in Claimant's neck pain, the persuasive evidence shows the lion's share of Claimant's proximal symptoms are related to the admitted shoulder injury.

B. TTD benefits after April 5, 2022

Judge Lamphere awarded TTD benefits commencing April 14, 2021. Once commenced, TTD benefits "shall continue" until the occurrence of a terminating event enumerated in § 8-42-105(3)(a). Those terminating events include reaching MMI and being released to return regular employment.

Respondents terminated TTD benefits effective April 6, 2022, based on Dr. Bogart's opinion that Claimant was at MMI and could return to work with no restrictions. Although Claimant argues Claimant could not have performed his regular work at that time, that is immaterial because the declaration of MMI was an independent basis for termination of TTD. Any ATP has the authority to put a claimant at MMI, and there is no requirement of a prior treatment relationship or in-person evaluation. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *Rosten v. City of Durango*, W.C. No. 5-128-609 (September 8, 2022). The ALJ lacks jurisdiction to question Dr. Bogart's determination that Claimant was at MMI on April 6, 2022.

However, Dr. Peterson subsequently determined Claimant was not at MMI as of May 24, 2022, referred Claimant for more evaluations and treatment, and reimposed work restrictions. Respondents have conceded that Claimant is entitled to reinstatement of TTD benefits on May 24, 2022, and continuing until he was put at MMI by Dr. Murray.

C. 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). 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). 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). 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). 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 failed to prove entitlement to a general award of medical benefits after MMI. No treating or examining provider has recommended any ongoing treatment related to the work injury. Dr. Cebrian's opinion that Claimant requires no maintenance care is persuasive. Claimant is not a candidate for surgery, additional injections, or other active interventions. He completed PT and has been instructed in a home exercise program. He has not been prescribed medication for any injury-related condition for well over a year. Although Claimant remains symptomatic, there is no persuasive evidence he needs treatment to relieve symptoms or prevent deterioration of his condition.

D. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained noticeable disfigurement as a direct and proximate result of his industrial injury. The ALJ concludes Claimant should be awarded $1,500 for disfigurement.

E. Medicaid Lien

If Medicaid pays for medical treatment for which a third party is liable, the Colorado Department of Health Care Policy and Financing has an automatic stautory lien for all such payments. Section 25.5-4-301(4), (5) C.R.S. The respondents are liable for medical treatment from authorized providers reasonably needed 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 respondents are also liable for diagnostic testing where such tests have a reasonable prospect of defining the claimant's condition and suggesting a course of treatment. *E.g., Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (February 23, 2012).

Besides showing that treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). "Authorization" refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Authorization is distinct from whether treatment is "reasonably needed" within the meaning of § 8-42-101(1)(a). *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals

made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

The mere fact that respondents deny a claim does not automatically entitle the claimant to select their own physicians. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Unless the ATP refuses to treat based on lack of authorization or advises the claimant to follow up with their personal providers, the respondents are not liable for treatment the claimant pursues outside the chain of referral. *E.g.*, *Ruybal v. University of Colorado Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988); *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008).

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). However, once the emergency has ended, the claimant must notify the employer of the need for continuing medical treatment and the employer then has the right to select a physician. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

As found, Medicaid paid medical expenses for which Respondents are liable. However, the March 9, 2023 lien notice from HCPF includes expenses that are not recoverable as part of Claimant's workers' compensation claim. The valid elements of the Medicaid lien are outlined in Findings of Fact Nos. 49-60 and will not be repeated here. For ease of reference, the parties may refer to the attached "Appendix A," wherein the charges that must be reimbursed by Respondents have been identified with a green checkmark.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on a 16% whole person impairment rating. Insurer may take credit for any PPD benefits previously paid in this claim.

2. Insurer shall pay Claimant TTD benefits, at the admitted rate of $333.33 per week, from May 24, 2022 through November 21, 2022.

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

4. Claimant's claim for TTD benefits from April 6, 2022 through May 23, 2022 is denied and dismissed.

5. Insurer shall pay Claimant $1,500 for disfigurement.

6. Claimant's claim for medical benefits after MMI is denied and dismissed.

7. Insurer shall reimburse the Colorado Department of Health Care Policy and Financing for injury-related expenses paid by Medicaid as set forth in the findings of fact and conclusions of law herein.

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

DATED: November 17, 2023

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that a spinal cord stimulator trial should be approved as reasonable and necessary maintenance medical treatment for Claimant's workers' compensation claim.

FINDINGS OF FACT

1. Claimant sustained a crush injury to his right leg on May 4, 2012, and underwent eight surgeries in 2012 for repair of a tibial metadiaphyseal fracture and a transverse process fracture. Dr. Caroline Gellrick was Claimant's primary provider who placed Claimant at maximum medical improvement (MMI) on February 27, 2014. Dr. Gellrick noted at MMI that an EMG/nerve conduction study occurred on September 3, 2013, showed a peroneal nerve impairment. Claimant had a thermography and a triple phase bone scan on September 25, 2013, which were negative for CRPS. Claimant continued treatment under maintenance care.

2. On April 6, 2017, Claimant saw Dr. Dominique Schiffer at UC Health. He complained that his ankle and foot felt like they were in a vice all day and that he would experience pain that extended from the lateral part of the knee and which had a sensation similar to a person stabbing a sharp rod down into his foot. Claimant also complained that he had sensitivity in his anterior shin area. Dr. Schiffer observed some hair changes, but suspected those were attributable to Claimant's multiple operations and skin grafts. She also noted Claimant's skin was warm and dry with no color changes observed. Nevertheless, Dr. Schiffer diagnosed Claimant with chronic regional pain syndrome (CRPS). Due to failure of more conservative treatments, Dr. Schiffer recommended lumbar sympathetic blocks under fluoroscopic guidance with a consideration of a spinal cord stimulator if the blocks were not effective.

3. On May 4, 2017, Dr. Kathy McCranie performed a record review to address the recommendation for lumbar sympathetic blocks. Dr. McCranie reviewed Claimant's medical history and noted that Claimant's symptoms did not meet the Budapest criteria for determining whether Claimant had CRPS. Specifically, she noted that although Claimant exhibited allodynia, Claimant did not exhibit other criteria, such as loss of range of motion or hair changes. Dr. McCranie felt that the

blocks were indicated only if Claimant had CRPS, which, in her opinion, Claimant did not.

4. Claimant nevertheless underwent lumbar sympathetic blocks on September 11, 2017.

5. The next day, Respondents sent a letter to Dr. Schiffer requesting clarification as to Dr. Schiffer's CRPS diagnosis. Dr. Schiffer responded, explaining that Claimant exhibited pseudomotor symptoms of sweating and swelling, allodynia, vasomotor signs of temperature symptoms compared to his other extremity, and "hair loss on the normal skin on his injured leg, i.e., not the scarred area."

6. Dr. McCranie performed a second record review on October 5, 2017, to address the need for a second lumbar sympathetic block. Dr. McCranie noted that the first injection was not beneficial. Dr. McCranie also noted that the Medical Treatment Guidelines allow for diagnostic sympathetic blocks for patients who exhibit clinical signs of CRPS, but that "further complex treatment would require a confirmed diagnosis." Because Claimant's medical records documenting his first visit with Dr. Schiffer did not demonstrate symptoms consistent with the Budapest criteria, Dr. McCranie felt that a CRPS diagnosis was not appropriate.

7. Dr. Schiffer referred Claimant to Dr. George Schakaraschwili for an infrared stress thermogram and automatic testing battery, including QSART, to evaluate Claimant for CRPS. Claimant saw Dr. Schakaraschwili on October 27, 2017, and complained of occasional ankle swelling with pain throughout his right lower leg that varied between five and nine out of ten. On examination, Dr. Schakaraschwili observed no swelling or discoloration, no abnormal skin temperatures, no trophic skin, hair, or nail changes (other than the skin grafts), and no hyperhidrosis. Claimant did complain of decreased sensation in the common peroneal and saphenous nerve distributions, and he exhibited decreased ankle range of motion. Dr. Schakaraschwili performed the infrared stress thermogram and the QSART. The thermogram showed no areas of significant temperature asymmetry, except where it corresponded with a skin graft. The QSART also showed findings consistent with a low probability for CRPS, noting only some sweat output asymmetry in an area corresponding to the saphenous nerve. Based on Claimant's history of diagnostic studies and Claimant's non-response to the lumbar sympathetic block, Dr. Schakaraschwili felt that Claimant's pain did not originate from the sympathetic nervous system and that Claimant did not meet the diagnostic criteria for CRPS.

8. Dr. Schiffer reviewed the results of Dr. Schakaraschwili's evaluation on November 7, 2017, and referred Claimant for an evaluation for a spinal cord stimulator.

9. Claimant underwent an IME with Dr. McCranie sometime around January 2, 2018. On physical examination, Dr. McCranie noted that Claimant exhibited decreased vibratory sensation in the right ankle and decreased pinprick sensation in the medial and lateral lower leg, as well as "right first web space and lateral right foot with allodynia along the right anterior tibialis and first web space in the right lower leg." Dr. McCranie observed no swelling in the lower extremities, though she noted the right ankle girth to be 0.5cm greater than the left. She observed no discrepancies in hair growth, besides the scarring, and no sudomotor or temperature asymmetries or discoloration of the skin.

10. Dr. McCranie ultimately opined that Claimant did not have CRPS, given the absence of symptoms consistent with the Budapest criteria, but instead had right peroneal neuropathy. Dr. McCranie felt that Claimant did not need any further diagnostic testing nor any changes to Claimant's treatment, aside from some possible modifications of his prescription medications.

11. Claimant returned to Dr. Schiffer on May 18, 2018. Dr. Schiffer observed that Claimant exhibited allodynia and hyperalgesia on the anterior and medial aspects of his right leg and the dorsum of his right foot as well as temperature asymmetry between his right and left feet. After thirty minutes of standing in the room while barefoot, Claimant's right foot was palpably cooler on the entire medial aspect and mild edema developed around his medial malleolus. Dr. Schiffer felt that Claimant's symptoms continued to meet the Budapest criteria for CRPS and that there was no other diagnosis that would better explain his symptoms.

12. Dr. David Orgel performed a record review of the matter on June 18, 2019, to address an out-of-state referral for a CRPS pain management and Dr. Schiffer's determination that Claimant's symptoms met the Budapest criteria for CRPS. Dr. Orgel opined that Claimant did not have CRPS based on "a negative response to a sympathetic block in September 2017, normal triple-phase bone scan in October 2017, a negative thermogram in October 2017, and a negative QSART in October 2017." Dr. Orgel agreed with Dr. McCranie that Claimant more likely had peripheral neuropathy.

13. An MRI was performed on March 3, 2020. The impressions were of no evidence of active CRPS.

14. On March 12, 2020, the parties held a *Samms* conference with Dr. Schiffer to discuss her referral of Claimant to an out-of-state treater in California. Dr. Schiffer agreed to instead refer Claimant back for repeat CRPS testing with Dr. Schakaraschwili.

15. Claimant returned to Dr. Schiffer on July 24, 2020. Dr. Schiffer continued to recommend a trial of a spinal cord stimulator, a peripheral nerve stimulation, or sympathetic nerve blocks. Dr. Schiffer also recommended that Claimant continue with his pain medications, use of his TENS unit, acupuncture, massage, and behavioral therapy to help manage the pain-related stress.

16. Claimant underwent an IME with Dr. Kathleen D'Angelo on March 17, 2021, to address, in part, the reasonableness and necessity of Claimant's ongoing medical treatments.[1] Ultimately, Dr. D'Angelo concluded that none of Claimant's ongoing maintenance medical treatment was reasonable and related and that the only reasonably necessary ongoing maintenance would be weaning off the pain medications.

17. Claimant returned to Dr. Schiffer on July 30, 2021. In her report, Dr. Schiffer wrote: "Will refer back to Dr. Rzasa Lynn for a second opinion as to how to get [Redacted, hereinafter JM] a stimulator trial. He is becoming more and more despondent regarding his pain; feeling no one can help him. I strongly believe he should have a stimulator trial. If it were to work, it would be life changing for JM[Redacted].

18. Claimant saw Dr. Yamamoto of Peak to Peak Family Medicine for the first time on October 1, 2021. Dr. Yamamoto reviewed Claimant's medical history and addressed the issue of CRPS and the need for a spinal cord stimulator. Dr. Yamamoto felt that it would not be beneficial, though he reserved the right to change his opinion "depending on [Claimant's] presentation."

19. On October 14, 2021, Claimant underwent another IME with Dr. McCranie. Dr. McCranie was again asked to address the question of whether Claimant's symptoms arose from CRPS. Dr. McCranie again opined that Claimant's presentation did not meet the diagnostic criteria for CRPS. Despite Claimant reporting allodynia and hyperalgesia, Dr. McCranie noted that Claimant exhibited no diagnostic asymmetries in skin temperature or color nor any edema, unusual sweating, or trophic changes. Regarding Dr. Schiffer's finding that Claimant exhibited edema and temperature changes after standing in bare feet for thirty minutes, Dr. McCranie felt that findings when seen at rest were more indicative of CRPS. Claimant's mild decreases in dorsiflexion and hyperalgesia, per Dr. McCranie, were explained by Claimant's history of peroneal neuropathy. Therefore, Dr. McCranie opined that Claimant was not a candidate for a spinal cord stimulator.

20. Claimant underwent additional testing with Dr. Schakaraschwili on December 9, 2021. The electrodiagnostic testing showed a severe peroneal nerve injury. The

[1] Dr. D'Angelo primarily addressed in the report questions related to an injury unrelated to this matter.

thermogram was normal and identical to the prior study, and the QSART was similarly low probability for CRPS, though there were some temperature abnormalities. Claimant also had a negative bone scan and a negative response to sympathetic blocks. Dr. Schakaraschwili opined that Claimant likely had a peripheral nerve injury and was likely experiencing neuropathic pain from that injury, and he further opined that Claimant was not a candidate for a spinal cord stimulator, though he could be a candidate for a peripheral nerve stimulator.

21. On August 27, 2022, Claimant saw Dr. Roberta Anderson-Oeser at Premier Spina & Pain Institute at Dr. Yamamoto's referral. Dr. Anderson-Oeser noted that Claimant had significant pain in a right peroneal nerve distribution. She noted Dr. Schakaraschwili's recommendation for an evaluation for a peripheral nerve stimulator. Therefore, Dr. Anderson-Oeser recommended visits with a Dr. Boyd as well as Dr. Giancarlo Barolat for evaluation for a peripheral nerve stimulator trial.

22. Claimant saw Dr. Barolat on October 19, 2022. Claimant reported that his pain would spread into the proximal thigh as well as into the posterior aspect of the thigh and that he noticed swelling of the leg, particularly at the ankle. Claimant also reported that none of the medications (Percocet, Butrans, morphine, and Lyrica) had been very effective in relieving his pain, and that he had not weaned himself off of all the medications. On physical examination, Dr. Barolat observed that Claimant had significant atrophy in the right leg and an area of severe allodynia on the anterior aspect of his lower leg. Dr. Barolat felt that lumbar sympathetic blocks would not be indicated since the symptomology had been present for so long and the blocks would have an "extremely low yield." Dr. Barolat considered peripheral nerve stimulation versus nerve root stimulation and spinal cord stimulation. He felt that because Claimant's distribution of pain involved the sciatic nerves and femoral nerves as well, Claimant's pain was too widespread to be amenable to stimulation limited to peripheral nerves and that stimulation of the L3 through S1 nerve roots would be more effective. Dr. Barolat also felt that such an approach would be reasonably necessary to possibly prevent further spread of CRPS. He based his opinions on his "experience with 10,000 neurostimulation implants over the past 40 years." Dr. Barolat submitted to Respondents a request for prior authorization for a trial spinal cord stimulator pursuant to Rule 16, W.C.R.P.

23. In response to Dr. Barolat's Rule 16 request for prior authorization, Respondents obtained a medical record review performed by Dr. Albert Hattem on November 15, 2022. Dr. Hattem noted that the Medical Treatment Guidelines for chronic pain (Rule 17, W.C.R.P., Exhibit 9) provided that the only indications for a spinal cord stimulator is where a patient has persistent radicular pain after lumbosacral spine surgery or has CRPS type 1 that failed conventional medical management. Dr.

Hattem, noting Claimant's multiple negative diagnostic tests for CRPS, felt that Claimant was not a candidate for a spinal cord stimulator.

24. Dr. Barolat submitted a new request for prior authorization for the same procedure on February 6, 2023. In an addendum to his request, he clarified his findings regarding the Budapest criteria:

> "The patient does report severe pain with allodynia in the right lower extremity. He also reports temperature asymmetry and skin color changes. He also reports weakness and decreased range of motion. At the time of the examination, there was clear evidence of allodynia. There was also evidence of decreased range of motion as well as weakness in the right lower extremity. The patient therefore qualifies for the clinical Budapest criteria for the diagnosis of complex regional pain syndrome."

25. Respondents submitted Dr. Barolat's second request for another medical record review by Dr. Hattem. Dr. Hattem's opinion remained unchanged, despite Dr. Barolat's findings regarding the Budapest criteria. Dr. Hattem reiterated that Claimant had undergone diagnostic studies on three separate occasions, all of which were negative for CRPS.

26. Respondents also obtained an opinion from Dr. McCranie regarding Dr. Barolat's second request. Based on her review of the additional records, Dr. McCranie felt that a spinal cord stimulator trial was not appropriate as "CRPS has been definitively ruled out."

27. Dr. McCranie also performed another IME in this case on July 25, 2023. At that examination, Claimant reported that all of his symptoms had worsened in that they had spread up his right leg into both hips, including his left knee. On physical examination, Dr. McCranie observed an area of hypersensitivity in the scarred area and in the distribution of the peroneal nerve. She observed no mottling or other skin color changes, no trophic changes in the hair, nails, or skin, and no sudomotor changes, edema or temperature changes. Dr. McCranie again opined that Claimant did not meet the criteria for CRPS, citing the following:

> Thermogram negative x 3 (09-23-2013, 10-27-2017, and 12-02-2021).
> Triple-phase bone scan negative for CRPS, 09-25-2013.
> QSART negative x 2 (10-27-2017, 12-02-2021).
> No benefit from lumbar sympathetic blocks, 09-20-2017.

28. Dr. McCranie reiterated that she felt the symptoms were limited to a peroneal nerve distribution.

29. Dr. Barolat testified that he was a specialist and board-certified neurosurgeon in both the United States and Italy. He had treated neuropathic pain and CRPS since 1985 and had treated, ever since then, thousands of patients with those conditions, including implantation of ten thousand nerve stimulators. Regarding his diagnosis of Claimant, Dr. Barolat testified that this was based on Claimant's history and his examination of Claimant.

30. In Dr. Barolat's opinion, Claimant sustained a major nerve injury to his right leg, which in turn developed into CRPS. He clarified that CRPS would cause allodynia—a condition where even the slightest touch will cause terrible pain—as well as atrophy and temperature changes. Dr. Barolat clarified that the spinal cord stimulator trial that he recommended would involve surgical implantation of electrical leads and that the leads would be removed if Claimant did not obtain a benefit from the stimulation.

31. Dr. Barolat was questioned regarding the Medical Treatment Guidelines on chronic pain. Dr. Barolat testified that there had been advancements in research regarding CRPS since the current version of the Medical Treatment Guidelines on chronic pain were issued in 2017. Specifically, there were advancements in understanding the underlying mechanisms of CRPS and more evidence that the condition is maintained by the autoimmune system.

32. Dr. Barolat was also questioned regarding Claimant's negative response to the sympathetic nerve blocks. Dr. Barolat explained that a high percentage of patients with CRPS will not respond to nerve blocks long after their injury, even if they would have responded early on. He felt that there was no significance in Claimant's non-response to nerve blocks, and, furthermore, outside of the workers' compensation context physicians do not give much value on those tests.

33. Although several other providers and examining physicians opined that Claimant's nerve injury was limited to the peroneal nerve, Dr. Barolat disagreed. Dr. Barolat testified that he believed that all the spinal nerve roots from L3 down were involved, as well as several other nerves noted in his report, as Claimant's complaints involved symptoms in dermatomes corresponding with those other non-peroneal nerves. And, although Claimant's injury involved the peroneal nerve, it was Dr. Barolat's testimony that a peroneal nerve injury can spread and develop into CRPS.

34. Claimant testified at hearing on his own behalf as well. Claimant testified that the pain was making it hard for him to focus or concentrate, that he would grind his teeth, and that he could not lift his right foot, and would sometimes catch the foot on things, causing him to fall. He testified that he was absolutely interested in

pursuing the spinal cord stimulator trial and had discussed the risks with Dr. Barolat.

35. Respondents called Dr. McCranie to testify at hearing. Dr. McCranie testified that she specialized in physical medicine and rehabilitation and pain management, and that part of her practice for the past thirty years has involved treating patients with CRPS.

36. Dr. McCranie also testified that she participated in the 2017 draft of the Medical Treatment Guidelines on chronic pain and CRPS, though her focus was on chronic pain portion. She testified that the Medical Treatment Guidelines are based on medical literature and research, and she disagreed with Dr. Barolat that only in Colorado do medical providers consider the Medical Treatment Guidelines. Furthermore, Dr. McCranie testified that she agreed with the statement in the Medical Treatment Guidelines that "Clinical criteria alone are not dependable nor necessarily reliable and require objective testing." She explained that doctors may disagree on what they observe when examining a particular patient.

37. Regarding Claimant's presentation, Dr. McCranie testified that one should look at the Budapest criteria. She observed that one of the criteria is whether the symptoms can be explained by another diagnosis. She felt that Claimant's symptoms could be explained by another diagnosis: peroneal neuropathy.

38. The Medical Treatment Guidelines, define spinal cord stimulation as "the delivery of low-voltage electrical stimulation to the spinal cord or peripheral nerves to inhibit or block the sensation of pain.[2] The system uses implanted electrical leads and a battery powered implanted pulse generator."

39. The Guidelines also note that "spinal cord stimulation devices have been FDA approved as an aid in the management of chronic intractable pain of the trunk and/or limbs, including unilateral and bilateral pain associated with the following: failed back surgery syndrome, intractable low back pain and leg pain."[3]

40. The Guidelines also describe a "spinal cord neurostimulation screening test" as one in which "a temporary lead is implanted at the level of pain and attached to an external source to validate therapy effectiveness." The test is positive if the patient either experiences a 50% reduction in radicular or CRPS pain and "demonstrates objective functional gains."

[2] Rule 17, W.C.R.P., Exhibit 7.
[3] Rule 17, W.C.R.P., Exhibit 9.

41. The Guidelines also address peripheral nerve stimulation. They recommend peripheral nerve stimulation for "proven occipital, ulnar, median, and other *isolated* nerve injuries."[4]

42. Dr. Barolat credibly testified and opined in his reports that Claimant's nerve injuries have spread beyond Claimant's peroneal nerve. It is well documented in Dr. Schakaraschwili's October 27, 2017 examination that Claimant's symptoms involved the saphenous nerve dermatome as well. Indeed, the peroneal and saphenous nerves arise from entirely separate nerve plexus, the sciatic and femoral respectively.[5] Based on this, Dr. Barolat credibly opined that peroneal nerve stimulation would not be sufficient to address Claimant's symptoms. This appears consistent with the Medical Treatment Guidelines recommendation that peripheral nerve stimulation be only for isolated nerve injuries. While it is not entirely clear whether Claimant in fact has CRPS, the Court finds it more probable than not that Claimant's nerve injuries have spread beyond the peroneal nerve distribution.

43. Based on Dr. Barolat's extensive experience treating neuropathic injuries and CRPS and his extensive experience with roughly ten thousand nerve stimulator implants, the Court finds Dr. Barolat credible insofar as he opined that stimulation of the L3 through S1 nerve roots would be more effective than focusing solely on the peroneal nerve and insofar as Dr. Barolat opined that a trial of a spinal cord stimulator would be reasonably necessary to address Claimant's ongoing lower extremity symptoms and to prevent possible CRPS from spreading.

44. To the extent that Drs. McCranie, Hattem, Schakaraschwili, and Yamamoto find the negative CRPS diagnostic tests to be the end of the analysis when addressing the need for a spinal cord stimulator trial, and to the extent they recommend only peripheral nerve stimulation, the Court finds those opinions less persuasive than those of Dr. Barolat.

45. Weighing the potential benefits of such a trial and the failure of other reasonable modalities in managing Claimant's pain, allodynia, and other symptoms, against the invasiveness of the treatment and the possibility of complications, the Court finds the spinal cord stimulator trial recommended by Dr. Barolat to be reasonably necessary maintenance medical care.

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[4] Rule 17, W.C.R.P., Exhibit 9 (emphasis added.).
[5] *AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, Table 48.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Benefits – Spinal Cord Stimulator Trial

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

Even where a respondent has admitted for ongoing maintenance medical benefits, it is not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997). Further, when the respondent contests liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1998); *Snyder*, 942 P.2d 1337.

As found above, the Court finds that the spinal cord stimulator trial recommended by Dr. Barolat is reasonably necessary to address Claimant's ongoing lower extremity symptoms and to prevent possible CRPS from spreading. Therefore, Claimant has proven by a preponderance of the evidence that the spinal cord stimulator trial recommended by Dr. Barolat is reasonably necessary maintenance medical treatment.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the spinal cord stimulator trial recommended by Dr. Barolat.

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 17, 2023.

Stephen J. Abbott
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-227-822-001

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage of $337.50.

2. The correct date of injury is November 16, 2022.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with Employer on November 16, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his November 16, 2022 industrial injury.

3. If Claimant sustained a compensable injury, whether a penalty should be assessed against him for late reporting pursuant to §8-43-102(1)(a) C.R.S.

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 11, 2023 until terminated by statute.

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

FINDINGS OF FACT

1. Employer is a temporary staffing agency that employed Claimant. On November 15, 2022 Claimant was assigned to begin work at a [Redacted, hereinafter BR] facility that processes propane tanks. His job duties involved preparing propane tanks for washing and reuse.

2. On November 16, 2022 Claimant began work at 4:00 a.m. Claimant explained he was removing a full propane tank from a pallet. As he twisted, the tank fell and he experienced pulling in his back. Claimant advised his Floor Supervisor [Redacted,

hereinafter DM] of his injury. DM[Redacted] took Claimant into the office of BR's[Redacted[Production Supervisor [Redacted, hereinafter JS].

3. Claimant testified he received a list of providers and selected Concentra Medical Centers. He planned to visit the Broomfield Concentra Center, but first drove from the BR[Redacted] facility in Henderson to his home in Thornton. Claimant took an Advil and laid down at home. He then called Employer, stated he did not need to visit Concentra, and would return to work on Monday.

4. The record reveals that Claimant has a significant history of lower back symptoms radiating into his legs. On June 28, 2018 Claimant presented to Salud Family Health Centers for sciatic pain, radiating from his right buttock down to his toes, that had been continuing for one year. He also reported lateral right thigh pain in his hip area. Claimant's medications included Neurontin 600 mg. X-rays revealed partial lumbarization of the S1 vertebral body with fusion on the left. Providers referred Claimant to physical therapy, orthopedics, and for an MRI.

5. On March 10, 2022, or approximately eight months before his alleged work injury, Claimant visited the emergency department at St. Anthony North for right-sided lumbar pain and radiculopathy. Coughing exacerbated his chronic, right lumbar back pain. A lumbar MRI revealed a 2 mm left sub articular-foraminal disc protrusion resulting in impingement on the emerging left S1 nerve root and severe left lateral recess narrowing. The imaging also reflected severe left and moderately severe right foraminal narrowing at L5-S1. Providers recommended repeat MRIs for further evaluation. Claimant's medical history included "chronic pain disorder" of the back.

6. Claimant returned to the BR[Redacted] facility on the following Monday, November 21, 2022, and worked for the first three days of the week. He was off work on Thursday and Friday for the Thanksgiving Holiday. Claimant testified he continued to complete his regular duties after returning to work, but could not perform as usual. He specifically had to take breaks by sitting down to rest his back and leg every 30-40 minutes. Claimant remarked he struggled to keep up with his job duties until he stopped working at the BR[Redacted] facility on November 30, 2022. Claimant acknowledged he had prior back problems, but his November 16, 2022 symptoms were on a different side.

7. JS[Redacted] testified that on November 16, 2022 Claimant reported he dropped a propane tank and tried catch it, but it struck him in the knee. In fact, Claimant was wearing a sleeve from a propane tank around his knee. JS[Redacted] inquired whether Claimant desired medical attention, but he declined. He gave Claimant a list of authorized medical providers and Claimant chose Concentra-Thornton Parkway. JS[Redacted] asked Claimant to complete a written injury form and interviewed Claimant's co-workers. The completed form stated Claimant had injured his knee, but did mention his lower back. Claimant then left the BR[Redacted] facility to obtain medical care, but later called JS[Redacted] stating he did not wish to receive any treatment and would return to work on Monday.

8. JS[Redacted] explained that he continued to check on Claimant during the following week. Claimant remarked he was feeling fine and continued to wear a self-

fashioned knee brace. JS[Redacted] commented that Claimant then advised him he would be ending his job assignment on November 30, 2022. Claimant specified that the cold and physical nature of the work, combined with his previous medical issues, were too much for him. JS[Redacted] explained he could accommodate light duty, even for temporary employees, if an individual provided a physician's note of restrictions. However, Claimant never requested light duty. JS[Redacted] emphasized that he did not receive any information that Claimant had injured his lower back. On January 11, 2023, when Claimant reported his lower back injury to Employer, JS[Redacted] completed a written statement.

9. On December 1, 2022, approximately two weeks after his alleged work injury and the day following his last day at BR[Redacted], Claimant presented to Salud Family Health Centers for a telehealth visit. He reported lower back pain with radiating symptoms down the left lower extremity. Claimant commented he "has had Sx's intermittently for years." He also stated he felt pins and needles in his feet. Notably, the report did not include any mention of a work injury. Claimant remarked he had been sent for an MRI and ortho/spine referral back in 2018 but was unable to schedule at the time. His current medications included Neurontin 600 mg. Providers referred Claimant for an MRI and to a spine specialist.

10. On December 15, 2022 Claimant returned to Salud for an evaluation. He again did not report any work injury.

11. On January 4, 2023 Claimant underwent a lumbar spine MRI at St. Anthony North without contrast. He completed an MRI safety screening form and stated his injury occurred on Saturday, November 19, 2022. Claimant did not list Employer as a responsible party, but only included himself and Medicaid. Claimant had also undergone previous lumbar imaging on March 10, 2022. In comparing the MRIs, Craig Stewart, M.D. noted the following impressions:

1. Overall similar appearance of multilevel lumbar spondylosis and scoliosis when compared with 3/10/22.
2. Multifactorial multilevel spinal stenosis again noted, greatest at the L3-L4 and L4-L5 levels although generally similar in the interval.
3. Multilevel neural foraminal stenosis, appearing most severe but unchanged on the left at L5-S1.
4. Degenerative endplate Modic changes at L3-L4 and L4-5, most likely degenerative/reactive and similar to prior, although a potential source of pain.

12. On January 9, 2023 Claimant again attended a telehealth visit at Salud. Claimant did not mention a work injury. He stated he had not been contacted by Spine West, despite a referral, and did not call for an appointment.

13. On January 11, 2023 Claimant reported his back injury to Employer. He visited Gordon Arnott, M.D. at Concentra in Broomfield. Claimant recounted that he was unloading the top level of propane tanks from approximately six feet high onto a conveyor belt. As he was lowering a tank, he twisted to his left to place it on a conveyor belt.

Claimant then experienced a strong, sharp pain similar to a muscle pull in his lower back. He denied any significant past medical history. On physical examination, Dr. Arnott noted a 10% loss of strength in the left lower extremity due to radicular symptoms and a positive straight leg raising test. He diagnosed Claimant with a lumbar strain and radicular leg pain. Dr. Arnott documented that his objective findings were consistent with the history and/or work-related mechanism of injury/illness. He referred Claimant for physical therapy, prescribed medications, and assigned restrictions of only working from one to four hours each day.

14. On January 16, 2023 Claimant returned to Dr. Arnott at Concentra. Dr. Arnott recorded that Claimant was a little better since his last visit after taking prescribed steroids. Claimant had not yet started physical therapy, but due to the severity of the left leg radicular symptoms, Dr. Arnott referred him for a neurosurgical consultation. Dr. Arnott again determined his objective findings were consistent with the history and/or work-related mechanism of injury/illness. He modified Claimant's work restrictions to only working up to four hours per day, sitting 95% of the time on a chair with a back, and performing only office work.

15. After two physical therapy visits, Claimant visited Michael Rauzzino, M.D. for a neurosurgical consultation on February 13, 2023. Dr. Rauzzino noted Claimant underwent an MRI on January 4, 2023 that had been compared to a study from March 30, 2020 or approximately seven months prior to the present injury. He commented that the findings were unchanged. Claimant denied prior back problems and was not sure why the MRI had been performed. Dr. Rauzzino stated it appeared Claimant had a chronic back condition. He concluded there was some question regarding the validity of the claim, but assuming Claimant experienced a flare-up of an unknown chronic condition, Dr. Rauzzino recommended an epidural steroid injection. Respondents subsequently denied Claimant's claim and he received no further treatment from either Concentra or any other Workers' Compensation provider.

16. On June 7, 2023 Claimant underwent an Independent Medical Examination (IME) with Lawrence A. Lesnak, D.O. Claimant explained that he was injured when he lowered an approximately 35-pound propane tank onto a waist-level conveyor belt and felt an acute "pull" in his left, lower back region. He remarked that he had never experienced any type of lower back symptoms and denied any prior lower back injuries. Dr. Lesnak determined that, although there may have been some type of incident on November 16, 2022, there was insufficient evidence to support any type of medical diagnoses as a result of the occupational incident. Notably, Claimant's reported history was inconsistent with the medical records that Dr. Lesnak reviewed. Specifically, Claimant suffered "symptomatic lumbar spine pathology that clearly predated 11/15/2022, for which he had undergone multiple medical evaluations in the past including an MRI on 03/10/2022, and a lumbar spine x-ray in June 2018." Dr. Lesnak commented there was no documented evidence of significant changes on the January 4, 2023 lumbar spine MRI when compared to the March 10, 2022 imaging. He explained that, although mild, soft tissue strain injuries may not be identified on lumbar spine MRIs, if Claimant had any injuries to his discs, nerve roots, facet joints, or lumbar vertebral bodies, they would have been clearly visible.

17. Dr. Lesnak testified at the hearing in this matter. He maintained that Claimant did not sustain any injury to his lower back on or November 16, 2022. Dr. Lesnak explained that Claimant denied any back or leg symptoms prior to mid-November, 2022. He reasoned that Claimant's denial of any prior back treatment or issues was inconsistent with the medical records. Moreover, Claimant's current complaints were identical to his symptoms at the time of his pre-injury treatment as noted in the records of Salud in June of 2018 and St. Anthony North in March of 2022. Dr. Lesnak also detailed that the March 10, 2022 MRI showed significant spinal pathology. He emphasized Claimant's spinal pathology predated his alleged November 16, 2022 work injury, it remained the same, and he was symptomatic both before and after the propane tank incident. Furthermore, Claimant did not report any work injury to the first medical provider he visited after the accident, and the December 1, 2022 report noted Claimant had experienced lower back pain radiating into the left lower extremity intermittently for years. Finally, Claimant's testing results from a psychosocial screening questionnaire suggested an underlying somatoform disorder in which patients commonly exaggerate or embellish symptoms.

18. Claimant has failed to establish it is more probably true than not that he suffered a lower back injury during the course and scope of his employment with Employer on November 16, 2022. Initially, Claimant explained that, as he was lowering a propane tank from a pallet onto a waist-level conveyor belt, he felt an acute pull in his lower back region. In contrast, JS[Redacted] testified that on November 16, 2022 Claimant reported he dropped a propane tank and tried to catch it, but it struck him in the knee. Claimant completed a written injury form specifying that he had injured his knee, but did mention his lower back. He did not obtain medical treatment, but returned to work at the BR[Redacted] facility on the following Monday. On December 1, 2022, approximately two weeks after his alleged work injury and one day after he ceased working at BR[Redacted], Claimant visited Salud and reported lower back pain with radiating symptoms down the left lower extremity. Claimant commented he had experienced the symptoms intermittently for years, but did not mention any specific injury on November 16, 2021. In fact, the record reveals that Claimant has suffered a chronic history of lower back symptoms for years.

19. Claimant also did not provide accurate and complete information to his Workers Compensation medical providers. He did not disclose his prior medical history to four different providers. In contrast to his medical records, Claimant simply denied any prior lower back injuries or treatment. Furthermore, Claimant sustained a felony conviction in the last five years for failing to register as a sex offender by falsifying his address. He also did not disclose his conviction in his answers to interrogatories. The felony specifically impeaches Claimant's credibility under §13-90-101, C.R.S. and CRE 608(B) due to his lack of character for truthfulness.

20. Dr. Lesnak also persuasively maintained that Claimant did not suffer any lower back injury on November 16, 2022. He explained that Claimant denied any back or leg symptoms prior to mid-November, 2022. However, Claimant's denial of any prior back treatment or issues was inconsistent with the medical records. Moreover, Claimant's current complaints were identical to his symptoms at the time of his pre-injury treatment as noted in the records from Salud in June of 2018 and St. Anthony North in March of

2022. Dr. Lesnak also emphasized that Claimant's spinal pathology predated his alleged November 16, 2022 work accident, his condition remained the same, and he was symptomatic both before and after the propane tank incident. Furthermore, Claimant did not report any work injury to the first medical provider he visited after the incident, and the December 1, 2021 report noted Claimant had experienced lower back pain radiating to the left lower extremity intermittently for years. Finally, Claimant's testing results from a psychosocial screening questionnaire suggested an underlying somatoform disorder in which patients commonly exaggerate or embellish symptoms. Dr. Lesnak summarized that, although there may have been some type of incident on November 16, 2021, there was insufficient medical evidence to support any type of medical diagnoses caused by the event.

21. Based on Claimant's lack of credibility, his pre-existing back condition, the credible testimony of JS[Redacted], and the persuasive opinion of Dr. Lesnak, it is unlikely that Claimant suffered a lower back injury while working at the BR[Redacted] facility on November 16, 2021. Accordingly, Claimant has failed to demonstrate that his work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. His Workers' Compensation claim is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

8. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with Employer on November 16, 2022. Initially, Claimant explained that, as he was lowering a propane tank from a pallet onto a waist-level conveyor belt, he felt an acute pull in his lower back region. In contrast, JS[Redacted] testified that on November 16, 2022 Claimant reported he dropped a propane tank and tried to catch it, but it struck him in the knee. Claimant completed a written injury form specifying that he had injured his knee, but did mention his lower back. He did not obtain medical treatment, but returned to work at the BR[Redacted] facility on the following Monday. On December 1, 2022, approximately two weeks after his alleged work injury and one day after he ceased working at BR[Redacted], Claimant visited Salud and reported lower back pain with radiating symptoms down the left lower extremity. Claimant commented he had experienced the symptoms intermittently for years, but did not mention any specific injury on November 16, 2021. In fact, the record reveals that Claimant has suffered a chronic history of lower back symptoms for years.

9. As found, Claimant also did not provide accurate and complete information to his Workers Compensation medical providers. He did not disclose his prior medical history to four different providers. In contrast to his medical records, Claimant simply denied any prior lower back injuries or treatment. Furthermore, Claimant sustained a felony conviction in the last five years for failing to register as a sex offender by falsifying his address. He also did not disclose his conviction in his answers to interrogatories. The felony specifically impeaches Claimant's credibility under §13-90-101, C.R.S. and CRE 608(B) due to his lack of character for truthfulness.

10. As found, Dr. Lesnak also persuasively maintained that Claimant did not suffer any lower back injury on November 16, 2022. He explained that Claimant denied any back or leg symptoms prior to mid-November, 2022. However, Claimant's denial of any prior back treatment or issues was inconsistent with the medical records. Moreover, Claimant's current complaints were identical to his symptoms at the time of his pre-injury treatment as noted in the records from Salud in June of 2018 and St. Anthony North in March of 2022. Dr. Lesnak also emphasized that Claimant's spinal pathology predated his alleged November 16, 2022 work accident, his condition remained the same, and he was symptomatic both before and after the propane tank incident. Furthermore, Claimant did not report any work injury to the first medical provider he visited after the incident, and the December 1, 2021 report noted Claimant had experienced lower back pain radiating to the left lower extremity intermittently for years. Finally, Claimant's testing results from a psychosocial screening questionnaire suggested an underlying somatoform disorder in which patients commonly exaggerate or embellish symptoms. Dr. Lesnak summarized that, although there may have been some type of incident on November 16, 2021, there was insufficient medical evidence to support any type of medical diagnoses caused by the event.

11. As found, based on Claimant's lack of credibility, his pre-existing back condition, the credible testimony of JS[Redacted], and the persuasive opinion of Dr. Lesnak, it is unlikely that Claimant suffered a lower back injury while working at the

BR[Redacted] facility on November 16, 2021. Accordingly, Claimant has failed to demonstrate that his work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. His Workers' Compensation claim is thus denied and dismissed.

ORDER

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

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

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

DATED: November 20, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-212-306-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Employer 1, Employer 2 and Employer 3 had notice of the hearing.

II. Whether Respondents were uninsured Employers as if July 15, 2022.

III. Whether Claimant proved by a preponderance of the evidence who her employer was on July 15, 2022.

IV. Whether Claimant proved by a preponderance of evidence that she was injured in the course and scope of her employer with one or all of the employers on July 15, 2022.

IF THE CLAIM IS DEEMED COMPENSABLE:

V. Whether Claimant has shown by a preponderance of the evidence whether she was entitled to medical benefits related to her July 15, 2022 work related injuries.

VI. Whether Claimant proved by a preponderance of the evidence who her authorized medical providers are.

VII. Whether Respondents should pay Claimant interest on unpaid medical bills.

VIII. Whether Claimant proved what her average weekly wage (AWW) was at the time of the injury.

IX. Whether Claimant has shown that she was entitled to temporary total disability benefits (TTD), including statutory interest on any unpaid TTD.

X. Whether Claimant has proven by a preponderance of the evidence that Respondents should be penalized for failure to admit or deny the claim and for failure to carry workers' compensation insurance.

XI. Whether Respondents should post a bond to secure payment of benefits due.

PROCEDURAL HISTORY

A Prehearing Conference Order was issued by Prehearing Administrative Law Judge Gregory W. Plank on June 5, 2023 listed as employers Employer 1, Employer 2, and Employer 3.

Claimant filed an Application for Hearing dated June 13, 2023 on issues that included compensability, medical benefits that were authorized, reasonably necessary and related, temporary total and partial disability benefits, and multiple penalties. In addition, Insurer was listed. No response was filed by any of the listed employers or the listed insurer.

OAC sent Respondents a Notice of Hearing dated June 30, 2023 to their agent, Employer 2.

At the end of the hearing, Counsel requested that the record remain open for submission of multiple photographs, which were received, with the exception of one of Employer 2's truck. Counsel indicated that the photograph showed Employer 2's license plate and a sticker stating "Jesus is Glory."

FINDINGS OF FACT

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

A. Jurisdiction:

1. Respondents failed to appear at the hearing. Claimant provided a history of proper service to Employer 1 and Employer 2, including showing that Employer 1's website has Employer 2's email address, which is the same as the one listed on the Notice of Hearing.

2. This ALJ confirmed with the OAC staff that no emails were returned or bounced back to the OAC after emailing the NOH.[1]

3. Claimant sent multiple other pleadings to Employer 1, Employer 2 and Employer 3 without response, including notice of the Application for Hearing, notice of prehearing conferences, and the Notice of Hearing, as well as exchange of the exhibits.

4. Employer 1's website shows that they were a masonry company in the Denver Metro area and for all of Colorado. They noted they had greater than 17 years' experience and knowledge. They offered services in brick, block, stone, think brick, "tuckpointing," and all kinds of repairs. The only contact information for Employer 1, other than completing the online contact form, was Employer 2's email address.

5. Counsel indicated that he did not receive any undelivered mail from Employer 1 or Employer 2 but did receive returned mail sent to Employer 3. This was made as an offer of proof and was accepted as this is also shown in the evidence. As found, Employers 1 and Employer 2 had notice of the hearing.

6. Employer 3 listed Employer 2's name on a business card, showing Employer 2 as the company's "Project Manager." As found, Employer 3 had notice by virtue of the fact that Employer 2 was provided notice of the hearing, the pleadings listed Employer 3 and Employer 2 had notice of the hearing.

7. This ALJ found and concluded that this ALJ had jurisdiction to hear the matter as proper notice was sent to all three employers, by virtue of listing Employer 2's contact information on Employer 1's website and Employer 3 listing Employer 2 on their business card, respectively, as their contact agent.

B. Insurance Coverage:

[1] See Exhibit 15.

8. Claimant conceded that Insurer, who was listed on the pleadings, including the Application for Hearing, did not insure either Employer 1 nor Employer 3. Claimant moved to strike the listed Insurer. This ALJ granted the motion and issued a Bench Order on October 11, 2023 noting that Insurer was not a party to this claim and ordered they be removed as a party in this matter.

9. Claimant advised this ALJ that the Colorado Uninsured Employer's Fund's third party administrator had notice of the hearing and declined to participate.

C. Generally

10. Claimant was 35 years old at the time of the hearing and went to the 9th grade in Maracaibo, Venezuela.

11. Claimant was hired by her supervisor, Employer 2. She found Employer 2 through Facebook when looking for employment in Denver, under an employment group page for the Denver area with different employers advertising, including Employer 1. It provided a phone number, which Claimant contacted and spoke directly with Employer 2.

12. This phone number was the same number Claimant had in her string of texts on [Redacted, hereinafter WP], including Employer 2's profile picture that was generated by her supervisor. She generally communicated with Employer 2 via WP[Redacted] daily with regard to her work. While the profile picture changed, Claimant captured a photo of him before the hearing took place. She would have had a different picture of Employer 2 on his boat at his home address, if she had taken a screen shot a few weeks earlier, as the profile picture had recently changed. At the time of the hearing, Claimant showed this ALJ her WP[Redacted] page for Employer 2, which then contained a meme or caricature of a laughing man instead of a photograph of Employer 2.

13. Employer 2 lived off of [Redacted, hereinafter WV] in Denver. Employer 2 took Claimant there once, when they went to exchange a vehicle, because he had to have his truck repaired. Employer 2 indicated to Claimant that this WV[Redacted] address was his home. She identified the cream colored house in the picture at Exhibit 17 as Employer 2's house. Approximately 5 days before the hearing, Claimant's husband took a picture of Employer 2 working at an address on [Redacted, hereinafter CH], in Denver.

14. Claimant spoke with Employer 2 about the work advertised as masonry type of work, and Employer 2 offered her a job. He advised her that it would be hard work in construction. He advised Claimant that he would pay her $18.00 an hour for 40 hours a week. She was just newly arrived in the state, so needed and she accepted the work. She worked Monday through Friday though she sometimes also worked on Saturdays at least twice in the four weeks she worked before her accident, working six hours though Employer 2 only paid her straight time, instead of overtime.

15. Claimant started work on June 6, 2022. [Redacted, hereinafter GO] was the one to train her, including how to mix and carry the gravel, how to fill the cinder blocks, and how to use the pulley system to get the gravel to where she was working. Employer 2 was her boss the whole time she worked in construction up to the day she had her accident.

16. Employer 2 paid her cash every Friday and when she worked Saturdays, he would pay her for the Saturday work separately. Employer 2 was the only one to hand her and pay her the cash. She never noticed any signs of a construction company on the job sites and never thought to look for any. Neither had she ever asked Employer 2 what his full name was. After the accident happened a co-workers gave her a card with Employer 2's name on it, identifying Employer 2 as the project manager for Employer 3. However, it had a different phone number and email than the one that Employer 2 had given her or that she had taken off the Facebook page and website. Employer 2 worked with her every day, supervising her work.

D. The Accident:

17. On July 15, 2022 Claimant reported to work at approximately 7:30 a.m. Claimant was working for Employer 2 at [Redacted, hereinafter ET]. She had been on the job for approximately one month when the accident happened. She was four floors up, working on the scaffolding, where the parking lot was. The scaffolding board was sitting on top of another board. She had been putting the gravel in the cinder blocks, filling them in. She had asked her supervisor if the scaffolding was safe because she did not think the scaffolding was secured correctly as there were two boards on the scaffolding instead of just the one that they generally had. She was assured that it was.

18. Claimant was in a hurry, because her boss had to turn in the project. At approximately 10 a.m. on July 15, 2022 Claimant was in the process of reaching to grab a bucket full of gravel while standing on the scaffolding when the overlapped boards of the scaffolding separated, tilting and Claimant fell four stories to the ground, hitting various parts of her body on the scaffolding, including another level of the scaffolding and a couple of the X supports of the scaffolding, ricocheting on the way down. She believed that the fact that she hit so many areas of the scaffolding, slowed her fall down to the concrete ground, saving her from worse injuries. Claimant lost consciousness when she hit the ground. Employer 2 sent her to the hospital and told her that he would pay for her medical costs.

19. When Claimant was taken to the emergency room at Denver Health, another gentleman went to the hospital though he was not Spanish speaking and Claimant could not communicate with him. Employer 2 declined to accompany her to the hospital. She was told that the other man had gone because Employer 2 did not want to go and Employer 2 sent him to the hospital to check on Claimant.

20. In the fall of July 15, 2022, Claimant injured her face, teeth causing a tooth prosthesis to brake, hurt her coccyx, low back, arms, shoulders, neck, hip, left leg, mid back and neck. She also had substantial bruising on the right leg (middle and outer portions including the quadriceps), left foot and ankle as well as her left forearm. She stated that Denver Health released her with a neck brace. They did not give her any treatment for the shoulders, low back and leg. She had not yet seen the dentist to get her missing tooth fixed, despite trying, because it was too costly, approximately $2,000.00, and she could not afford it. She was seen at Denver Health but had not returned there since July 19, 2022 as they told her how much she had to pay before she

could receive more care and she did not have the money to pay. Her bills have since gone to collections.

E. Claimant's Testimony:

21. Claimant stated that she wished to have further medical and dental care to cure or relieve her of the effects of her injuries.

22. Claimant stated that she had not been able to work since the accident due to her continuing symptoms and injuries, which she has yet been able to have addressed by medical providers. When she was released from the emergency room she was released with a walker due to her low back and lower extremity pain. When she returned to Denver Health, they provided her with narcotic medication due to the severe pain she was experiencing after the fall.

23. She continued to have pain, including in the neck, shoulders, left leg and low back, on both sides. She had difficulty with standing, crouching, leaning over, straightening up, sitting due to pain in her coccyx, and moving from side to side. She had neck pain, especially in the dawn hours, which was constant. She had a gash of approximately 5 inches on her left leg but they did not do any stitches. She also continued with symptoms in her left leg, with numbness in her shin area, pain in the left knee and felt a pulsing pins and needles sensation. She had pain in her bilateral shoulders, right greater than left, especially going into the shoulder blades when lifting. She used acetaminophen and an ointment to alleviate some of the pain.

24. Claimant considered going to a chiropractor but was concerned about making her problem worse. She took multiple pictures, including of the all the bruising. They showed, in order, bruising on her right hip and upper right leg to her mid thigh, her neck brace, the cut on her left shin, extensive bruising on her right upper arm, arm pit, elbow and forearm, while in the hospital. There were subsequent pictures of her shin healing, but Claimant stated she had some infection after she was released and it took some time to have the swelling go down and heal. There were also pictures of her arm bruises, that were significantly discolored, as well as all the abrasions, and pictures of the healing bruises on her right upper thigh, left ankle, and left thigh.

25. Claimant took screen shots of Employer 1's website, which showed her supervisor's email address.

26. Claimant recalled seeing Employer 1's Facebook page that had multiple pictures of Employer 2 working, and several job sites, showing work Employer 2 had purportedly completed. Employer 2 also advised Claimant that he was a preacher and had invited Claimant to attend one of his services, but she never accepted and he never gave her an address where he preached.

F. Division Records:

27. The Division's demand letter for the employer to state a position dated May 18, 2023, as well as the letter demanding the employer file their statement admitting or denying the claim dated June 21, 2023, were sent to Insurer, not to any of the employers listed as parties. While this ALJ understands that Insurer had an obligation to provide the

notices to the correct employer, Insurer did not insure neither Employer 1 nor Employer 3.

28. Records from Insurer did indicate that Insurer insured Employer 1 beginning July 25, 2022.

G. Medical Records:

29. On July 15, 2022 Claimant was seen in the emergency room at Denver Health by Gabriel Siegel, MD. Claimant was brought in by ambulance, complaining of back pain and lower extremity joint pain following a fall from 30 feet. Dr. Siegel noted that EMS reported Claimant was witnessed to fall/jump from a 30 foot scaffolding that she was working on, landing on her feet, and then falling to the ground. Claimant had complained of back pain, and knee, hip, and ankle pain. There were no head strikes or loss of consciousness (LOC). She had abrasions to her right arm, and no appreciable deformities. EMS administered Fentanyl *en route*.

30. Dr. Siegel noted that "[P]er chart review: patient transferred with known acute fracture to right base of dens extending into the R side with displacement and fracture fragment in the narrowing of the canal. No intracranial abnormalities."[2] He reported that Claimant complained of severe pain, but no abdominal pain, chest pain, fever or shortness of breath. She was negative for fever, facial swelling, dysuria, seizures or confusion. He noted that she was positive for arthralgias and back pain. He noted bony tenderness of the lumbar spine and sacral midline tenderness, a laceration of the left anterior shin, motor weakness and multiple abrasions. She had a GCS[3] score of 15. There were at least 40 diagnostic or x-ray images taken. He noted that the MRIs of the spine showed no evidence of acute injuries to the cervical, thoracic or lumbar spine, though there were small disc bulges at L1-L2 and L2-L3. X-rays of the forearms, elbows, wrists, chest, left ankle and foot, right foot, knees, pelvis, were all normal. CT of the chest showed a lucency suspicious for small pneumothorax[4] but no additional acute traumatic injury to the chest, abdomen or pelvis or thoracolumbar spine. CT of the head and the cervical spine were normal. Her trauma shock index was normal. Another provider noted that Claimant had sensory weakness present.

31. Dr. Leah S. Warner admitted Claimant for observation. She took a history of "34 y.o. female who presented as trauma activation after fall >30ft." She noted that initial CT scans failed to show acute injuries, and she had stable labs. The patient continued to have neck pain and lower extremity paresthesias and they ordered an MRI. She was transferred to the Clinical Decision Unit (CDU) for imaging, pain control and final recommendations. On exam she noted claimant was positive for tenderness to palpation in the midline lumbar spine, with multiple abrasions. She was neurologically intact. Multiple other providers evaluated Claimant while in the emergency room and the CDU, while awaiting test results, mainly imaging.

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[2] Nowhere else in the records were there mentions of a fracture.

[3] This ALJ infers that GCS stands for Glasgow Coma Scale and that a 15 indicates the highest level of consciousness.

[4] This ALJ infers that pneumothorax of the chest means that air had leaked into the chest cavity between the lungs and the chest wall, which is generally caused by trauma to the chest.

32. She was administered acetaminophen, ibuprofen, Toradol and Ativan. All imaging were normal except for the chest CT. Claimant had lab work performed showing Claimant was negative for any illegal or legal but control substances. She was seen by physical therapy who recommend a four point walker and she was advised to establish care with a primary care provider (PCP). Multiple other instructions were given in Claimant's native language, Spanish. She was discharged home with a front wheel walker, with diagnoses of fall, back pain and left leg pain.

33. Claimant was evaluated at the outpatient Hospital Transition Clinic at Denver Health on July 19, 2022 for acute back and left leg pain. They took a history of Claimant having been seen in the emergency room on July 15, 2022, following a 30 foot fall from a fourth floor, landing on her feet. They noted she had multiple imaging though noting only a pneumothorax on CT of the chest. They noted Claimant had swelling and bruising on her lateral left knee, had been using ice to the area, and continued to have nightmares of the fall. Claimant reported that her employer's insurance would be responsible for the treatment. Nurse Amy J. Witte noted that Claimant had coccyx pain, pain in multiple sites on her body and psychosocial problems. On exam she noted that Claimant had a large laceration to the left shin, no signs or symptoms of infection and swelling/bruising to the left knee and arm. She stated Claimant was having difficulty sleeping at night due to the pain. She recommended Claimant acquire a donut pillow and provided narcotic medication (oxycondone-acetamenophen) and a return to the clinic for further evaluation.

34. A billing statement from Denver Health showed a balance of $894.10 (after adjustments, $2,554.56 prior to adjustments) for specified dates of service from July 15, 2022 to July 19, 2022, including for CT scans, X-Rays, and the Clinic visit as well as an outpatient service. As found, these charges were related to the July 15, 2022 work related injury.

H. Conclusive Findings:

35. As found, Claimant provided sufficient notice to Employer 1, Employer 2 and Employer 3 that she filed a workers' claim for the injuries she sustained during the fall on July 15, 2022 and that a hearing was scheduled to determine whether one or all of the employers listed on the pleadings were liable for workers' compensation benefits in this matter.

36. As found, Claimant's counsel's representation that they contacted Employer 2 multiple times without response are deem reliable. Further, communications from Insurer showed that they did not cover any of the three employers for workers' compensation. They did confirm that they covered Employer 1 as of July 25, 2022. As found, Employer 1, Employer 2 and Employer 3 do not have policies for workers' compensation in the State of Colorado.

37. As found, Employer 2 was Claimant's employer. Employer 2 hired Claimant, trained Claimant and supervised Claimant. Employer 2 was Claimant's only point of contact and he, himself, paid Claimant for the work she performed. As found, Employer 2 was not only Claimant's supervisor or manager, he was Claimant's employer.

38. As found, Claimant established that she was injured in the course and scope of her employment working for Employer 2 on July 15, 2022, while filling blocks with gravel on the fourth floor of a building when the scaffolding failed and she plummeted to the ground, hitting her body on multiple structures of the scaffolding.

39. As found, Claimant has shown that Employer 1 and Employer 3 are one and the same and that Employer 2 was the Project Manager and supervisor for both. Employer 3's card with Employer 2's name supported this conclusion. Further, Employer 1's website also had Employer 2 as their contact person. However, it is uncertain whether Employer 2 owned Employer 1 and Employer 3 or if they were separate entities. As found and concluded, there is insufficient evidence that Claimant was working for either Employer 1 or Employer 3 at the time of the July 15, 2022 accident. The issue of whether Employer 1 or Employer 3 were actually Claimant's employers or were statutory employers is reserved for future determination.

40. As found, Employer 1, Employer 2 and Employer 3 were not insured for workers' compensation in the Colorado. Division sent Insurer a request for a statement to admit or deny the claim. Insurer provided confirmation that they did not insure Employer 1, Employer 2 or Employer 3 on July 15, 2022. In fact, the evidence showed that a policy for insurance commenced as of July 25, 2022 and that there was no coverage as of July 15, 2022. None of the listed employers provided Division with any information regarding insurance.

41. As found, Claimant was attended at Denver Health emergency room on July 15, 2022. Claimant's care was related to the injuries sustained during the fall off the scaffolding. Denver Health provided the emergency care and was authorized as the emergency provider.

42. As found, Claimant continued to have ongoing symptoms and injuries related to the fall of Jul 15, 2022 which have been left untreated at the time of the hearing. Claimant was credible and continued to require medical care. As found, Claimant showed that she was entitled to reasonably necessary and related medical care related to the July 15, 2022 work injury.

43. As found, Denver Health outpatient clinic declined to provide her with further treatment unless she paid for her care. This was deemed a refusal of the provider to treat Claimant for her work related injuries caused by the fall of July 15, 2022.

44. As found, Employer 2 knew or should have known that Claimant fell four floors and was taken to the hospital emergency room for care as Employer 2 was a witness to the fall. As found, Employer 2 should have provided a designated provider list and failed to do so. As found, Claimant was entitled to select her treating provider and Claimant selected Sander Orent, M.D. to be her authorized treating provider (ATP). As found and concluded, Claimant showed by a preponderance of the evidence that Dr. Orent is Claimant's ATP.

45. As found, Claimant's average weekly wage was $720.00 and her temporary total disability benefits rate was $480.00. This was calculated based on an hourly rate of $18.00 per hour multiplied by 40 hours a week. The Claimant's testimony regarding her

overtime hours was not sufficiently persuasive to increase this average weekly wage calculation.

46. As found, Claimant was unable to work following her injury due to her multiple injuries, specifically to her low back and left lower extremity. Claimant showed that she was entitled to temporary total disability since the date of her injury until terminated by law.

47. As found, Respondent Employer 2 failed to admit or deny Claimant's claim. Claimant is entitled to any penalties for Employer 2's failure to admit or deny the claim.

48. As found, Employer 2 failed to carry workers' compensation insurance and is penalized for failure to insure.

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

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See Industrial Commission v. Riley, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See Bodensieck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. Arenas v. ICAO, 8 P.3d 558 (Colo. App. 2000). Assessing weight,

credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. University Park Care Center v. Industrial Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. Cordova v. ICAO, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See Burnham v. Grant, 24 Colo. App. 131, 134 P. 254 (1913); see also Heinicke v. ICAO, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. Colorado Springs Motors, Ltd. v. Industrial Commission, 441, P.2d 21 (Colo. 1968).

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

B. Jurisdiction

Claimant established that this ALJ had jurisdiction to hear the matter. Pursuant to Sec. 8-43-103(2) (2) "administrative law judges employed by the office of administrative courts shall have jurisdiction at all times to hear and determine and make findings and awards on all cases of injury for which compensation or benefits are provided by articles 40 to 47 of this title." *Dee Enterprises v. Industrial Claim Appeals Office*, 89 P.3d 430, 437 (Colo. App. 2003) (ALJ may not exercise jurisdiction, exert any powers, perform any duties, or assume any authority unless the right is granted by statute). See also *Lewis v. Scientific Supply Co., Inc.,* 897 P.2d 905, 908 (Colo. App. 1995).

Section 8-43-211(1), states in pertinent part that "[A]t least thirty days before any hearing, the office of administrative courts in the department of personnel shall send written notice to all parties by regular or electronic mail or by facsimile." In this case, OAC sent Respondents a Notice of Hearing dated June 30, 2023 to their agent, as demonstrated by the Claimant's testimony that she was hired by Employer 2 as well as Employer 1's website identification of Employer 2's email address and Employer 3's card showing Employer 2 as their "Project Manager." The NOH showed all three employers as listed in the pleading. Notice was also appropriately provided to Insurer. Lastly, no emails were returned to the Office of Administrative Courts. Therefore, it was determined that this ALJ had proper jurisdiction to address the issues set for hearing.

C. Claimant's Employer on July 15, 2022

Claimant credibly testified that she contacted Employer 2 by responding to a Facebook notice of employment which listed Employer 1 but provided Employer 2's email address. Employer 2 communicated with Claimant by WP[Redacted] for all the work they performed. Employer 2 hired Claimant and agreed to pay her, and actually handed over personally all wages to Claimant. Employer 2 was the one to train her and supervised

her work. Claimant was not made aware of any statutory employers or other companies under which they may have been working. As found, Employer 2 was Claimant's employer of injury on July 15, 2022.

There was persuasive evidence that Employer 2 was associated with Employer 1. This ALJ cannot conclude on the available evidence that Employer 2 was an owner of said company, but he clearly represented to the world through Employer 1's website that he was a representative of that company as Employer 1 listed Employer 2's email address. However, there are no contracts of hire, no social media communications, paychecks, or other documentation in the record available at this time to conclude that Employer 1 was Claimant's employer or a general contractor for Employer 2. The issue of whether Employer 1 was an employer or a statutory employer is specifically reserved for future determination.

There was persuasive evidence in the form of a business card that Employer 2 was associated with Employer 3. This ALJ cannot conclude on the available evidence that Employer 2 was an owner of said company, but he clearly represented to the world through his business card that he was a representative of that company. However, there are no contracts of hire, no WP[Redacted] communications, paychecks or other documentation available at this time to conclude that Employer 3 was Claimant's employer or statutory employer. This issue is specifically reserved for future determination.

D. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

As found, Claimant was in the course and scope of her employment for Employer 2 on July 15, 2022 while filling blocks with gravel on the fourth floor of a structure when she fell off a scaffolding, falling approximately 30 feet, hitting multiple scaffolding structures or braces and falling on the ground on her feet. Claimant was working for Employer 2 under a contract of hire on that day. Claimant injured multiple body parts, including her neck, back, left hip, lower extremities, and bilateral shoulders and arms. The fall also caused nightmares. Claimant proved that it was more likely than not she suffered compensable work related injuries on July 15, 2022 while working for Employer 2 and was entitled to compensation.

E. Medical Benefits, Authorized Provider and Penalties

Employer 2 is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; Sims v. Industrial Claim Appeals Office, 797 P.2d 777 (Colo. App. 1990). A claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106

(Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra,* 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office,* 121 P.3d 328, 330 (Colo.App.2005).

As found, Claimant was attended at Denver Health emergency room on July 15, 2022 and July 19, 2022. Claimant's care was related to the injuries sustained during the fall off the scaffolding. Denver Health provided the emergency care and was authorized as the emergency provider.

As found, Claimant continued to have ongoing symptoms and injuries related to the fall of Jul 15, 2022 which have been left untreated at the time of the hearing. Claimant credibly testified that she continued to require medical care. As found, Claimant showed that she was entitled to reasonably necessary and related medical care related to the July 15, 2022 work injury. As found, Denver Health outpatient clinic declined to provide Claimant with treatment unless she paid for her care. This is deemed a refusal of the provider to treat Claimant for her work related injuries caused by the fall of July 15, 2022.

As found, Employer 2 knew or should have known that Claimant fell four floors and was taken to the hospital emergency room for care as Employer 2 was a witness to the fall. As found, Employer 2 should have provided a designated provider list and failed to do so. As found, Claimant was entitled to select her treating provider and Claimant selected Sander Orent, M.D. to be her authorized treating provider (ATP). As found and concluded, Claimant showed by a preponderance of the evidence that Dr. Orent is Claimant's ATP for her work related fall of July 15, 2022 injuries.

As further found, Employer 2 is financially responsible for the payment of Claimant's medical expenses, including the Denver Health bill in the amount of $894.10 for the outstanding medical benefits to Denver Health.

There was insufficient evidence to establish whether Claimant was due and owing interest for failure to pay medical benefits. This issue is reserved.

F. 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." Claimant was hired by Employer 2 who paid Claimant $18.00 per hour, for 40 hours a week. As found,

Claimant's average weekly wage was $720.00 at the time of the July 15, 2022 work related accident.

G. Temporary Total Disability Benefits and Interest

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) 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) (citing *Ricks v. Industrial Claim Appeals Office,* P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

As found, Claimant's credible testimony, the photographic evidence and the medical records from Denver Health show that Claimant had a significant accident and injuries as a result of the July 15, 2022 fall. As further found, Claimant's testimony was persuasive that she had not been able to return to work following the fall of July 15, 2022 and through the date of the hearing. Nothing in the records showed that Claimant had been placed at maximum medical improvement and Claimant credibly testified that she had been unable to access further medical care due to the expense involved. Claimant showed that she was entitled to TTD as a consequence of the work related accident of July 15, 2022 while in the employ of Employer 2, until terminated by law.

Claimant was also due interest on all benefits which were not paid when due pursuant to statute at the rate of 8% per annum. Temporary total disability benefits and interest through the date of the hearing were calculated as follows:

[Redacted, hereinafter calculation chart]

Therefore, Claimant is owed $32,604.74 in past due TTD, including interest, through October 10, 2023. From the day of the hearing forward, Claimant continued to be owed TTD benefits until terminated by law but would only be entitled to interest until benefits were paid and up to date.

H. Insurance, and Penalties for Failure to Admit or Deny Benefits and to Insure under the Act

Section 8-41-404(1)(a), C.R.S. states as follows

> …every person performing construction work on a construction site shall be covered by workers' compensation insurance, and a person who contracts for the performance of construction work on a construction site shall either provide, pursuant to articles 40 to 47 of this title, workers' compensation coverage for, or require proof of workers' compensation coverage from, every person with whom he or she has a direct contract to perform construction work on the construction site.

Sec. 8-41-404(5) states:

> (a) "Construction site" means a location where a structure that is attached or will be attached to real property is constructed, altered, or remodeled.
>
> (b) "Construction work" includes all or any part of the construction, alteration, or remodeling of a structure.
>
> …
>
> (c) "Proof of workers' compensation coverage" includes a certificate or other written confirmation, issued by the insurer or authorized agent of the insurer, of the existence of workers' compensation coverage in force during the period of the performance of construction work on the construction site.

Pursuant to Sec. 8-43-203(1)(a), C.R.S. "The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division … whether liability is admitted or contested."

As found, Claimant's supervisor and Employer 2 knew of the accident as he was a witness to Claimant's fall from the scaffolding and saw Claimant off on the ambulance to the hospital. He also sent a representative to the hospital to check on Claimant. As found, Employer 2 had notice of the accident and failed to file any documents with Division to either admit or deny the claim or provide any insurance information. Neither did Employer 2 contact Claimant to provide insurance information after the accident despite advising her that he would make sure her bills would be paid. As found, Respondents failed to secure insurance coverage for workers' compensation and failed to comply with the Act.

Under Sec. 8-43-203(2)(a), C.R.S. if notice of insurance is not filed with Division, the statute states that:

> …the employer or, if insured, the employer's insurance carrier, as the case may be, may become liable to the claimant, if the claimant is successful on the claim for compensation, for up to one day's compensation for each day's failure to so notify; except that the employer or, if insured, the employer's insurance carrier shall not be liable for more than the aggregate amount of three hundred sixty-five days' compensation for failure to timely admit or deny liability. Fifty percent of any penalty paid pursuant to this subsection (2) shall be paid to the subsequent injury fund, created in section 8-46-101, and fifty percent to the claimant.

As found, Employer 2 was responsible to Claimant for failure to admit or deny and Claimant was entitled to penalties. Claimant was entitled to one day's compensation for their failure to insure. From July 16, 2022 through the date of the hearing of October 11,

2023, there were 453 days. However the statute limits the maximum penalty to 365 days. Claimant was entitled to 365 days' penalty in this matter for failure to admit or deny the claim. Claimant's daily rate was $68.57, which multiplied by 365 was a penalty in the amount of $25,028.05.

Sec. 8-43-408(5), C.R.S. in effect at the time of Claimant's July 15, 2022 injury provides,

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

The penalty for failure to insure only applies to indemnity benefits and does not encompass medical benefits. *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc.*, W.C. No. 4-155-231 (ICAO, Feb. 13, 1998). Statutory interest is not properly considered "compensation or benefits" within the meaning of Sec. 8-43-408(5), C.R.S. Interest is a statutory right intended to secure claimants the present value of benefits to which they were 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).

As found, Employer was not insured on Claimant's July 15, 2022 date of injury. Based on the preceding sections' calculation in the present Order, Employer 2 was required to pay Claimant $31,062.86 in TTD benefits. Twenty-five percent of $31,062.86 was $9,015.71. Accordingly, Employer 2 shall pay $9,015.71 in penalties to the Colorado Uninsured Employer Fund created in Sec. 8-67-105, C.R.S.

Pursuant to Sec. 8-43-408(2), C.R.S.

> [I]n all cases where compensation is awarded under the terms of this section, the director or an administrative law judge of the division shall compute and require the employer to pay to a trustee designated by the director or administrative law judge an amount equal to the present value of all unpaid compensation or benefits computed at the rate of four percent per annum; or, in lieu thereof, such employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado.

In this matter, Employer 2 shall 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. Alternatively, "employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado." Employer 2 may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

As found, this order awards ongoing benefits so the present value calculated in this order does not limit the amount Employer 2 will be required to pay. Claimant was owed $32,604.74 in TTD and interests benefits through October 10, 2023 and penalties of $25,028.05. The CUE Fund was owed $9,015.71 in penalties and Denver Health was owed at least $894.10 for a total of $67,542.60. Employer 2 shall deposit with the trustee of the Division the amount of $67,542.60 plus 4% interest per annum.

ORDER

IT IS THEREFORE ORDERED:

1. Employer 2 was Claimant's employer on July 15, 2022.

2. Claimant sustained compensable injuries to multiple body parts, as stated above, including but not limited to the neck, bilateral shoulders, arms, back, left hip, lower extremities, head and psychological sequelae, on July 15, 2022 during the course and scope of her employment with Employer 2.

3. Employer 2 shall pay Claimant's reasonably necessary and related medical benefits caused by the July 15, 2022 work related accident, including for Denver Health and Dr. Sander Orent, who was found to be an authorized treating provider. Further, if the Colorado Uninsured Employers' Fund designates a new provider pursuant to Rule 4-1, 7 CCR 1106-1[5] Employer 2 shall pay for the medical benefits under the new designated provider as well.

4. Claimant's average weekly wage was $720.00 and her temporary total disability benefits rate was $480.00.

5. Employer 2 shall pay Claimant TTD benefits from July 16, 2022 until terminated by law. Employer 2 shall pay interest on benefits due and owing at the statutory rate of 8% per annum. Benefits due and owing through the day prior to the hearing including October 10, 2023 were $32,604.74. TTD and interests continue to be due from October 11, 2023 until terminated by law and past due benefits are paid.

6. Employer 2 shall pay Claimant penalties for failure to admit or deny the claim in the maximum amount of 365 days for a total of $25,028.05.

7. Employer 2 shall pay $9,015.71 in penalties to the Colorado Uninsured Employer Fund created in Sec. 8-67-105, C.R.S.

8. In lieu of payment of the above compensation and benefits to Claimant and the CUE Fund, Employer 2 shall:

   a. Deposit the sum of $67,542.60, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of

[5] Rules Governing the Colorado Uninsured Employer Fund under the Workers' Compensation Act, Colorado Department of Labor And Employment, Division of Workers' Compensation, 7 CCR 1106-1 Title 8, Article 67.

Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee; or

b. File a bond in the sum of $67,542.60 with the Division of Workers' Compensation within ten (10) days of the date of this order:

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

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

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

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

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

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

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

12. Pursuant to Sec. 8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer 2 is solely liable and responsible for the payment of all medical costs related to Claimant's July 15, 2022 work injury.

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

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

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

DATED this 21st day of November, 2023.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-084-400-007

ISSUES

I. Whether Claimant has overcome the DIME opinion by clear and convincing evidence that he is not at MMI because he sustained a compensable injury to his right shoulder?

II. Whether Claimant has proven by a preponderance of the evidence that he sustained additional disfigurement of the left shoulder?

FINDINGS OF FACT

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

1. On September 23, 2017, while lifting a pipe that was stuck in the ground at work, Claimant was injured. E**x. W:514.** He was treated at Advanced Urgent Care, LLC the next day for off and on left shoulder pain, which was at a 2/10 but rose to a 5 when he moved the left shoulder. **Ex. C:054**. Claimant's neck and back were normal, and there were no right upper extremity or shoulder complaints. **Ex. C:054**.
2. An MRI Arthrogram of the left shoulder on October 25, 2017, requested by Julie Parsons, MD, showed abnormal pathology. **Ex. D:073**.
3. On September 28, 2017 and November 13, 2017, Claimant treated with Julie Parsons, MD, for left shoulder complaints only, and was released to full duty work. **Ex. C:057**.
4. Dr. Parsons referred Claimant to Thomas A. Mann, MD, who first evaluated Claimant on December 7, 2017. Claimant's complaints were regarding the left shoulder, although the right shoulder was mildly stiff at the extremes but had normal rhythm and good strength. **Ex. E:081**. Dr. Mann concluded that Claimant had a "left shoulder injury with acute-on-chronic appearance of significant cuff injury." **Ex. E:083**.
5. Claimant underwent left shoulder surgery by Dr. Mann on December 28, 2017. **Ex. F:162**.
6. On January 16, 2018, Dr. Mann saw Claimant post left shoulder operation, and instructed Claimant to wear his shoulder brace for any type of activity or when he is up and around. **Ex. E:088**. There was no mention of neck or right shoulder complaints.
7. Around seven weeks postop, on February 15, 2018, Claimant followed-up with Dr. Mann. Claimant was doing well, and only noted soreness and no regular pain. **Ex. E:090**. Eleven weeks postop, On March 15, 2018, were similar with approval of fairly limited lifting and pushing. **Ex. E:097**.
8. A physical therapy report dated April 3, 2018, recorded that Claimant "reports right hand got slammed in door 3/29/2018." **Ex. G:204**. Two days later, on April 5, 2018,

a physical therapy note states, “Patient reports that he had a fall in shower and broke right hand Patient reports that he did not hurt left shoulder with fall.” **Ex. G:206**.

9. On April 17, 2018, Dr. Mann reported that Claimant, “unfortunately broke his hand in the shower two weeks ago. He is also complaining of some right shoulder pain because he is using it more.” **Ex. E:098**. That same day, a physical therapy report states, “Patient reports that he is continuing to have more pain since he hurt his R hand (april 2nd) and has started having to use his L Upper extremity more.” **Ex. G:211**. “Patient has been having increase in shoulder pain and soreness at left upper extremity reports since breaking right hand and now using only left upper extremity.” **Ex. G:213**. “Patient having increased pain and difficulty with L upper extremity due to R hand injury. He reports that he has to use L upper extremity to shoulder bc he can not get cast wet.” **Ex. G:226**.

10. Despite what is documented in the medical records by multiple providers, Claimant testified that he did not sustain injuries to his right upper extremity after September 24, 2017. **TR. 40:4-9**. As a result, the ALJ does not find Claimant credible regarding the cause of his right shoulder pain.

11. During a visit on May 15, 2018, Dr. Mann noted that Claimant continued to have significant weakness and pain across the front of his clavicle into his pectoralis. **Ex. E:103**.

12. An MRI of the left shoulder on May 23, 2018, as requested by Dr. Mann, showed abnormal pathology evidencing a re-injury. **Ex. D:075**. On May 31, 2018, Dr. Mann noted that Claimant only had left shoulder pain, and a recurrent cuff tear with retraction and ongoing atrophy. **Ex. E:108**. Dr. Mann recommended another shoulder surgery. **Ex. E:110**.

13. Claimant underwent a second left shoulder surgery on August 15, 2018. **Ex. E:128; F:165**.

14. Claimant later complained of right shoulder and neck pain. **Ex. E.138**. Nevertheless, Dr. Parsons continued to identify the injured body part was the left shoulder. **Ex. C:070**.

15. On September 18, 2018, Claimant saw Dr. Mann because of “severe progression of right shoulder pain. He has been sweeping at work and this particular activity has flared up the shoulder to the point now that it is more severe than its operative side.” **Ex. E:143**. Dr. Mann wrote, “Given his chronic rotator cuff tear that was found in his left shoulder, I am suspicious he may have similar type of pathology in the right…” **Ex. E:147**.

16. Dr. Mann requested an MRI of the right shoulder, which was performed on September 22, 2018. **Ex. D:077**. The MRI showed abnormal pathology. **Ex. D:078**.

17. Mark S. Failinger, MD, saw Claimant on November 15, 2018, for a Respondent-sponsored IME. **Ex. A**. Dr. Failinger concluded that Claimant’s right upper extremity condition was unrelated to the September 23, 2017, industrial accident unless Claimant returned to work after surgery and was performing major lifting duties and tasks with only his right upper extremity. **Ex. A:012**. “It is fallacious reasoning to state

that a patient's opposite limb symptomatology is related to overuse of the opposite limb when favoring the injured limb." **Ex. A:012**.

18. Dr. Failinger also pointed out that there was no mention of any neck pain before the December 2017 visit with Dr. Mann, which was three months following the work accident. Thus, "it would appear that the neck symptoms were transient and likely due to cervical spine pathology rather than due to the work incident on 09-23-2017." **Ex. A:013**.

19. At the hearing, Dr. Failinger testified that sweeping with the right arm would not cause Claimant's preexisting right shoulder pathology to be symptomatic, unless he was sweeping at the shoulder level or above. **TR. 58:18-25**. Dr. Failinger also testified that throwing trash bags into a dumpster would not cause Claimant's preexisting pathology to be symptomatic unless they were extremely heavy bags, and he was throwing overhead all day long. **TR. 59:3-16**.

20. Dr. Failinger also stated that:

> In fact, he fell in the shower just a couple of weeks before the first report of right shoulder symptoms. He fell hard enough that he broke his right hand. And, you know, we can't say for sure that the shoulder was injured at that point, but there was no symptoms until that fall. And that raised a question of whether or not the fall created an acceleration of what was, no doubt, preexisting rotator cuff tearing in the right shoulder, the opposite shoulder, and that's possibly the reason he had developed symptoms after that fall.

TR. 55:9-19.

21. With respect to the right shoulder and neck being aggravated because he was using it more due to the left shoulder injury, Dr. Failinger testified that, "There is no supportable evidence in the medical literature of opposite side developing a pathology based on contralateral or other side injury or so-called favoring of the opposite extremity." **TR. 60:12-20**.

22. Dr. Failinger also testified that there was no relationship between the distal clavicle and the original fall. **TR. 62:17-20**.

23. Dr. Failinger's opinions are well reasoned and supported by the medical records. Thus, the ALJ finds Dr. Failinger's opinions to be credible and highly persuasive in concluding that Claimant's right shoulder condition is unrelated to overuse or to performing work tasks, such as sweeping or taking the trash out, after his 2017 left shoulder injury.

24. On November 27, 2018, Dr. Mann wrote that Claimant's right shoulder pain increased because of relying on the right shoulder now more than the left, contrary to his September 18, 2018, note. **Ex. E:148**. Dr. Mann also recorded Claimant's neck pain complaints, with radicular symptoms and numbness on the ulnar side of the hand. **Ex. E:148**.

25. Despite Dr. Mann indicating that Claimant's right shoulder pain increased because Claimant was relying more on his right side, Dr. Mann's statement seems to be merely

repeating Claimant's assertion, and not a medical opinion that Claimant injured his right shoulder due to overuse and needs medical treatment due to the alleged overuse. Thus, the ALJ does not find Dr. Mann's statement to be persuasive in determining Claimant allegedly overusing his right shoulder caused Claimant's right shoulder complaints and need for treatment.

26. A CT scan of Claimant's left shoulder, as requested by Dr. Mann, was performed on December 14, 2018, and showed mild glenohumeral joint arthrosis and superior migration of the humeral head with volume loss of the supraspinatus and infraspinatus muscles.

27. On December 19, 2018, Dr. Parsons discharged Claimant, stating that the "Injured employee requests treatment for a condition that is unrelated to the work injury: Patient is claiming a neck injury which is not the original injury of the Left shoulder which he did not start complaining of until after his second L shoulder surgery." **Ex. C:070**. Dr. Parsons also wrote, "Patient and his wife consistently request narcotic pain medication which has never been prescribed by me but by the surgeon; it has been explained at every visit that I am not prescribing any narcotics." **Ex. C:70**.

28. Claimant's care was transferred to Marc Steinmetz, MD, following discharge by Dr. Parsons. Dr. Steinmetz reported that it did not appear that Claimant had significant neck complaints or arm numbness or neck stiffness originally back in 2017. **Ex. H:287**. Dr. Steinmetz referred Claimant to a second opinion of pain management with Dr. Lesnak. **Ex. H:287**.

29. Lawrence A. Lesnak, DO, examined Claimant on January 31, 2019, and highlighted that Claimant's right shoulder symptoms started several months after the September, 2017 occupational incident. **Ex. I:313**. Dr. Lesnak also reported that claimant had a high level of somatic pain complaints. **Ex. I:313**.

30. Dr. Lesnak conducted an electrodiagnostic evaluation of Claimant's bilateral upper extremities and cervical spine, which was normal. **Ex. I:325**.

31. On May 21, 2019, Dr. Steinmetz reported his concern that Claimant was not likely to improve and possibly have more problems with further procedures. **Ex. H:295; 297; 300**.

32. Dr. Steinmetz placed Claimant at MMI on June 20, 2019, with impairment for the left shoulder only. **Ex. H:300**.

33. On October 28, 2019, Claimant was awarded $625.00 in disfigurement benefits by ALJ Michelle Jones. **Ex. GG:551**.

34. Richard Gordon, MD, conducted a DIME on November 6, 2019, and opined that Claimant was not at MMI because he should be evaluated for a left shoulder replacement. **Ex. B:031-042**.

35. On December 30, 2019, Dr. Steinmetz reported that Claimant continued to complain of left shoulder, neck, and new leg complaints. **Ex. H:304**.

36. By February 20, 2020, Dr. Lesnak wrote, "it appears that the patient has had a dramatic increase in his diffuse pain behaviors and nonphysiologic findings, which suggests severe psychosocial factors are currently present and affecting his

symptoms, his recovery, as well as his perceived function. His presentation was nearly completely nonphysiologic in nature today." **Ex. I:364**. He concluded that Claimant's right shoulder and neck complaints were unrelated to the September 24, 2017 claim. **Ex. I:368**.

37. Claimant's primary care was transferred to Annu Ramaswamy, MD, on April 29, 2020. **Ex. P:451**.

38. On Dr. Ramaswamy's recommendation, Claimant began treating with Philip Stull, MD, who recommended a performed a left reverse shoulder arthroplasty and distal clavicle excision on September 10, 2020. **Ex. N:436; 438; 445.** Following the left shoulder replacement procedure, Claimant dislocated the prosthesis and underwent a revision of left total shoulder prosthesis on October 2, 2020. **Ex. N:448**.

39. On January 13, 2021, Dr. Ramaswamy noted that Claimant's right shoulder hurt more than the left, and that Claimant was interested in right shoulder treatment. **Ex. N:474**. Claimant attributed the right shoulder pain as a result of compensation for the left shoulder. **Ex. N:476-477**.

40. Claimant was placed at MMI by Dr. Ramaswamy on April 7, 2021. He did not receive impairment for the neck or right shoulder. **Ex. N:483-484**.

41. Dr. Gordon saw Claimant on July 21, 2021, for a follow-up DIME. **Ex. B:043**. He opined that "there is no ratable injury to the right shoulder. There is no ratable injury to the cervical spine." **Ex. B:052**.

42. Claimant returned to Dr. Ramaswamy on January 4, 2023, at the request of his attorney for an evaluation. **Ex. N:492**. Claimant noted chronic pain in both shoulders, and despite a left shoulder replacement that clearly helped him (**Ex. N:480**), he told Dr. Ramaswamy that his left shoulder condition never changed. **Ex. N:492**.

43. For the purpose of disfigurement, Claimant's scar to his left shoulder was observed to be approximately 5 inches long, and approximately ½ inch wide. The scar is different in color than the surrounding skin. In addition, Claimant has some atrophy from his clavicle into his chest. Claimant was previously paid $625.00 in disfigurement benefits.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the

claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Off.,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Med. Ctr.,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Off.,* 12 P.3d 844 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has overcome the DIME by clear and convincing evidence that he is not at MMI because he sustained a compensable injury to his right shoulder?

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Off.*, 87 P.3d 261, 263 (Colo. App. 2004).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proven by clear and convincing evidence if, considering the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra*. When there are two or more reasonably supported medical opinions, the mere difference of opinion may, or may not, constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (Nov. 17, 2000).

Here, Claimant suffered an injury to his left shoulder in September 2017. Claimant contends that the injury to his left shoulder caused him to overuse his right upper extremity and overusing his right upper extremity caused him to develop a right shoulder condition that requires medical treatment. For example, Claimant testified that performing various work duties after the September 2017 accident, with his right upper extremity - such as sweeping and taking out the trash - caused him to develop right shoulder pain.

However, Dr. Failinger credibly and persuasively testified that Claimant using his right upper extremity to sweep or take out the trash would not cause Claimant to develop a new right shoulder condition, or aggravate his preexisting shoulder pathology, and necessitate the need for medical treatment.

Moreover, in April of 2018, Claimant fell in the shower and broke his right hand. Then, after Claimant fell in the shower and broke his right hand, he started complaining of persistent right shoulder pain. Dr. Failinger also credibly testified that the fall in the shower, with the onset of right shoulder pain after the fall, could be the cause of Claimant's right sided shoulder problems.

In the end, the ALJ finds and concludes that Drs. Failinger, Parsons, Steinmetz, and Dr. Lesnak all credibly concluded that Claimant's work-related injury was to his left shoulder only. The DIME physician agreed, and placed Claimant at MMI with an impairment rating for the left shoulder injury only.

Based on the totality of the evidence, the ALJ finds and concludes that Claimant failed to overcome the DIME physician's opinion by clear and convincing evidence. As a result, the Claimant is at MMI.

II. Whether Claimant has proven by a preponderance of the evidence that he sustained additional disfigurement of the left shoulder?

For the purpose of disfigurement, Claimant's scar to his left shoulder was observed to be approximately 5 inches long, and approximately ½ inch wide. The scar is different in color than the surrounding skin. In addition, Claimant has some atrophy from his clavicle into his chest. Claimant was previously paid $625.00 in disfigurement benefits. Claimant shall be paid an additional $2,250.00 for his disfigurement.

ORDER

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

1. Claimant failed to overcome the opinion of the DIME physician. As result, Claimant is at MMI as of April 7, 2021, and his right shoulder condition is not related to his September 23, 2017, work injury.
2. Claimant shall be paid an additional $2,250.00 in disfigurement benefits.
3. The previously endorsed issues by the parties, are reserved. This includes, but is not limited to, PPD (including conversion), PTD, overpayment, recovery of overpayment, offsets, and credits. As a result, and any all issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: November 28, 2023.

/s/ Glen Goldman

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that recommended medical treatment is reasonable and necessary to maintain Claimant at maximum medical improvement (MMI)? The recommended treatment modalities at issue are:

- left shoulder subacromial bursa injections and arthrocentesis;
- left upper extremity electromyography (EMG) study; and
- bilateral C5-C7 medial branch blocks.

Have Respondents demonstrated, by a preponderance of the evidence, that post-MMI medical treatment should be terminated because it is no longer reasonable, necessary, or related to Claimant's work injury?

FINDINGS OF FACT

1. Claimant suffered a compensable injury on January 2, 2017 when she experienced a slip and fall while at work. On January 6, 2017, Claimant was first seen by her authorized treating physician (ATP) Dr. Vanessa McClellan. In the medical record of that date, Dr. McClellan listed Claimant's symptoms as left shoulder soreness; neck soreness; right arm soreness; left knee tenderness; radiating pain from the left knee up to the left hip; and radiating pain from the left knee down to the left foot. Dr. McClellan diagnosed Claimant with a neck strain and a knee contusion. Dr. McClellan referred Claimant to physical therapy for the left shoulder.

2. After a period of physical therapy, Dr. McClellan ordered magnetic resonance imaging (MRI) of Claimant's left shoulder. In addition, Dr. McClellan referred Claimant for an orthopedic consultation.

3. On April 19, 2017, Claimant began treatment with orthopedist Dr. Peter Scheffel. Dr. Scheffel read the MRI as showing a partial versus full-thickness tear of the supraspinatus tendon with the appearance of upper-border subscapularis tearing and biceps tendon instability with tendinosis. Dr. Scheffel recommended an arthroscopy of the left shoulder to include possible rotator cuff repair, biceps tenotomy, and possible acromioplasty.

4. On May 18, 2017, Dr. Scheffel performed a left shoulder arthroscopic rotator cuff repair, biceps tenotomy, glenohumeral joint debridement, acromioplasty, subacromial decompression, and extensive debridement of the subacromial space. Following the surgery, Claimant underwent physical therapy.

5. Claimant testified that there was a delay in beginning physical therapy after surgery. As a result, Claimant developed adhesive capsulitis ("frozen shoulder"). Claimant further testified that in addition to physical therapy, she underwent injections. However, these treatments did not relieve Claimant's left shoulder symptoms.

6. On October 4, 2017, Claimant returned to Dr. Scheffel and reported ongoing pain and stiffness in her left shoulder. Dr. Scheffel recommended a repeat left shoulder MRI to assess the rotator cuff for possible failure.

7. On October 18, 2017, the MRI was performed and showed post rotator cuff repair with severe tendinopathy of the distal supraspinatus tendon, possible intrasubstance tearing with no full-thickness tear, evidence of post biceps tenotomy, and linear sign in the superior glenoid labrum.

8. On October 24, 2017, Dr. Scheffel reviewed the MRI and noted that the rotator cuff repair was intact and "looks excellent". Dr. Scheffel also noted that Claimant had acromioclavicular joint arthritis that was clinically asymptomatic. Dr. Scheffel diagnosed impingement syndrome of the left shoulder and recommended Claimant undergo a subacromial steroid injection. He also recommended continued physical therapy.

9. On December 20, 2017, Claimant was seen by Dr. Scheffel. At that appointment, Dr. Scheffel told Claimant to "remain confident" and to continue with aggressive physical therapy followed by a gentle strengthening program. Dr. Scheffel also told Claimant that "most rotator cuff repair patients have a sensation of clicking or popping in the shoulder and that is nothing to be concerned about." Dr. Scheffel opined that no further injections, imaging, or surgery was appropriate.

10. On January 10, 2018, Claimant attended an independent medical examination (IME) with Dr. Brian Lambden. In connection with the IME, Dr. Lambden reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. Lambden opined that Claimant had reached maximum medical improvement (MMI) as of the date of the IME (January 10, 2018). Dr. Lambden further opined that no maintenance medical treatment was necessary for Claimant's left shoulder. Dr. Lambden assessed a permanent impairment rating of four percent of the left upper extremity.

11. On February 14, 2018, Claimant was seen by Dr. McClellan. At that time, Claimant indicated that she disagreed with Dr. Lambden's determination that she had reached MMI. Dr. McClellan stated her opinion that Claimant was at MMI. Dr. McClellan further opined that additional formal therapy would not be beneficial, but Claimant could

continue with strengthening and range of motion exercises. Dr. McClellan did not perform an impairment rating.

12. On March 12, 2018, Dr. McClellan responded to a letter from Insurer. In her responses, Dr. McClellan indicated her agreement that Claimant reached MMI as of January 10, 2018. Dr. McClellan also indicated that an impairment rating should be performed by another provider, and she recommended Dr. Ellen Price. Finally, Dr. McClellan identified permanent restrictions for Claimant's left arm that included no lifting over five pounds, no overhead reaching, and no pushing or pulling over ten pounds.

13. On March 14, 2018, Claimant attended a second IME with Dr. Lambden. In a letter dated April 19, 2018, Dr. Lambden stated that his opinions were unchanged.

14. On March 21, 2018, Claimant was seen by Dr. Scheffel. Claimant reported that she was "struggling with range of motion and frozen shoulder." Claimant also reported popping in her left shoulder. Claimant described the popping as "suprising", but not significantly painful. Dr. Scheffel noted that Claimant had not received much relief from a subacromial steroid injection. Dr. Scheffel recommended that Claimant could continue with eight to twelve weeks of physical therapy. He also recommended the use of Tylenol for pain control. Dr. Scheffel stated that he had no further treatment recommendations.

15. On May 10, 2018, Claimant was seen by Dr. Price for an impairment rating. In her report of that date, Dr. Price reviewed Claimant's pain diagram and noted that Claimant complained of symptoms in her arms and hands, low back, and left leg. Dr. Price further noted Claimant had a difficult time lifting and performing activities of daily living. Dr. Price stated that Claimant had reached MMI. With regard to an impairment rating, Dr. Price assessed a whole person impairment of 12 percent that included Claimant's left upper extremity and low back. With regard to maintenance medical treatment, Dr. Price recommended acupuncture and a functional capacity evaluation (FCE).

16. On July 26, 2018, Claimant attended a Division independent medical examination (DIME) with Dr. Douglas Scott. In connection with the DIME, Dr. Scott reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his DIME report, Dr. Scott opined that Claimant had reached MMI as of January 10, 2018. Dr. Scott also noted that Claimant's left shoulder was stable. As a result, he opined that Claimant did not require further "diagnostic testing, surgery or active treatment" of her left shoulder. Dr. Scott assessed a permanent impairment rating of eight percent for Claimant's left upper extremity. With regard to maintenance medical treatment, Dr. Scott recommended a home exercise program, hot and cold compresses, and over-the-counter pain medications, (including topical applications).

17. On October 2, 2018, Respondents filed a Final Admission of Liability (FAL) in this case. In that FAL, Respondents admitted for the permanent impairment rating of eight percent for Claimant's left upper extremity and an MMI date of January 10, 2018. Respondents also admitted for reasonable, necessary, and related post-MMI medical treatment. On January 3, 2019, Respondents filed a second FAL to reflect a disfigurement award.

18. On January 17, 2019, Respondents filed another FAL that specifically referenced Dr. Scott's July 26, 2018 DIME report. Respondents and admitted for the permanent impairment rating of eight percent for Claimant's left upper extremity and an MMI date of January 10, 2018. Respondents also admitted for reasonable, necessary, and related post-MMI medical treatment.

19. On March 14, 2019, Claimant was seen by Dr. McClellan as part of her post-MMI treatment. Claimant reported pain and popping in her left shoulder. Claimant also reported that although the popping was not initially painful, it was now "painful after every pop." Dr. McClellan referred Claimant back to Dr. Scheffel for consultation.

20. On April 25, 2019, Claimant was seen by Dr. Scheffel. At that time, Claimant reported two months of worsening left shoulder pain when reaching. Claimant also reported popping in her left shoulder. Dr. Scheffel opined that Claimant had impingement bursitis. At that time, he recommended and administered a subacromial steroid injection.

21. On May 3, 2019, Claimant returned to Dr. McClellan and reported that the injection administered by Dr. Scheffel provided approximately one week of relief. Claimant also reported continued left shoulder pain and popping. Dr. McClellan referred Claimant to Dr. Price.

22. Claimant returned to Dr. Price on June 5, 2019. Dr. Price identified the purpose of this visit was to assess an impairment rating. In her report dated August 22, 2019, Dr. Price assessed a permanent impairment rating of 11 percent for Claimant's left upper extremity. Dr. Price recommended maintenance medical treatment of ongoing care with Ors. Sheffel and McClellan and four to six visits of physical therapy.

23. Claimant did not undergo treatment with any authorized provider between August 22, 2019 and March 12, 2021.

24. On March 12, 2021, Claimant was seen with Dr. McClellan and reported painful popping in her left shoulder. Dr. McClellan referred Claimant back to Dr. Scheffel for evaluation. Dr. McClellan also noted that an updated MRI might be needed.

25. On April 12, 2021, Claimant was seen by Dr. Scheffel. In the medical record of that date, Dr. Scheffel noted that Claimant had developed pain and popping in her left shoulder. Expressing a concern for a possible re-tear of Claimant's left rotator cuff, Dr. Scheffel recommended a new left shoulder MRI.

26. On August 3, 2021, Claimant returned to Dr. Lambden for an IME. As with the January 10, 2018 IME, Dr. Lambden reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. Lambden agreed that a new left shoulder MRI would be appropriate. Dr. Lambden suspected that the MRI would show "significant underlying degenerative changes and tendinopathy". Dr. Lambden opined that if there were such MRI findings, they would not be related to Claimant's work injury. Dr. Lambden specifically noted that he would not recommend any further injections. Dr. Lambden also stated that Claimant remained at MMI.

27. On August 17, 2021, Claimant underwent a left shoulder MRI. The results showed supraspinatus tendinosis with a 3mm full thickness tear of the distal supraspinatus tendon; with no definite labral tear.

28. On September 14, 2021, Claimant returned to Dr. Scheffel to discuss the MRI results. Dr. Scheffel noted that Claimant's rotator cuff was intact, but he indicated that it was possible Claimant had subacromial impingement. Dr. Scheffel recommended and administered a subacromial steroid injection. Dr. Scheffel also recommended a home exercise program.

29. On January 12, 20231, Claimant returned to Dr. Scheffel. At that time, Claimant reported that the injection in September 2021 provided one day of 40 percent relief. Dr. Scheffel referred Claimant to Dr. Price for evaluation for fibromyalgia and to discuss trigger point injections.

30. On February 2, 2023, Claimant underwent a left shoulder MRI. The MRI results included findings of a stable postoperative left shoulder.

31. On February 7, 2023, Claimant was seen by Dr. Scheffel to review the MRI results. Dr. Scheffel noted that the MRI showed an intact rotator cuff repair. In that same medical record, Dr. Scheffel noted no symptoms of adhesive capsulitis. He again noted that Claimant was to see Dr. Price regarding fibromyalgia. Dr. Scheffel also wanted to order a neck MRI for evaluation with Dr. Christopherson for possible radiofrequency ablation of the left shoulder. Finally, Dr. Scheffel stated that if Claimant continued to experience left shoulder pain, he would discuss a possible diagnostic arthroscopy.

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[1] Based upon the medical records entered into evidence, it appears that Claimant did not see Dr. Scheffel between September 2021 and January 2023.

32. On February 21, 2023, Claimant returned to Dr. Price's practice and was seen by Dr. Nikos Hollis. Claimant reported her symptoms as pain and popping in her left shoulder, with numbness, tingling, and weakness in her left hand. Dr. Hollis recommended and administered trigger point injections. These injections were made in the left thoracic paraspinal, rhomboids, trapezius, levator scapulae, infraspinatus, supraspinatus, tares minor, anterior deltoid, and splenius capitis. Dr. Hollis opined that it was possible that Claimant had left sided cervical radiculopathy. As a result, he recommended cervical flexion and extension x-rays, a cervical MRI, or EMG testing.

33. On March 7, 2023, Claimant returned to Dr. Hollis. Claimant reported that the trigger point injections initially caused a flare in her symptoms, but then provided approximately two days of relief. Claimant also reported experiencing chronic headaches. Dr. Hollis administered laser treatment to Claimant's upper back and neck. Dr. Hollis also administered bilateral occipital nerve injections. These treatments were intended to address cervical dystonia and occipital neuralgia, respectively.

34. On March 8, 2023, Claimant was seen in Dr. Price's practice by Dr. David Saldivar. At that time, Dr. Saldivar noted that Claimant had "significant neck and low back and lower extremity issues" since her work injury. Dr. Saldivar opined that claimant had facet mediated pain in her cervical and lumbar spines, trochanteric bursitis, and sacroiliitis. He recommended Claimant undergo the following: a left subacromial bursa injection; bilateral C5-C7 medial branch blocks; bilateral L3-L5 medial branch blocks; bilateral sacroiliac (SI) joint injections; and bilateral greater trochanteric bursa injections.

35. As noted above, the recommended treatment modalities currently before the ALJ are: 1) left shoulder subacromial bursa injections and arthrocentesis; 2) a left upper extremity EMG study; and 3) bilateral C5-C7 medial branch blocks.

36. At the request of Respondents, on June 19, 2023, Claimant attended an IME with Dr. F. Mark Paz. In connection with the IME, Dr. Paz reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. At the IME, Claimant reported that her left shoulder symptoms included pain and popping. In his IME report, Dr. Paz opined that Claimant's current left shoulder condition was not related to the January 2, 2017 work injury. Rather, it is Dr. Paz's opinion that the condition of Claimant's left shoulder is caused by deconditioning, coupled with comorbidities including obesity, diabetes mellitus, and a sedentary activity. Dr. Paz agreed with the DIME physician, Dr. Scott, that Claimant reached MMI for her left shoulder as of January 10, 2018. Dr. Paz also noted that Dr. Scott's recommendations for post-MMI treatment for the left shoulder included "topical applications, physical applications, and over-the-counter nonsteroidal anti-inflammatories". It is Dr. Paz's opinion that Claimant's left shoulder remains stable and no further treatment is needed.

37. Dr. Paz further opined that Claimant's cervical symptoms and any treatment of those symptoms are not reasonable, necessary or causally related to the January 2, 2017 work injury. In support of this opinion, Dr. Paz noted that Claimant has a history of chronic neck pain. Dr. Paz also noted that reports from other medical providers (including Drs. Scheffel, Price, and Scott) as well as his findings on examination at the IME are inconsistent with cervical radiculopathy. Dr. Paz noted that such a diagnosis would be secondary to cervical degenerative disease, a diagnosis which is not causally related to the January 2, 2017 incident. Dr. Paz further noted that there is no cervical diagnosis in this claim.

38. Dr. Paz specifically opined regarding the treatment modalities at issue in this case. It is Dr. Paz's opinion that the left shoulder subacromial bursa injections and arthrocentesis; the EMG study of Claimant's left upper extremity; and bilateral C5-C7 medial branch blocks; are not reasonable, necessary, or related to the January 2, 2017 work injury.

39. Dr. Paz's deposition testimony was consistent with his IME report. Dr. Paz reiterated his opinion that the only body part at issue is Claimant's left shoulder, for which she reached MMI on January 10, 2018. Dr. Paz reiterated his assessment that Claimant's deconditioning and lack of compliance with a home exercise program was one of the primary contributors (along with obesity, diabetes, and a sedentary lifestyle) to her current left shoulder symptoms. Dr. Paz testified that the specific treatments recommended for Claimant are not related to the work injury. Dr. Paz also specifically testified that, in his opinion, Claimant is not in need of any additional post-MMI treatment.

40. The ALJ credits the medical records and the opinions of □rs. Paz and Lambden. Generally, the ALJ credits the opinion of Dr. Paz that Claimant is not in need of further post-MMI medical treatment. The ALJ also specifically credits Dr. Lambden's August 3, 2021 opinion that no further injections are necessary to treat Claimant's left shoulder. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the recommended left shoulder subacromial bursa injections and arthrocentesis is reasonable and necessary to maintain Claimant at MMI.

41. With regard to the recommended left upper extremity EMG study, the ALJ credits the medical records and the opinions of Dr. Paz. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the recommended EMG study is reasonable and necessary to maintain Claimant at MMI.

42. The ALJ further credits the medical records, the opinions of Dr. Paz, as well as those of the DIME physician, Dr. Scott. The ALJ specifically credits Dr. Paz's opinion that his findings on physical examination are inconsistent with cervical radiculopathy. The ALJ further credits the DIME report in which Dr. Scott only assessed Claimant's left shoulder, and not her cervical spine. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the recommended bilateral

C5-C7 medial branch blocks are reasonable and necessary to maintain Claimant at MMI.

43. With regard to the issue of whether post-MMI medical treatment should continue, the ALJ credits the medical records and the opinions of Dr. Paz. Specifically, the ALJ credit's Dr. Paz's opinion that Claimant's left shoulder remains stable and no further treatment is needed. The ALJ finds that Respondents have demonstrated that it is more likely than not that post-MMI medical treatment should be terminated because it is no longer reasonable, necessary, or related to Claimant's work injury.

CONCLUSIONS OF LAW

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

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

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

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

an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

5. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that left shoulder subacromial bursa injections and arthrocentesis is reasonable and necessary to maintain Claimant at MMI. As found, the medical records and the opinions of Ors. Paz and Lambden are credible on this issue.

6. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that a left upper extremity EMG study is reasonable and necessary to maintain Claimant at MMI. As found, the medical records and the opinions of Dr. Paz are credible and persuasive on this issue.

7. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that bilateral C5-C7 medial branch blocks are reasonable and necessary to maintain Claimant at MMI. As found, the medical records, the opinions of Dr. Paz, and Dr. Scott's DIME report are credible and persuasive on this issue.

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

9. In the present case, Respondents have admitted for reasonable, necessary, and related post-MMI medical treatment. They are now requesting to end all post-MMI medical treatment. Although Claimant bears the burden of proof with regard to the specific treatment modalities addressed above, it is Respondents' burden to prove, by a preponderance of the evidence, that no further post-MMI treatment is necessary.

10. As found, the Respondents have demonstrated, by a preponderance of the evidence, that there is no further medical treatment necessary to maintain Claimant at MMI. As found, the medical records and the opinions of Dr. Paz are credible and persuasive on this issue.

ORDER

It is therefore ordered:

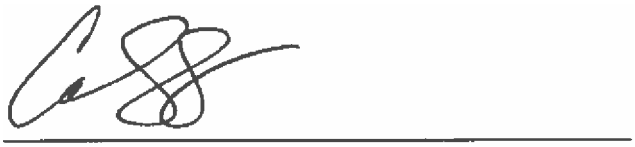
1. Claimant's request for left shoulder subacromial bursa injections and arthrocentesis is denied and dismissed.

2. Claimant's request for a left upper extremity EMG study is denied and dismissed.

3. Claimant's request for bilateral C5-C7 medial branch blocks is denied and dismissed.

4. Respondents' request to terminate maintenance medical treatment is granted.

Dated November 29, 2023.



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

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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-117-992-005

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is permanently and totally disabled as a result of the admitted work related injuries of August 10, 2019.

PROCEDURAL HISTORY

Claimant was placed at MMI by Dr. Zimmerman on October 14, 2021 with a 21% rating. Respondents filed an Application for a Division of Workers' Compensation Independent Medical Examination (DIME). Claimant was evaluated by Dr. Mark Winslow, the DIME physician on March 15, 2022.

Respondents filed a Final Admission of Liability on June 2, 2022 admitting to temporary total disability benefits paid based on an average weekly wage of $859.63 and a TTD rate of $573.09. Respondents also paid permanent partial disability benefits beginning the date of MMI. Respondents admitted to maintenance medical benefits.

Claimant filed an Application for Hearing on December 7, 2022 on multiple issues including permanent total disability benefits. Respondents filed a Response to Application for Hearing dated January 4, 2023. Present during the hearings were [Redacted, hereinafter JG] from [Redacted, hereinafter MO] office, and Claimant's daughter, [Redacted, hereinafter MA], as observers; Claimant, Dr. David Yamamoto and Cynthia Bartman who testified on behalf of Claimant; and Dr. John Raschbacher and Katie Montoya, who testified on behalf of Respondents.

This ALJ issued Findings of Fact, Conclusions of Law and Order on August 18, 2023 and served on the parties on August 21, 2023 determining that Claimant was permanently totally disabled from earning any wages proximately caused by the August 10, 2019 admitted work related accident.

Respondents filed a Petition to Review (PTR) the Order on September 8, 2023. After multiple extensions of time to file briefs in support and in opposition of the PTR, the final brief was filed on November 16, 2023. Issues raised included,

1. Whether the ALJ failed to adhere to the controlling law in Colorado concerning permanent total disability.
2. Whether the ALJ considered evidence that was not part of the record.
3. Whether the ALJ misapplied the applicable law to the findings of fact.

This Supplemental Findings of Fact, Conclusions of Law and Order followed.

FINDINGS OF FACT

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

A. Generally:

1. At the time of the hearings, Claimant was fifty nine years old, lived with his wife and had a ninth grade education in Mexico. Claimant worked as a laborer in construction. While he mainly performed manual labor, he also used machinery including the mixer and a forklift tractor. He had been doing the same kind of work for more than 20 years and would essentially perform the same kinds of tasks each day, so he understood the instructions in English. He would use a coworker to interpret when he was unable to understand his supervisor. He would frequently be lifting the 80 to 90 lbs. of mix when operating the tractor. His job required lifting, walking, standing, climbing scaffolding. After his accident, he performed modified duty for approximately four months sorting materials, washing cars, cleaning floors.

B. The Accident:

2. On August 10, 2019 Claimant had been preparing the mix for the mixer, went up the scaffolding to put the mix in the mixer, when the weight of the bucket of cement mix overbalanced him, it threw him back and he fell to the floor. The mixer had a solid piece of concrete in it which was shaking the scaffolding. He injured his low back and had almost immediate pain going into his right lower extremity all the way to his foot. About three weeks after the accident the pain started getting worse, then about six weeks later, the pain was even worse causing numbness going down his leg. Approximately three months prior to the March 2023 hearing, he developed increasing nerve pain radiating into the groin.

3. Claimant last worked on February 10, 2020. He had surgery on February 12, 2020. He was happy initially with the surgical results. The pain in his low back seemed to get worse after about another month or two, especially in his low back, and his right lower extremity. After the surgery he received medications, injections and physical therapy. Both the physical therapy and the injections helped with the pain. The medications only helped for a while and then the pain and symptoms would return. He continues to take Gabapentin at nighttime and sometimes when he wakes up he may take more of the Gabapentin.

C. Medical and Vocational Records:

4. Claimant was first evaluated by Dr. Carrie Burns of Concentra – Centennial on August 12, 2019. She documented that Claimant was operating a cement mixer when he felt back pain which immediately radiated down his right leg, reporting right leg pain and paresthesias. Dr. Burns noted loss of lordosis, tenderness at the L1-L5 left and right paraspinal, worse on the right, right sided muscle spasms, limited range of motion (ROM) and positive right straight leg raise (SLR). She assessed lumbar strain, right wrist sprain and acute lumbar radiculopathy. She ordered physical therapy, a wrist brace, x-rays of

the right wrist (normal) and spine; and medications. She noted degenerative joint disease of the lumbar spine and suspected some nerve irritation or compression. Dr. Burns ordered restrictions of sedentary duty, no lifting greater than 10 lbs., limited bending and twisting. Claimant started physical therapy at Concentra shortly thereafter.

5. By August 16, 2019 Dr. Burns ordered an MRI of the lumbar spine, diagnosing lumbar radiculopathy, lumbar strain and right wrist strain.

6. The August 16, 2019 MRI read by Dr. Brian Steele of Health Images showed as follows:

> 1. At L4-LS there is a medium-sized broad-based right paracentral/foraminal caudally-directed disc extrusion that causes moderate thecal sac stenosis and impinges on the transiting right L5 nerve root in the lateral recess. The disc also contacts the transiting left L5 nerve root to a lesser degree and contributes to mild bilateral foraminal stenosis.
>
> 2. A caudally-directed central disc extrusion at L5-S1 only slightly narrows the thecal sac but contacts both transiting S1 nerve roots, without nerve root compression or displacement.
>
> 3. At L3-L4 there is a broad-based right paracentral disc protrusion that contributes to mild-moderate thecal sac stenosis and contacts the transiting right L4 nerve root in the lateral recess.
>
> 4. Smaller disc protrusions at L1-L2 and L2-L3 does not cause thecal sac stenosis or specific nerve impingement. No sites of severe degenerative foraminal stenosis are present.

7. On August 19, 2019 Dr. Burns noted that the MRI showed a large disc extrusion with compression of the nerve root on the right at L4-5. Claimant continued to have right sided paraspinal spasms, limited ROM and positive SLR on the right. Claimant complained of increasing pain and numbness. She injected a Ketorolac Tromethamine intramuscular solution, prescribed pain medication and referred Claimant to Dr. Pehler, an orthopedic spine surgeon.

8. Dr. Stephen F. Pehler of Colorado Orthopedic Consultants evaluated Claimant on August 29, 2019 and diagnosed lumbar disc herniation with radiculopathy, spondylosis of the lumbar spine with radiculopathy and low back pain. He documented that Claimant had low back pain with right lower extremity radiculopathy, numbness and tingling, and was not able to work due to the pain and limped when walking. He documented Claimant had increased pain with prolonged sitting and at nighttime. He reviewed the MRI films and noted L4-5 lumbar disc herniation with right neuroforaminal narrowing and nerve root compression, and recommended a right-sided transforaminal epidural steroid injection. He commented that if symptoms did not subside, then Claimant would require a microdiscectomy. He prescribed gabapentin, flexeril and lidocaine patches.

9. Dr. Burns noted on September 6, 2019 that Claimant continued with severe pain in the low back and radiating pain down the right leg. He was having problems sleeping as he would wake up with pain down his leg and would have difficulty going back to sleep. Exam, diagnoses and restrictions remained the same. Dr. Burns administered another Ketorolac injection on September 27, 2019 while awaiting authorization for steroid injection with the specialist.

10. Claimant was attended by Dr. Barry A. Ogin of Colorado Rehabilitation & Occupational Medicine on October 10, 2019 for a right L4 and L5 transforaminal epidural steroid injection (ESI). The 7/10 pre injection pain level was immediately reduced to 0/10 post-injection. He was given a pain dairy and recommended follow up with Dr. Pehler.

11. On October 18, 2019 Dr. Burns reported that Claimant was working but that it was a struggle to make it to the end of the 4 hours and he was in significant pain, even with an extended lunch break. On October 23, 2019 Nurse Hanna Bodkin noted that she was very concerned that Claimant was having problems with getting and understanding proper instructions for follow up, medications, procedures and would benefit from a nurse case manager.

12. Dr. Pehler submitted a request for authorization on November 1, 2019 for the right sided L4-5 microdiscectomy surgery for the large herniated disc as Claimant had failed conservative treatment including therapy and injections.

13. On November 7, 2019 Dr. Burns noted that Claimant was being scheduled for surgery but it had not yet been authorized. Claimant was again out of medications on December 19, 2019 and was still awaiting authorization for surgery. Claimant was getting some weakness down his right leg. His daily pain was a 9/10. Dr. Burns noted that it was clear that Claimant needed surgery as he had a definite disc herniation that was compressing on his nerve. He was weak on the right side and short relief with injections. She discussed consulting with Dr. Pehler to refile the request for authorization since it had been 5 months since his injury.

14. Dr. Burns noted on January 31, 2020 that Claimant's back and right leg were more painful, and had been doubling up on his medications as his employer was working him for longer shifts. Dr. Burns noted that Claimant was moving very slowly, obviously limping when transitioning from sitting to standing and walking.

15. Dr. Pehler performed the surgery on February 12, 2020 at The Medical Center of Aurora with a post-operative diagnosis of lumbar disk herniation with radiculopathy, right sided at L4-L5.

16. On February 24, 2020 Dr. Pehler noted that Claimant had improving back and leg pain though still had ankle tingling. Claimant was taking oxycodone, Robaxin (Methocarbamol) and Tizanadine for pain and spasms, which were helping.

17. Claimant was not doing well three weeks post-op, when Dr. Burns examined him on March 6, 2020, with low back pain radiating down into the right leg, though his leg pain was improving. At that time Claimant was taking 3 Vicodin per day for pain. Dr. Burns noted that Claimant had been having significant difficulties with the physical requirements of his job before surgery.

18. On March 30, 2020 Dr. Pehler continued to assert that Claimant had significant improvement to his right lower extremity radiculopathy, however still noted some right toe and foot numbness. He also documented Claimant had stiffness in his low back as well as spasms. He reported that the oxycodone and Robaxin had been helping. He referred Claimant to physical therapy and provided further medications.

19. By March 27, 2020 Dr. Burns noted that Claimant's pain in the low back had intensified and the pain down his right leg was also worsened, with the right foot going

numb and walking too long causing pain and fatigue. On exam she palpated bilateral muscle spasms of the lumbar spine.

20. Claimant was treated by Devan Ohi, P.T. on March 31, 2020 who noted on exam that Claimant demonstrated high level of pain, reporting 8/10 pain, minimally changed with posture changes, except that pain increased with prolonged sitting or standing. He demonstrate limited LS ROM in all directions, most significantly with extension, which also reproduced right sided great toe numbness. He noted glute atrophy and that Claimant would benefit from physical therapy to address the deficits. Notes continued through May 13, 2020 with further recommendations for PT.

21. Dr. Burns documented on May 1, 2020 that Claimant could not stand for more than 20 minutes before his back started to hurt so bad he had to sit down, and was still having numbness in his right foot and pain behind his right knee. He continued to be on gabapentin, skelaxin and Lidoderm patches, which helped but when off medication he was miserable. She made a referral for a neurosurgery consult with Dr. Rauzzino regarding the post-surgical radiculopathy. Dr. Burns still had Claimant off work at this point

22. On May 12, 2020 Claimant had the evaluation with Dr. Michael Rauzzino, who documented that following the L5 disc extrusion surgery, Claimant had worsening low back and right leg pain, was increasingly frustrated due to failure to improve post-surgery and was unable to work. On examination he noted a well-healed lumbar incision, positive straight leg raise on the right, negative on the left; loss of ROM, subjective weakness of his right EHL. Claimant complained of diminished sensation on the top of his toe and he walked with an antalgic gait secondary to pain. Dr. Rauzzino recommended a follow up MRI.

23. The MRI was performed at Health Images -- Diamond Hill on May 20, 2020, and was interpreted by Dr. Kevin Woolley. It showed evidence of a previous right L4-L5 laminotomy with a broad-based disk bulge, a small right paracentral protrusion with mild degenerative changes, mild right-sided foraminal tension, and mild spinal stenosis. The impression was interval right-sided L4-L5 laminotomy with decreased spinal stenosis and disk extrusion, a small residual disk protrusion was noted with no recurrent disk herniation.

24. On May 28, 2020 Dr. Pehler reviewed the MRI noting that there was improvement at the L4-5 level though some degenerative compression on the descending L5 nerve root and he planned on referring Claimant for an L4-5 transforaminal ESI. Claimant reported low back and leg pain but there was no interpreter present so communication was difficult. He continued to diagnose lumbar radiculopathy.

25. Dr. Burns documented on June 1, 2020 that Claimant was unable to stand up straight, was in a flexed position, had loss of normal lordosis, had mild swelling at the incision, and had tenderness at the L3-L5 level paraspinals with bilateral muscle spasms, limited range of motion and antalgic gait. She provided ibuprofen. In July she added a Medrol pack, stating he was no better and needed a functional capacity evaluation and kept him off work.

26. Dr. Ogin performed a right L4 and L5 transforaminal ESI on June 29, 2020 at Belmar Surgery Center.

27. On August 3, 2020 Dr. Burns provided the first work restrictions of working only 4 hours a day, lifting 5 lbs. occasionally, push/pull 5 lbs. occasionally.

28. Claimant had another transforaminal ESI on November 5, 2020 by Dr. Ogin, who documented pre-injection pain of 8/10 and a post-injection 0/10 pain level.

29. Dr. Burns commented on November 5, 2020 that Claimant had his second injection with Dr. Ogin and was feeling better already, making him hopeful it would help. He was out of medications again and she prescribed Lidocaine patches and Metaxalone.

30. On November 30, 2020 Claimant reported to Dr. Burns that the injection had helped for about 2 weeks, and now he was getting worse again, had a pain level of 8/10 and felt like he was being stabbed in the right foot. On exam she noted that Claimant had loss of normal lordosis, tenderness in the bilateral paraspinals and right sacroiliac joint, right sided muscle spasms, loss of range of motion, increased pain with facet loading on the right and was limping on the right. She noted that Claimant needed to return to his surgeon for further evaluation. She also increased his work restrictions to lifting, pushing and pulling 10 lbs. occasionally but only up to 4 hours a day.

31. Dr. Pehler's PA, Maria Kaplan mentioned on December 30, 2020 that Claimant received approximately two weeks of relief from a third post-surgical ESI. Claimant continued to have significant pain in the low back and right lower extremity radiculopathy, with reduced quality of life and difficulties sitting and walking. She recommended a two level interbody fusion of L3-5 as he had failed continued conservative care.

32. Dr. Burns recorded on January 19, 2021 that Claimant continued to worsen with pain in his low back, with muscle spasms and a sensation of nails driven into his foot from time to time. She noted that Dr. Pehler was recommending a fusion. She sustained that objective findings were consistent with history and work related mechanism of injury, and she decreased restrictions to lifting 20 lbs., with no repetitive bending or stooping.

33. While Claimant awaited the decision for further surgery and an IME result, Claimant's pain in the low back continued to be documented by Dr. Burns, who ordered further medications for pain control.

34. At Respondent's request for an independent medical evaluation, Dr. Brian E. Reiss, an orthopedic spine surgeon, examined Claimant on March 17, 2021. He did an extensive medical record review including the films of both MRIs. He stated that Claimant continued with constant central low back pain of 8/10 with 9/10 at its worst and 6/10 at its best. Claimant also complained of posterior leg pain at the knee and some numbness at the bottom of his right foot. Dr. Reiss wrote that Claimant did not show pain behaviors.

35. On exam Dr. Reiss noted Claimant was able to heel and toe stand, had loss of ROM, had some tenderness centrally, and at the right SI ligament and sciatic notch. SLR was positive on the right, with decreased sensation of the right big toe and some groin pain with a Faber test. Dr. Reiss indicated that the first MRI showed a herniated disc at L4-5 but the second one was done without gadolinium, which was not optimal. He

mentioned that there might be a retained central disc protrusion at the L4-5 which might be touching the right L5. He recommended a new MRI with gadolinium and an EMG to determine nerve root involvement, but stated that there was no indication for a fusion. He diagnosed post-laminectomy syndrome[1], deconditioning, and primarily back pain.

36. Following additional record review, on April 23, 2021 Dr. Reiss opined that a multilevel fusion for the low back in the absence of instability was unlikely to provide any benefit. He specifically noted that the pain generator had not been identified and conservative care had not been completed. He recommended core strengthening, aerobic conditioning and a stretching program.

37. On June 17, 2021 Dr. Burns noted that the surgery had been denied due to failure to reinstate physical therapy after the surgery and Claimant's post-surgical decline. Dr. Burns recorded that Claimant requested a second surgical opinion and that medications were helping with his night pain. She prescribed physical therapy, and changed the lifting restrictions to 25 lbs. with no repetitive bending or stooping.

38. Dr. Rauzzino saw Claimant for a second opinion on July 6, 2021. On examination, he observed Claimant had bilateral negative SLR, limited ROM, was not able to walk on his toes or his heels. Reflexes were 1/4. Dr. Rauzzino recommended updated imaging and flexion and extension x-rays. He stated that it was not clear what was Claimant's pain generator given the diffuse nature of his axial lumbar pain. Claimant continued to take oxycodone for pain but his pain continued getting worse. Dr. Rauzzino also recommended Claimant return to see Dr. Pehler since Claimant had not been evaluated since the fusion surgery was initially recommended in December 2020. He stated that it would be difficult to know that performing a lumbar fusion would actually clinically improve Claimant's symptoms given Claimant's poor response to the microdiskectomy and the fact that he had continued persistent leg pain in the absence of a significant structural lesion.

39. Claimant's MRI of July 25, 2021 showed multilevel degenerative changes in the lumbar spine with associated disc bulging and annular fissuring at the L1-2 and L2-3; circumferential disc bulging indenting the ventral thecal sac resulting in moderate right subarticular recess stenosis at the L4-5 level which might have been impinging on the exiting L5 nerve root; and circumferential bulging at the L5-S1 level with mild foraminal narrowing.

40. On August 3, 2021 Dr. Burns emphasized that Claimant had most pain with standing, walking and driving, though medications helped, and he had pain chiefly in his right lower back which radiated down his right leg. He was unable to squat. She continued to prescribe medications and reduced restrictions to 15 lbs. maximum lifting, limited bending, twisting and stooping.

41. Dr. Pehler attended Claimant on August 5, 2021 noting that Claimant continued to have fairly significant back pain as well as right lower extremity pain, especially worse with standing and extension. Dr. Pehler remarked that the repeat MRI demonstrated some slight worsening at the L3-4 and L5-S1 levels. However, the biggest area of work-related pathology was at the L4-5 level, the site of his previous

[1] Dr. Raschbacher described post-laminectomy syndrome as failed back syndrome

microdiscectomy. He thought it would be reasonable to consider a one level L4-5 oblique lateral interbody fusion with percutaneous fixation to address his most significant level of pathology. In the interim, he sent Claimant for a right-sided transforaminal epidural steroid injection at the L4-5 level. He noted Claimant was still continuing to have worsening pain symptoms that were affecting his quality of life and ability to work.

42. Claimant was referred by Dr. Burns to Dr. Zimmerman for an impairment rating on October 12, 2021 noting that Claimant should have permanent work restrictions in the sedentary category.

43. Dr. Frederic Zimmerman placed Claimant at maximum medical improvement on October 14, 2021. He noted that Claimant failed conservative care and proceeded with surgery in February 2020. He had also had epidural steroid injections, which did not significantly improve his symptoms long term. He recorded that Claimant had constant low back pain across the lumbosacral region that radiated down the right lower extremity with bending activities, paresthesia down the right lower extremity which resolved with position changes, difficulty walking community distances and was forced to sit down after five minutes of walking. He also documented weakness and decreased sensation in the great toe.

44. On exam, Dr. Zimmerman observed that Claimant went from a seated to standing position in a very slow and stiff fashion, ambulated with antalgia/stiffness of the right lower extremity with a very short stride length, had weakness in the right EHL compared to the left with sensation subjectively decreased to light touch in the right great toe, an equivocal SLR test, positive neural tension on the right and valid ROM testing. He diagnosed low back injury status post L4-5 laminotomy and post-laminectomy syndrome with pain and radiculitis down the right lower extremity. He provided a 21% whole person impairment rating. Dr. Zimmerman issued light physical demand category work restrictions with no stooping, bending, crawling, crouching, or ladders, as well as limited to ambulating on level ground and stated he qualified for a disability parking pass.

45. Dr. Burns noted Claimant was at MMI on October 18, 2021, noting that objective findings were consistent with history and work related mechanism of injury. On exam, Dr. Burns noted that Claimant had decreased lordosis of the lumbar spine, tenderness present in right paraspinal muscles from L3-S1, but not the left and loss of range of motion. Dr. Burns diagnosed status post lumbar surgery with lumbar radiculopathy (acute). She provided work restrictions of maximum lifting to 15 lbs., limited bending, twisting, stooping, no ladders or crawling. She made a referral for a health club membership.

46. Dr. Rauzzino issued a letter to Respondents in response to specific inquires on October 26, 2021. He stated that he did not see a new large recurrent disc protrusion at L4-L5; the discs at L3-L4, L4-L5, and L5-S1 showed similar degeneration and disc protrusions. He did not see a clearly definable pain generator that would require surgery, that fusion surgery would likely not treat Claimant's pain or relieve his symptoms; and

more likely would worsen his condition. He was interested in knowing whether Dr. Pehler would consider a one level L4-L5 fusion instead of the two level fusion.[2]

47. Claimant was evaluated by Dr. Mark Winslow, the Division Independent Medical Examination (DIME) physician on March 15, 2022. Claimant reported that subsequent to the surgery, he continued to worse with lower extremity symptoms though was not sure he wanted to move forward with further surgery unless surgery was assured to relieve his symptoms. On exam, he found increased paraspinal muscle tone and pain with range of motion and valid measurements. He found no focal neurologic deficits. He diagnosed acute lumbar radiculopathy, status post lumbar surgery with residual symptoms and stiffness. He opined as follows:

> I reviewed the opinions from the neurosurgeons and their opinions regarding surgery. On review of the medical record, on clinical examination of the patient I must agree with Dr. Rauzzino. It is my opinion based on the patient's past history, current presentation, and the known pathology that the patient would most likely not do well with a subsequent surgery. In addition, it is my opinion that as Dr. Rauzzino stated he might actually be worse. The patient has had a poor outcome to his previous surgery, is a smoker, deconditioned, there is not a significant identifiable pain generator, there is no instability demonstrated on imaging that is available.

48. Dr. Winslow found Claimant to be at MMI as of October 14, 2021 as no further active treatment was likely to change Claimant's symptoms. He provided an impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (*Revised)*, of a Table 53IIE rating of 10% of the lumbar spine specific disorder and 14% for loss of range of motion for a combined impairment of 23% whole person. Under restrictions he stated "[l]ight physical demand category. No stooping, bending, crawling, crouching or climbing ladders. Level ground work with no stairs. Disabilities parking pass."

49. Claimant returned to see Dr. Pehler on April 1, 2022 who documented Claimant had persistent low back pain with right sided buttock and leg pain. Plain films showed spondylosis with an underlying spinal deformity and has a history of recurrent protrusion as well as progression of spondylosis at L4-5. He recommended a new MRI.

50. Respondents filed a Final Admission of Liability on June 2, 2022 consistent with Dr. Winslow's report, and admitted to maintenance medical care pursuant to Dr. Burns' October 18, 2021 report.

51. Claimant was evaluated by Cynthia Bartmann for an Employability Evaluation, who issued a report dated July 29, 2022. Ms. Bartmann interviewed Claimant and reviewed the medical records, specifically for restrictions. She relied upon the work restrictions provided by ATP Zimmerman and Dr. Winslow, of light physical demand category, no stooping, bending, crawling, crouching or ladders, ambulation on level ground only (no stairs) as well as noting he qualified for a disability parking pass. She also considered ATP Burns' restrictions of 15 lbs. lifting, limited bending, twisting, and stooping with no ladders and no climbing as well as DIME physician Winslow's light duty restrictions with no stooping, bending, crawling, crouching or ladder climbing, walking only on level ground and a disability parking pass. Ms. Bartmann noted that the lifting of 15

[2] Dr. Reiss may not have had Dr. Pehler's August 5, 2021 report that recommended a one level fusion at the L4-L5.

lbs. did not release Claimant to a full range of light work which requires up to 20 lbs. lifting. She noted that a physician's recommendation for a parking pass required limited walking no more than 200 feet without stopping.[3]

52. Claimant reported to Ms. Bartmann that he had typically 5/10 to 6/10 pain on a numeric pain scale, with pain radiating to his right leg to the knee and continuing down to his big toe, with numbness in the big toe, weakness in the right leg and occasional use of a cane. She highlighted that Claimant had a ninth grade education in Spanish and did not attend any English as a second language courses. Claimant reported working in a factory using a forklift and mixing cement to pour into molds, cutting down trees, picking up trash, and construction cement work. At his employer of injury, Claimant would lift 50 lb. bags of mix, standing and walking throughout the day. He was then moved to working modified duty, sorting materials in the shop, washing cars, and sweeping. Though while doing modified duty he required an extended break before he could complete the part time work. Claimant could not read or write English and for the majority of his time he had a bilingual supervisor, though was able to understand simple directions in English.

53. Ms. Bartmann opined that Claimant's entire work history involved working as a laborer in production, mainly unskilled work without transferable skills to other occupations. She opined that, considering Claimant's providers' restrictions, he fit more in the sedentary than light category of work, which comprised mainly of telemarketer, customer service, night auditor, concierge and front desk work, for which Claimant did not have the vocational skills. Ms. Bartmann opined that Claimant was permanently and totally disabled as any employment opportunities in the general labor market did not match Claimant's skills and work restrictions as well as the fact that employers would not be willing to train a 59 year old worker.

54. John Raschbacher, M.D. issued an Independent Medical Evaluation at Respondent's request on September 6, 2022. He took a history, reviewed the records and examined Claimant. Dr. Raschbacher noted no concerning findings on exam except for Claimant's exaggerated behaviors and complaints of pain and limitations, and that Patrick's test on the right produced groin pain. He opined that there was no physiologic or medical reason for him to have loss of range of motion, loss of strength and impairment. He mistakenly noted that Claimant qualified for a Table 53IIB impairment of 8% whole person for the lumbar spine and disagreed with both Dr. Zimmerman and Dr. Winslow regarding their assessments of restrictions and impairment. He provided a 40 lb. work restriction assuming that Claimant had any real symptoms at all, for the lumbar spine, "which he may well not, given his presentation" according to Dr. Raschbacher. ROM testing results were attached to the report August 25, 2022 Rule 8 IME but were not assessed for validity as Dr. Raschbacher did not believe them to be valid.[4] But the pain diagram attached showed a pain pattern consistent with Claimant's treaters' descriptions in the records.

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[3] Claimant only met the eligibility requirement of Colorado disabled parking permit eligibility guidelines for limited walking.

[4] Dr. Raschbacher did not take a second set of ROM numbers during his exam pursuant to the requirements of the *AMA Guides*.

55. Kristine M. Couch, OTR performed a Functional Abilities Evaluation on September 15, 2022. During the testing she noted that Claimant had a consistent and valid performance in 22 of 22 in multiple validity testing parameters. Testing showed Claimant was able to sit for up to 21 minutes, required position changes, and had increased low back with continual sitting. Claimant attempted the 12 minute treadmill test but was only able to complete 6:38 minutes and ambulated with an altered gait, favoring his right leg and leaned heavily on the rails. He reported low back pain radiating into the right groin with walking. Claimant had difficulty and limitations with positional tolerances. He was able to lift 15 lbs. shoulder to overhead, and 20 lbs. knuckle to shoulder but was unable to lift floor to knuckle. He was limited in his ability to lift with the bilateral upper extremities to 15 lbs. for 50 feet with an altered gait but only up to 10 lbs. with either the right or left upper extremity individually. Lifting testing was terminated due to increased pain in the lumbar spine.

56. Ms. Couch noted that Claimant's abilities demonstrated a capacity to lift between sedentary and light work categories as defined by the US Department of Labor. He was unable to demonstrate the ability to tolerate repetitive horizontal reaching and forward bending, the ability to tolerate repetitive supination/pronation of the forearms while stepping side to side, unable to demonstrate the ability to tolerate sustained standing while performing repetitive reaching between chest level and the overhead on an occasional basis, and was limited in his ability to tolerate stair climbing during the evaluation. Claimant was unable to complete any crouching, stooping, kneeling or repetitive bending testing, which was consistent with the restrictions provided by his ATPs. Claimant reported his abilities as less than what testing showed during the FCE. As found, Ms. Couch's findings were consistent with Dr. Burns and Dr. Zimmerman's work restrictions previously provided at MMI.

57. Claimant was evaluated by Dr. David W. Yamamoto of Peak to Peak Family Medicine at Claimant's request for an Independent Medical Evaluation (IME) on October 26, 2022. He interviewed Claimant, took a history, reviewed the medical records and examined Claimant. He was provided a mechanism of injury of being jerked back while mixing concrete using a portable mixer and being thrown back feeling immediate pain. Claimant reported a 7/10 pain with an aching in his lower back, radiating down his right leg and stated his great toe was numb . Claimant reported he had increased pain with standing and could only walk for 10 minutes before he had major pain. He stated that he could stand for only 20 minutes at a time, had difficulty putting his socks on and tying his shoes. He also conveyed he had depression and anxiety as a result of the work injury.

58. On exam, Dr. Yamamoto observed that Claimant appeared uncomfortable with movement, had tenderness over the inguinal area, noted the surgical incision, decreased ROM, antalgic gait favoring the right leg, positive straight leg test on the right, decreased sensation over the medial right foot and decreased EHL strength on the right compared to the left. He diagnosed lumbar radiculopathy, ongoing low back pain post lumbar surgery with residual symptoms and stiffness. He conveyed that Dr. Zimmerman and Dr. Winslow's evaluations, and permanent restrictions were consistent with the FCE performed by Ms. Couch. He averred that Dr. Raschbacher arbitrarily assigned a 40 lb. work restrictions without testing or evidence of ability. Dr. Yamamoto opined Claimant had sustained a lower back injury and was treated appropriately but did not do well with

the L4-5 microdiscectomy. He disagreed with Dr. Raschbacher, noticing his mistaken citation to the *AMA Guides* for specific disorder and failure to properly assess ROM. He agreed with the restrictions that were provided by Dr. Winslow and Dr. Zimmerman. He further opined that Dr. Winslow had provided an accurate report and rating and that Claimant would be unlikely to find any work based on his chronic pain, lack of function and lack of English skills.

59. Ms. Bartmann provided an addendum report dated November 5, 2022. At that time she reviewed additional records including Ms. Couch's FCE, and IMEs from Dr. Raschbacher and Dr. Yamamoto. She noted that, even using Dr. Raschbacher's 40 lb. work restrictions, Claimant would be unable to return to his pre-injury job or any position he had performed in the past. She stated that these restrictions were categorically different and not consistent with the work restrictions of Dr. Zimmerman, Dr. Burns, Dr. Winslow, and Dr. Yamamoto. She stated that restrictions of no bending, crawling, crouching or stair climbing combined with the added work restrictions provided by Ms. Couch in her Functional Capacity Evaluation would eliminate all production and machine operator jobs. She agreed with Dr. Yamamoto's conclusion that Claimant would not be able to find any work based on his chronic pain, his lack of function and his lack of English skills and opined that Claimant was permanently and totally disabled from a vocational standpoint.

60. Katie G. Montoya performed a Vocational Assessment on November 15, 2022, though she interviewed Claimant on September 27, 2022. Claimant reported that he drove to the appointment five to ten minutes, but generally limited his driving as his low back pain would increase and his right foot would get tired. Claimant reported he had no prior injuries. Claimant reported he worked in cement, concrete and masonry work most of his working life, setting forms, making/mixing concrete, setting up scaffolds, taking up materials, stacking materials, and bringing materials where they were needed. Claimant reported that he was never in a supervisory or lead position. Claimant reported to Ms. Montoya that he did not feel he could work, that he had gone to multiple companies, including restaurants, factories, and cement companies, they had seen him and had said no. Ms. Montoya reported Claimant stated he could not work because of the following:

> He explained it is due to the fact that he cannot walk long, cannot stand long, and cannot bend over. [Claimant] believes he can walk about five to 10 minutes. He can stand still approximately 20 to 30 minutes. [Claimant] is able to sit longer but explained that he still must move. He explained that he really does not lift from the floor at all. If he lifts from the table level it is 15 pounds. This is due to back pain. [Claimant] explained that he is able to use his hands at the table level. He does not use a cane but will use a cart when he is at the store. [Claimant] had been up and down during our interview, and he explained that was typical.

61. Ms. Montoya reviewed the medical records in this smatter, including Dr. Zimmerman's MMI report, Dr. Winslow's DIME report, Dr. Raschbacher's Respondent IME report, the FCE performed by Kristine Crouch and Dr. Yamamoto's Claimant IME report. She also reviewed Ms. Bartmann's vocational assessment. Ms. Montoya opined that Claimant's work history showed he was an unskilled worker. She noted that Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto's work restrictions were substantially similar and opined they allowed for light duty work, so long as Claimant was not required to perform bending, crawling, crouching, stooping, ladders and ambulate only on level

ground with no stairs. She stated that Claimant had limited options due to his unskilled Spanish speaking profile but could perform production and packaging work. She opined that, when considering Dr. Burns' 15 lb. restriction, that Claimant's work availability was further limited but included food preparation, packaging, office cleaning, and some forklift operation. She opined that when considering Dr. Raschbacher's decreased limitations, the job opportunities increased.

62. On February 3, 2023 Claimant was evaluated by Nurse Kelly F. as a walk-in patient with complaints of middle back and right foot swelling. Dr. Lesley Pepin ordered an ultrasound of the right lower extremity, which was normal. X-rays of the hip findings were inconclusive and unclear. He was advised to follow up with his primary doctor.

63. Claimant was attended at Platte Valley Medical Center for low back and right leg pain and foot swelling. Claimant reported two weeks' history of increased pain and symptoms. PA Noel Kiley noted a normal exam. Claimant reported no numbness or tingling to his legs, no weakness, no loss of bowel or bladder function and advised Claimant that an MRI of the lumbar spine was not medically indicated at that time and recommended Claimant return to see his surgeon, take Tylenol and Motrin for pain, provided a muscle relaxer, lidocaine patches to help pain control and recommended ice or heat. She diagnosed lumbar spine pain.

D. Claimant's Testimony:

64. In the past Claimant worked as a laborer driving a forklift, trimming trees, and in construction and masonry. Some of his supervisors were only English speaking and Claimant would understand some of their instructions regarding work to be performed. However, if he did not understand his supervisor, while working for Employer, he would request that the supervisor's assistant, someone from the office, the mechanic or one of the truck drivers to interpret for him, but while working modified duty, most of the time it was the mechanic that was in the shop all the time. Occasionally, his supervisor would give him instructions to wash a car or clean the floor and he would understand those instructions in English. Claimant speaks some English, but he does not read or write English.

65. He did have to fill out paperwork when he began employment with Employer, all of which were in English. He had help completing them and only signed them. He also was provided with an employee handbook and a benefits package, both of which were translated by a coworker at the Employer's yard. This ALJ noticed that the completed forms handwriting in Exhibit O and the signature handwriting were distinctly different, with the exception that the Benefit Enrollment and Change form at bate stamp 423 seems that have been completed by the signatory (name and identifying information only).

66. Approximately two months after his surgery in February 2020, Claimant went to where his original supervisor was working and was not offered any further employment. He was instructed to contact the main office to see what his options for employment would be. Claimant contacted Employer's main office and enquired about work. He was informed that there was no space for him. Employer never contacted Claimant after that time.

67. Claimant contacted multiple businesses in search for employment. He provided his phone number but did not fill out any written applications for employment.[5] He did make some specific enquiries about jobs as a laborer and did not provide his restrictions. The prospective employers were for production factories, a thrift store, an electrical business, construction work and framing work. He would go to the job sites and speak with the supervisors who had the ability to hire laborers. Claimant believed he was not hired because they would notice how he was walking but none mentioned his problems with walking.

68. Claimant understood that Dr. Pehler recommended a second surgery, which was not authorized or approve by Insurer.

69. He used to visit his father daily. His father lived approximately five blocks away but Claimant would drive to his house, not walk. His father moved away, and was living with his brother, who was taking care of him, though he later moved to Mexico for most of the time, returning to live with his brother only two to three weeks at a time. In the spring, he would water his plants and flowers every day during the season, but he did not have any grass. He would either stand or sit on a wooden chair, both at his own home and when his father lived near, his father's garden, which was approximately 10 by 10 ft., a little larger than his own. He could stand for approximately 10 minutes then would need to sit down. He did not use other tools other than the hose.

70. Claimant would drive his father to the store, appointments and other errands. He would only drive thirty to forty minutes at a time due to his back pain. At around twenty minutes his back pain increased and by thirty the pain was not tolerable and would go to his lower extremity into his foot. He attempted to get a handicap placard for his vehicle but when he went to the DMV (Department of Motor Vehicle) he was told he needed a medical form. Claimant went to Eastside Family Health Center, his primary care provider, and was told by one of the physicians that he had to be in a wheel chair to qualify for one.

71. Claimant had recently sought medical attention at Denver Health Medical Center due to the increased pain in his low back and right leg, which was hurting and was swollen, changing colors on the sole of the foot. He was also having groin pain and that was the first time he had groin pain. They provided him medication, they ordered x-rays and gave him an injection for the pain. They also did an ultrasound due to the swelling of the leg and groin pain.

72. He attempted to return to Concentra but they personally declined to attend him. He then went to Brighton Platte Valley Hospital. They referred Claimant back to his surgeon, Dr. Pehler, at Concentra. He continues to take medications which include, Cyclobenzaprine 10 mg, three times daily, Morphine but only one tablet at the time of the visit to Platte Valley, prednisone 40 mg, once per day in the mornings, and Gabapentin.[6]

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[5] This ALJ infers that Claimant did not have anyone available to assist him in completing any formal applications for employment.

[6] The Final Admission of Liability dated June 2, 2022 shows that Respondents admitted to maintenance medical benefits. Counsel for Respondents indicated he would contact his client to have Concentra authorize the follow up visits.

73. He had a functional capacity evaluation with Ms. Couch. Claimant stated that they tested his ability to sit, stand, and required change in positions. He was able to walk on the treadmill approximately six minutes before he asked to stop the tests due to back and groin pain. He was also limited in performing the bending test, and other tests with his arms away from the body as it significantly increased his pain. There were also some tests that he declined to perform due to the back and leg pain, like crouching and squatting. He was able to do lifts from chest to shoulder level and other lifts, but not from the floor.

74. Claimant continues to have problems with pain in his low back and right leg since his injury. He is able to walk approximately 10 minutes, then he needs to rest or sit down. He is unable to bend down and lift an item from the floor. He has to lie down during the day for approximately one hour. His wife does the cooking, shopping and cleaning. He only makes the bed in the morning. Sometimes he does go with his wife to do the shopping so that he can walk for a little but goes out to wait in the car when he tires out. He generally proceeds to bed around 9 to 10 p.m. but will wake up in pain around 1 a.m. and stays up until around 5 or 6 a.m. when he returns to lay down. He then gets up again around 10 or 11 a.m. He has to alternate between laying down, standing, walking and sitting during the day. During the night he may watch TV or walk to distract him with the pain. The pain is what limits him. He is unable to bend at the waist, crouch, and squat without pain. When he needs to pick up something from the floor, he has to hold on to the wall or a table. He continues to perform his home exercise program to help with the pain. When he walks greater than ten minutes the pain increases, coming from his low back. He uses a cane to walk every so often.

75. Claimant stated that, but for the leg symptoms, he might be able to work, but the symptoms going down the leg prevent him from being able to work.

76. On multiple occasions Claimant requested to have questions repeated. This ALJ observed and noticed Claimant's confusion and lack of understanding on those occasions.

77. Claimant continues to have problems with his low back as he cannot bend forward and touch the floor. He also has problems with his foot and leg, which limit his movement and function. He stated that, if not for his leg, he might be able to work at a fast food restaurant or at a vegetable factory separating vegetables. Claimant declared his leg symptoms prevent him from working.

78. He can walk approximately 10 minutes before the pain in his back increases and now the pain is worse with groin pain. Claimant's biggest problems continue to be with the low back pain, the right leg pain and the groin pain.

79. At times, during the hearing, Claimant was visibly uncomfortable, moving around in his chair, as well as standing and sitting. This ALJ noted that Claimant took breaks from sitting on more than one occasion and request formal breaks.

Dr. Yamamoto's Testimony:

80. David W. Yamamoto, M.D., an expert in medicine generally, occupational medicine and family medicine as well as a Level II accredited physician by the Division of

Workers' Compensation, testified at hearing on June 23, 2023. Dr. Yamamoto reviewed the medical records, Claimant's restrictions as well as reviewing Respondent's IME physician's report.

81. Dr. Yamamoto agreed with the restrictions imposed by the DIME physician, as they were consistent with his examination of Claimant. He was considered to be in the light duty category, which means occasional lifting to 20 lbs., no bending, no crawling, no crouching or climbing ladders. He specifically opined that Claimant should not perform any job that would require him to bend repetitively. He also agreed that Claimant should have a handicap permit. He reviewed Kristine Couch's Functional Capacity Evaluation and stated she was extremely professional in how she did her work, was well known in the community and provided very dependable reports every time. He opined that Dr. Raschbacher's assignment of a 40 lb. restriction with no other limitations was very arbitrary and subjective. This is based on the fact that Dr. Raschbacher provided no evidence that he had done any testing for lifting limitations. He opined that Dr. Winslow and Dr. Zimmerman provided valid and objective reports in a scientific administration of the test for range of motion.

82. Dr. Yamamoto stated that it was a physician's responsibility to provide physical restrictions which can be used by vocational experts to reach an opinion with regard to the work they may perform. He expressed that Claimant had not recovered the function he had hoped following the microdiskectomy surgery. He mentioned that the MRI of May 20, 2020 showed a right-sided laminotomy with decreased spinal stenosis, a disc protrusion and multi-level degenerative changes but no longer showed the extrusion on the right at L4-L5 and stenosis. Dr. Yamamoto did not find any sign of instability post-operatively. Both he and Dr. Zimmerman observed that there was a decrease in the spinal stenosis post-surgery and no recurrent disc herniation. He noted that, unlike his examination of a positive straight leg test, a subjective finding, Dr. Zimmerman opined that Claimant had a tight hamstring, not nerve pain, which he did not consider a significant point.

83. Dr. Yamamoto opined that Claimant's work injury was the straw the broke the camel's back. In essence, Claimant was able to work a heavy duty job for many years, up to the point that he was injured, which is something that happens with laborers that are his age. He voiced that it was not uncommon to have degenerative changes in addition to what looked like a treatable condition. He specifically pointed out that neither the ATP nor the DIME physicians rated the radicular symptoms. This ALJ infers that the reason for the choice not to rate was not clear from either report. Dr. Yamamoto explained that it is the rater's choice, but under the *AMA Guides for the Evaluation of Permanent Impairment*, Third Edition (*Revised*), under Table 53IIE, Claimant had a surgically treated disc lesion with residual, medically documented pain and rigidity with or without muscle spasm. Dr. Yamamoto agreed with both Dr. Winslow and Dr. Zimmerman that the surgery, while technically successful, did not help Claimant's symptoms, as Claimant continued with radicular symptoms and he did not regain function.

E. Testimony of Cynthia Bartman:

84. Ms. Cynthia Bartman, an expert vocational evaluations, testified at hearing on June 23, 2023. Ms. Bartman interviewed Claimant, reviewed the medical records, and considered Claimant's work restrictions as well as his residual labor market, if any. She noted Claimant had light duty restrictions, no stooping, bending, crouching, crawling and no ladders and the Functional Capacity Evaluation performed by Kristine Crouch. She noted that, she considers whether a patient has a valid profile on the FCE to consider whether a Claimant had an indication of maximal effort and Claimant met 22 of 22 for validity markers. She also considered that Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto all agreed he should have a handicapped parking tag. The last requires limits on walking, which were consistent with the FCE. She stated that if a physician feels a claimant is able to walk over 200 feet, they should not recommend a parking permit.

85. Ms. Bartman opined that, contrary to Ms. Montoya's opinion, there is no work that would match Claimant's vocational skills and his sedentary to light work restrictions, and his limitations. She opined that the majority of the jobs identified by Ms. Montoya were primarily in the medium or heavy work categories and did not match Claimant's work restrictions or the overwhelming medical evidence. Those jobs identified fit only within the restrictions provided by Dr. Raschbacher. Further, in assessing Claimant's skill level based on the jobs and how he performed those jobs, he primarily worked performing unskilled work and laboring manual jobs. Ms. Bartman opined that there were no jobs in the local labor market that he could perform within his skill set in the sedentary to light duty categories. [7] Ms. Bartman stated as follows:

> [Claimant] mainly worked in the unskilled work category, so what I indicated earlier is that there would be very few skills, if any, that would ever transfer into other occupations, so then you have to look at what is his chances of getting other unskilled work. But then you have to factor in his work restrictions. And when I look at his work restrictions, I do not believe there are any jobs in the local labor market that matches his vocational skills and his work restrictions and that would come available in his local labor market. There are no matches when I evaluate each one of those elements.
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> …
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> I do labor market research every single week by calling employers and inquiring on the physical requirements of many different jobs, I feel like I have a firm understanding.

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[7] This ALJ takes judicial notice of the *Dictionary of Occupational Titles (4th Ed., Rev. 1991)* -- Appendix C by the U.S. Department of Labor job category list of physical demands as follows:
A) S-Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.
B) Light Work - Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.
C) Medium Work - Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.

86. Ms. Bartmann stated that there were certain types of jobs that employers would be willing train workers at Claimant's age (59) such as front desk and customer service if they had prior computer skills. However, considering Claimant's background of no skills and work restrictions, she opined employers were not willing to train. Further, she noted that while packing job may sitting allow, very infrequently, that they would also require horizontal reaching, which Claimant was unable to perform pursuant to the FCE and Dr. Yamamoto's recommendations pursuant to the FCE. Others required the ability to read and write in English, which Claimant could not do. Ms. Bartmann consulted the Dictionary of Occupational Titles (DOT)[8] to determine whether the jobs identified by Ms. Montoya were appropriate for Claimant considering his limitations and restrictions. The jobs, such as packaging, cleaning, food prep, required occasional bending, were inappropriate for Claimant considering his restricted, Ms. Bartmann never found any positions suitable for someone with Claimant restrictions. Ms. Bartmann opined that Claimant was permanently and totally disabled from employment,

F. Testimony of General Superintendent:

87. The general superintendent testified that he supervised Claimant's supervisor, as well as Claimant when he worked in the shop on modified duty after his injury form October 8, 2019 to February 11, 2020. [Redacted, hereinafter MZ] stated that he gave Claimant instructions of the jobs to perform each morning. He stated that he did not give instructions to have his instructions translated but that the workers were continuously speaking in Spanish, which was their native language. He did not recall having Claimant's supervisor or the main office contact him if Claimant went to either of them about a job following his surgery, as neither informed him as was the company policy.

G. Testimony of Katie Montoya:

88. Ms. Montoya testified as an expert vocational rehabilitation and assessment. Ms. Montoya interviewed Claimant on September 27, 2022. She obtained a history including that Claimant had ongoing low back and right leg pain that was constant. He stated that he was not the same person he used to be and could not do what he used to do. Claimant reported physical limitations consistent with his testimony at hearing. Ms. Montoya reviewed the medical records including the work restrictions prescribed by different providers, including the parking pass eligibility and the FCE performed by Ms. Couch. She discussed the jobs Claimant had sought out but that he had filed no formal applications for employment, as he had been turned away.

89. Ms. Montoya performed labor market research in this case after reviewing all available information by looking at local employment posting and sources as well as

[8] The Dictionary of Occupational Titles, Volume I & II (Forth Edition, Revised 1991) U.S. Department of Labor, Employment and Training Administration, U.S. Employment Service, found at https://babel.hathitrust.org/cgi/pt?id=umn.31951d00357017o&view=1up&seq=1 and at https://babel.hathitrust.org/cgi/pt?id=umn.31951d00357018m&view=1up&seq=1 as they are in the public domain and not updated since 1991.

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the DOT for the job classifications and determining any transferable skills. She relied on those restrictions that allowed Claimant to work the full range of light work, identifying jobs that fit that category, and possible job leads in the general metropolitan labor market. Ms. Montoya did not identify any that were within 20 minutes of Claimant's home. She opined that Claimant could earn a wage within the light duty category. She agreed that the DOT classification for forklift operator fell within the medium unless there was a job with cross-classification. She also agreed that hand packager was also in the medium category under the DOT. Further, Ms. Montoya did not consider any walking limitations.

H. Testimony of Dr. Raschbacher:

90. Dr. John Raschbacher testified at the second hearing as an expert in occupational medicine. At the time of his examination on September 6, 2022 Claimant was complaining of low back and leg pain. He noted that the post-surgical MRI of May 2020 showed resolution of the disc extrusion that was supposedly pinching the nerve and that Dr. Rauzzino indicated that Claimant had persistent leg pain in the absence of structural lesion. He also opined that the July 26, 2021 MRI did not show any re-herniation. Dr. Raschbacher went on to state that the surgery was "technically successful" and could not explain why the Claimant continued with symptoms, going so far as to state "that assumes he is, in fact, suffering leg pain. I don't – I doubt that he is. That's just what he's saying." This ALJ infers that Dr. Raschbacher is stating that Claimant is lying when he is reporting that he has leg pain. He also stated that things to look for to determine whether there is some abnormality are normal lumbar lordosis and the presence of lumbar spine spasms, positive SLR or positive tripod sign.

91. Dr. Raschbacher went on to exhaustively articulate the need for an EMG to be ordered by providers, then stated that it would not change the outcome, his complaints, his treatment or the need for further surgery. Dr. Raschbacher noted that he did not belief Claimant was telling the truth and if he were, the surgical outcome would be successful. He disagreed with Dr. Winslow that Claimant had a poor outcome to the surgery.

92. Lastly, he opined that FCEs were rarely indicative of a patient's abilities or restrictions despite the validity criteria being met as patients rarely if ever give a good effort. He recommended a 40 lb. work restriction and stated that Claimant really does not need any restriction at all. Dr. Raschbacher opined that Dr. Winslow and Dr. Zimmerman's opinions that Claimant had a poor outcome of his surgery was incorrect because Claimant was not telling the truth. However, he could not site to any medical records where any other physician found Claimant not credible or not truthful.

93. This ALJ finds Dr. Raschbacher's opinions not credible and contrary to medical records. Nothing in the DIME report, Dr. Zimmerman's, Dr. Burns' or other treater's, or Dr. Yamamoto's reports support the conclusion that Claimant was not truthful to his providers. It is well noted that while surgeries can be "technically successful" because it takes away the source of the original offending tissue, it may leave patients with permanent conditions and ongoing symptomology. While Dr. Raschbacher did not believe this Claimant, this ALJ does not doubt the veracity of the Claimant and his complaints of symptoms that limit his abilities as Claimant has consistently been reporting the same symptoms as shown above for the last four years.

I. Ultimate Findings:

94. As found, Claimant had no significant or relevant medical conditions that limited his ability to perform work as a heavy masonry worker prior to his work injury of August 10, 2019. Claimant is found credible and persuasive.

95. As found, Claimant had ongoing consistent low back pain from the day of the work related accident on August 10, 2019 to the present that limit his function. As found, the work related injury caused the ongoing symptoms despite providers being unable to identify a specific pain generator that would be amenable to surgery. As found, Claimant's work related injury was admitted and was the reason for the surgical treatment that resulted in Claimant's failed back syndrome or post-laminectomy syndrome. As found, simply because there is no identified pathology that can be addressed by surgery does not naturally indicate that there is nothing wrong with Claimant. Claimant clearly responded to steroid injections, improving for a short while, with symptoms returning wthin weeks. Here, throughout most of the medical care, Dr. Burns document that Claimant had ongoing lumbar spine spasms on the right, stiffness and significant loss of range of motion. Multiple other providers, other than the ATPs also highlighted objective findings. Dr. Rauzzino found positive straight leg raise on the right, negative on the left; loss of ROM, subjective weakness of his right EHL. Dr. Reiss wrote that Claimant did not show pain behaviors, had loss of ROM, had tenderness centrally, a positive SLR on the right, decreased sensation of the right big toe and some groin pain with a Faber test. Dr. Winslow found increased paraspinal muscle tone, and loss of range of motion. Dr. Yamamoto found decreased ROM, antalgic gait favoring the right leg, positive straight leg test on the right, decreased sensation over the medial right foot and decreased EHL strength on the right compared to the left. This ALJ is persuaded by the multiple providers that recorded objective findings over the lone physician that did not even believe Claimant had any symptoms. As found, Claimant has significant ongoing chronic pain caused by the work related August 10, 2019 injury.

96. As found, Dr. Winslow's opinion regarding a 'significant identifiable pain generator" was in the context of his opinion against recommending further surgery and not that Claimant was either symptom magnifying or was not truthful as Dr. Raschbacher suggested. It was simply noting that, from a surgical perspective, there was not sufficient identified pathology to operate again, and was not a comment about Claimant's credibility or disability, which are for this ALJ to determine and not a medical opinion. As found, Dr. Winslow, Dr. Zimmerman and Dr. Burns clearly found Claimant trustworthy as they provided ongoing care recommendations, work restrictions and formal significant impairment ratings. The opinions of Drs. Burns, Zimmerman, Winslow and Yamamoto were consistent and more credible than the contrary opinions of Dr. Raschbacher, who is specifically found not credible.

97. As found, Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto all agreed Claimant qualified for a parking permit. As found, when a physician indicates that a patient qualifies for a permit, they are indicating that the patient meets the legal criteria of limited walking up to 200 feet and ranges greater than that only with breaks or assistance.

98. As found, the job of office cleaner would require stooping, bending, crouching, and possibly stairs, which Claimant is unable to perform, which is fully

document in the credible medical records. The job of hand packer and food preparer would require bending forward and horizontal reaching. Claimant was unable to perform these activities during the functional capacity evaluation, which is found credible, valid and consistent with Dr. Yamamoto's credible endorsement of the evaluation. These types of jobs would also require occasional bending to pick items off the ground, which Claimant credibly testified and Dr. Burns documented he was unable to perform. These jobs would also most likely involve standing and sitting for extensive periods of time, which Claimant is unable to do as he requires frequent rests to lay down during the day. As found, Claimant could not perform the job of fork lift driver pursuant to the work restrictions of his ATPs as it would involve climbing on to the machine, and would not be considered to be on level ground. As found, any of the jobs which were potentially identified as possibly available to Claimant do not meet all of the Claimant's functional limitations or work restrictions. As found, even if the work restrictions of the ATPs had fit within the parameters of the proposed jobs identified, Claimant is unable to obtain and retain a job because he is unable to rest a full night without frequently waking up and staying awake for long hours at a time and requires rest breaks laying down during the day due to the unremitting low back and leg pain caused by the August 10, 2019 work injury.

99. As further found, considering Claimant's ongoing consistent complaints of low back pain and radicular symptoms, Claimant's background and experience, his transferable skills or lack thereof, as well as the persuasive vocational evidence Claimant has proven that he is permanently and totally disabled. As found, despite the robust current labor market, Ms. Bartmann's opinions and testimony are found more credible and persuasive that those presented by Ms. Montoya. Not because Ms. Montoya is not credible, but because Ms. Montoya's assessment did not include all of Claimant's credible and persuasive work restrictions and physical limitations caused by the chronic pain that prevent him from performing the full range of light duty jobs identified. In light of Claimant's education, primarily Spanish language skills, limited unskilled laboring experience, the accumulation of work restrictions provided by his ATPs, the DIME physician and Dr. Yamamoto, related to the admitted work injury, and his ongoing functional limitations, from the totality of the credible and persuasive evidence, Claimant is permanently and totally disabled.

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

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

B. Permanent Total Disability Benefits

To prove his claim that he is permanently and totally disabled, Claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Yeutter v. Indus. Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53 ¶ 26. Claimant must

also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Wallace v. Current USA, Inc.* W.C. No. 4-886-464 (ICAO, Dec. 24, 2014).

The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether Claimant can 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 Claimant could perform. *Weld County Sch. Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Yeutter* 2019 COA 53 ¶ 26. The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (ICAO. Apr. 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his particular circumstances. *Weld County Sch. Dist. Re-12 v. Bymer*, *supra*; *Blocker v. Express Pers.* W.C. No. 4-622-069-04 (ICAO, July 1, 2013.). Whether Claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

Because permanent total disability is based upon a claimant's impaired access to the labor market, medical evidence is neither required nor dispositive of permanent total disability. See *Baldwin Construction Inc., v. Industrial Claim Appeals Office*, 937 P.2d 895 (Colo. App. 1997). To the contrary, the claimant's testimony, if credited, may alone be sufficient to support a finding of permanent total disability. Chacon v. I.C.A.O., W.C. No. 54-382-050 (September 26, 2003). However, to the extent medical evidence is presented, the ALJ is the final abiter of conflicts in the evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990). It is immaterial if the record contains some medical and vocational evidence which, if credited, might support a contrary determination. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The determination of the weight to be accorded the various pieces of evidence is a matter within the ALJ's province as the fact-finder. *Rockwell International v. Turnbull, supra*.

This ALJ finds and concludes Claimant has proven, by a preponderance of evidence, that due to the restrictions that flow directly from his work injury he is permanently and totally disabled. Most important, the ALJ credits Claimant's testimony as it relates to his development of symptoms and limitations after his August 10, 2019 work injury and his surgery. This includes his limited ability to engage in activities of daily living, and physical activities necessary to obtain and retain employment.

The ALJ also credits the opinions of Dr. Burns, Dr. Zimmerman, and Dr. Winslow, all of whom listed work restrictions that were similar and substantially consistent. Those work restrictions include lifting no more than 15 to 20 lbs. occasionally, no bending, no stooping, no crouching, no crawling, no ladder climbing, as well as limited twisting, ambulating on level ground (no stairs or climbing) and was qualified to obtain a parking permit that includes limited walking up to 200 feet without breaks. These restrictions largely concurred with the findings of the Functional Capacity Evaluation which was later performed by Ms. Crouch. Ms. Crouch's evaluation is found to be persuasive, and markedly consistent with Claimant's acknowledged functional abilities.

This ALJ also credits and finds persuasive the testimony of Claimant's vocational expert, Cynthia Bartmann. Ms. Bartmann credibly explained Claimant's limited education, advanced age, lack of English skills including reading and writing, his limited work experience as an unskilled laborer, the physical restrictions as laid out by his ATPs Dr. Burns and Dr. Zimmerman, which are the human factors considered, all support the conclusion that Claimant is precluded from work due to his work injury of August 10, 2019 and that Claimant is permanently and totally disabled. This ALJ credits Claimant's testimony, the opinions of the authorized treating physicians, Dr. Burns and Dr. Zimmerman as well as the opinions of the DIME physician, and the opinion of Ms. Bartmann to conclude that the claimant is permanently and totally disabled. Further, when these are considered with the opinions of Dr. Winslow and Dr. Yamamoto, and the findings of the FCE by Ms. Crouch, as well as the Claimant's inability to find, secure and retain any jobs that may have become available in the labor market due to his inability to sleep, requiring rest periods during the day and his ongoing chronic pain, are all human factors that, collectively, support the finding that Claimant is unable[9] to earn a wage due to his August 10, 2019 work related injuries, and therefore, is not employable in a competitive job market, despite its current robustness.

While Respondents argue that this ALJ misapplied the facts to the law, this ALJ disagrees. Here, Respondents state that both Dr. Zimmerman and Dr. Winslow identified that Claimant could perform work in the light duty category. This ALJ interprets light duty work as the general ability to stand for up to 8 hours day and lift up to 20 lbs., with frequent lifting up to 10 lbs. Dr. Zimmerman issued light physical demand category work restrictions with no stooping, bending, crawling, crouching, or ladders, as well as limited to ambulating on level ground and stated he qualified for a disability parking pass.

Dr. Burns provided work restrictions of maximum lifting to 15 lbs., limited bending, twisting, stooping, no ladders or crawling, though she did not state she considered this light work, though it may be classified as not the full range of light duty. Both physicians limited the kind of work that Claimant could perform to something less than the full range of light work. In fact, Claimant's functional abilities, as demonstrated by the credible FCE performed by Ms. Couch, were less than this category when considering all of Claimant's limitation caused by the severe back injury and pain Claimant continued to experience following the unsuccessful lumbar surgery. Further, Claimant credibly testified that he could not lift from the floor or more than occasionally lift items or walk for more than 10 minutes without taking a break, and, required multiple breaks to lay down during the day. While Ms. Montoya identified several jobs available in the market, which involved the full range of light duty work. One of the jobs was as a tomato packer. This was a line job and would not be consistent with Dr. Burns' restrictions of 15 lbs. lifting, limited bending, twisting, and stooping, and this ALJ inferred that it would require reaching and standing for extensive periods of time, which Claimant stated he was not able to do. This ALJ did not consider this type of job to be within Claimant's functional abilities, given the credible and persuasive evidence.

[9] The FFCL issued on August 18, 2023 stated "able" instead of unable as appropriate given the context of the order. This was a scrivener's error.

Respondents argue that because Claimant had a recent complaint of groin pain, that the ongoing complaints cannot be linked to the August 10, 2019 work related injury. Claimant was placed at MMI as of October 18, 2021 and established what his physical limitation were at that time. The groin pain did not come about until 2023 and are found not to be a significant factor in the determination of whether Claimant was permanently and totally disabled upon reaching MMI.

Lastly, Respondents argue that Claimant's functional limitations as testified by Claimant cannot be relied upon for a determination of permanent total disability. Yet they cite no specific case law that supports this conclusion. In fact, case law states that an ALJ can make such a determination based on Claimant's testimony alone, if found credible, and need not rely on a specific medical opinion. However, in this case, Claimant's functional limitations is actually documented by providers. For example, Dr. Burns found Claimant to have difficulty standing up straight, had loss of normal lordosis and noted that objective findings were consistent with history and work related mechanism of injury. Dr. Burns noted that Claimant had spasming of the lumbar spine, tenderness present in right paraspinal muscles from L3-S1, and loss of range of motion. Other providers also documented multiple difficulties Claimant had with function that support his testimony. This bolsters Claimant's credibility in the final assessment of the totality of the evidence.

This ALJ concludes that Claimant cannot perform the full range of light duty work, has significant physical factors and functional limitations beyond those provided by his providers, as well as a significant amount of personal and human factors that affect Claimant's ability to return to the work force and cannot earn any wages. This ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that Claimant is permanently and totally disabled.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant is permanently and totally disabled.

2. Respondents shall pay permanent total disability benefits beginning October 14, 2021, which is the date Claimant reached MMI.

3. Based on the admission in the record, Claimant's TTD rate is $573.09. As a result, Claimant's PTD rate is currently $573.09.

4. Respondents may take credit for any temporary disability, permanent partial disability benefits or other allowable offset for benefits paid to Claimant after MMI against any retroactive PTD benefits payable to Claimant.

5. Respondents shall pay Claimant interest at the rate of eight percent (8%) per annum for all compensation benefits which were not paid when due.

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

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

DATED this 29th day of November, 2023.

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-220-689-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer in September 2022.

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

3. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits.

4. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant worked for Employer as a delivery driver beginning July 10, 2022. (Ex. G). Claimant testified he was injured while pulling a dolly up a truck ramp in early September 2022 while making a delivery, although Claimant could not recall the precise date of the alleged injury, or the location where it occurred.

2. On September 3, 2022, Claimant saw Heather Roesly, M.D., at the UCHealth emergency room in Green Valley Ranch, reporting intermittent left leg cramping for several months, which he reported was worse over the previous few days. Claimant reported he had always suffered from cramps, and it was likely due to excessive sweating association with working outside. Dr. Roesly recommended Claimant hydrate appropriately and follow up with his primary care provider. Claimant did not report any work-related injury at this visit. (Ex. D).

3. On September 6, 2022, Claimant saw Kimberly Maiers, PA-C, at the UCHealth emergence department at the Anschutz Medical Campus, reporting left lower calf pain, radiating into his upper thigh and back, and left calf swelling. He reported the pain as severe enough to prevent him from working and doing normal activities of daily living. Claimant reported having intermittent left calf pain for a year. Evaluation for deep vein thrombosis was negative. Ms. Maiers' clinical impression was pain of the lower extremity, with possible neuropathy. She prescribed gabapentin and recommended physical therapy. Claimant did not report any work-related injury at this visit. (Ex. E).

4. On September 9, 2022, Claimant was seen at Swedish Medical Center for a lumbar x-ray. The x-ray was negative for acute abnormality in the lumber spine. (Ex. C). No other record of Claimant being seen at Swedish Medical Center was offered or admitted into evidence. However, other providers reviewed the treatment note and summarized Claimant's evaluation, indicating Claimant reported left leg pain beginning approximately one year earlier. Claimant reported a distant history of motor vehicle

collision in and that he was told he had an L4-L5 disc bulge. Claimant stated his symptoms resolved so he never pursued surgery. (Ex. F).

5. On September 13, 2022, Claimant saw Alvin Padua, D.C., at Aim High Chiropractic, reporting shooting pain in his leg, shooting into his lower back. Claimant reported acute leg pain starting one week earlier, without a known origin, but noted that it started as a cramp "over a year ago." Claimant did not report a work-related injury. (Ex. C).

6. On September 21, 2022, Claimant was seen again at the UCH emergency department for low back and left leg pain. Although Claimant indicated he lifted heavy objects at work, he did not report a specific mechanism of injury, or being injured in the course of his employment. (Ex. A).

7. On October 20, 2022, Claimant reported to Employer that he sustained an injury to his lower back when he slipped on a ramp while loading a truck in a dark alley at a unknown location. Employer completed a First Report of Injury on October 20, 2022, which lists the date of injury as October 20, 2022. (Ex. G).

8. Also on October 20, 2022, Claimant saw Brian Cass, M.D., at UC Health, for complaints of back pain radiating into his left leg after heavy lifting at work 2½ months earlier. (The treatment note for this date was not offered or admitted into evidence). (Ex. A).

9. On November 1, 2022, Claimant was first seen by a workers' compensation provider, when he was evaluated at Workwell by Casey Jones, PA-C. The record from the initial evaluation was not offered or admitted into evidence, but was summarized by various other providers. Claimant reported he was injured while carrying a large load of plates and dishes on a dolly up a ramp. He reported he tried to catch himself, and the dolly fell on him, forcing him into a wall. Claimant reported left calf and lower back pain. Claimant denied prior similar problems, and was diagnosed with a lower back strain. Physical therapy was recommended. (Ex. F & A).

10. Over the following month, Claimant received physical therapy at Workwell, and had follow up appointments with Workwell providers. No records of Workwell visits from November 2022 were offered or admitted into evidence, although the treatment was summarized by others. (Ex. A).

11. On November 3, 2022, Claimant saw Ms. Jones, who noted that Claimant had a motor vehicle accident in 2012 which resulted in an L4-L5 disc bulge, for which Claimant was told surgery may be required. Ms. Jones opined that Claimant's pre-existing L4-L5 disc bulge was asymptomatic prior to his September incident, and that Claimant's current symptoms were work-related. She recommended a lumbar MRI and spine referral. (Ex. A).

12. At Claimant's initial physical therapy evaluation on November 3, 2022, Claimant reported needing to use a cane to ambulate, and that his pain was unrelenting, impacting his ability to sit, bend, walk and sleep. (Ex. A).

13. Claimant saw Lynne Yancey, M.D., at Workwell on November 9, 2022 and November 28, 2022. (Ex. F & A). At the November 28, 2022 visit, Claimant reported he had completed a course of steroids, and was moving better, but had now regressed to his pre-medication baseline. Claimant reported using a cane for ambulation. Dr. Yancey referred Claimant to Stephen Pehler, M.D., for evaluation of his ongoing reported symptoms. (Ex. F & A).

14. On December 2, 2022, Claimant had a lumbar MRI which showed a minimal disc bulge at L4-L5 with mild facet arthropathy and ligamentum flavum hypertrophy, without spinal canal or neuroforaminal stenosis. The MRI also showed a mild disc bulge at L5-S1, with a subarticular disc protrusion resulting in mild to moderate spinal canal stenosis, with compression of the traversing left L5 nerve root. (Ex. A & F).

15. Claimant's next documented medical visit was December 7, 2022 with Dr. Yancey, M.D., at Workwell, for a date of injury of September 1, 2022. Dr. Yancey documented her review of Claimant's records from a September 9, 2022 Swedish Medical Center visit, and noted Claimant had provided a history indicating his symptoms had existed for one year prior to that evaluation. Dr. Yancey also reviewed Claimant's October 20, 2022 and indicated Claimant reported a 2.5-month history of lower back and left leg radiation after "heavy lifting at work." She opined that the timeline would put his injury date in early August 2022, several weeks before his reported injury date. (Ex. F).

16. At the December 7, 2022 visit, Claimant reported his lower leg was worse, and that his pain level was 10/10. He reported his pain was worse with all movements, and that he was unable to tolerate prolonged standing or walking. Dr. Yancey opined that Claimant's reported symptoms corresponded to the disc bulge shown on his MRI, and noted he was scheduled for an evaluation with Samuel Chan, M.D., for an EMG. (Ex. F).

17. On December 8, 2022 and December 12, 2022, Claimant attended physical therapy visits at Workwell. Claimant's physical therapy records document that Claimant reported severe pain with transitions and gait, and that he was using a cane. One of Claimant's functional goals was listed as "To be able to ambulate without quad cane > 100 feet." (Ex. F).

18. On December 14, 2022, Claimant saw Dr. Yancey with no reported significant changes in his condition. (Ex. F).

19. On December 15, 2022, Claimant saw Dr. Pehler. (Dr. Pehler's note from this date was not offered or admitted into evidence, but is summarized by other providers). Claimant reported debilitating pain, difficulty weight bearing, and needing to use a cane. Dr. Pehler performed x-rays and recommended an L5-S1 epidural steroid injection for a large central and left-sided L5-S1 disc herniation with nerve impingement. Dr. Pehler noted that if injections did not improve, a microdiscectomy would be recommended. (Ex. F & A).

20. On December 16, 2022, Claimant saw Samuel Chan, M.D., for a physiatry consultation. (The treatment note for Dr. Chan's December 16, 2022 visit was not offered

or admitted into evidence, but is summarized and referenced in other records). In a June 4, 2023 letter, Dr. Chan indicated Claimant was using a single point cane at his visit, and had significant pain behavior. On December 16, 2022, Dr. Chan performed an EMG study of Claimant's left leg which was within normal limits. He noted that there was no electrophysiologic evidence of left sided lumbar radiculopathy or lumbosacral plexopathy, and no evidence of nerve entrapment or neuropathy of the left leg. (Ex. A & B).

21. On January 12, 2023, Dr. Chan performed a left L5-S1 transforaminal epidural steroid injection (TESI). Eight days later, on January 20, 2023, Claimant returned to Ms. Jones using a cane for ambulation, and reporting 10/10 pain, without obvious signs of discomfort. Ms. Jones indicated the TESI provided no benefit and recommended additional physical therapy. (Ex. A).

22. Claimant's next documented treatment notes is a physical therapy re-evaluation from February 16, 2023. Claimant had attended 13 physical therapy visit, and reported continued severe pain. He reported "increased pain after walking a few steps," and his goals continued to include walking without a cane for greater than 100 feet. It was also noted that Claimant had not responded to conservative therapy. (Ex. F).

23. On February 17, 2023, Claimant saw Jacqueline Denning, M.D., at Workwell. Ms. Denning documented that Claimant sustained a fall injury in September 2022, and that there was a "delay of care [due to] insurance coverage logistics." Claimant reported to Ms. Denning that he woke that morning experiencing the worst pain since his injury, radiating down his left leg, and now had popping in his left knee. On examination, required support to stand on his heels and toes, and reported requiring a cane for ambulation. Dr. Denning diagnosed Claimant with a lower back strain and lumbar radiculopathy. (Ex. F).

24. On February 23, 2023, Claimant saw Dr. Pehler, reporting that buttock and leg pain and requiring a cane for ambulation assistance. Dr. Pehler characterized Claimant as having a very large and significant herniation on the left-hand side at the L5-S1 level. He recommended a left-sided L5-S1 microdiscectomy. (Ex. F).

25. Respondents performed video surveillance of Claimant on eight days between November 8, 2022, and January 5, 2023. The video surveillance footage contained in Exhibit I is approximately 22 minutes in length. The surveillance videos show Claimant walking, jogging a short distance, walking his dog, riding an electric bicycle, carrying various items, loading, and unloading vehicles, getting in and out of a vehicle, working in a garage, ducking under a partially open garage door, going into various buildings, and shopping in a store, all without apparent difficulty. Although Claimant is seen carrying a cane at various points in the video, the majority of footage shows Claimant walking without the use of a cane, and with a normal gait. At some points, Claimant is shown carrying, but not using a cane to walk. When using the cane, Claimant alternately used it in his right or left hand, and did not appear to be placing any weight on the cane, or using it to assist in walking. On November 9, 2022, the day Claimant had two appointments with Workwell, Claimant is shown walking in and out of a building and into a parking lot using a cane or adjustable walking stick. Video from November 11 and 12, 2022, shows Claimant walking, jogging, and working in a garage, without a cane. When considered in

its totality, the video surveillance demonstrates that Claimant symptoms were not as reported to his health care providers, and that he did not require a cane for ambulation. (See Ex. I). Although Claimant testified briefly regarding the video footage, he offered no credible, cogent explanation for his ability to perform these tasks without apparent difficulty, while reporting severe pain and limitations to his physicians.

26. On February 8, 2023, Claimant underwent an independent medical examination (IME), with Carlos Cebrian, M.D., at Respondent's request. Dr. Cebrian reviewed Claimant's medical records and performed an examination. After completion of the evaluation, Dr. Cebrian was provided with video surveillance footage of Claimant. Dr. Cebrian's description of the surveillance footage he reviewed is consistent with the ALJ's interpretation of the video provided for hearing. Dr. Cebrian noted that Claimant presented at the IME with an exaggerated limp of the left leg while using a cane in the right hand. Based on his review of records, examination, and review of video surveillance, Dr. Cebrian opined that Claimant had no work-related diagnoses. He indicated that Claimant's lumbar pain was degenerative changes at L5-S1 due to a disc protrusion compressing the left S1 nerve root, but did not attribute Claimant's condition to any work-related cause. The ALJ finds Dr. Cebrian's opinion credible.

27. On June 4, 2023, Dr. Chan authored a letter to Respondents' counsel after reviewing Dr. Cebrian's report. Dr. Chan noted that Claimant's clinical presentation was significantly different than that described by Dr. Cebrian in his report. For example, Dr. Chan noted that when he saw Claimant he was using a single-point cane, and had significant pain behavior, including alternating sitting and standing during his clinical visit. Dr. Chan opined that Claimant's lumbar pain and left leg complaint "is incidental, independent and unrelated to his work" for Employer. He opined that Claimant required no further treatment modalities, and that any further treatment should be provided outside the workers' compensation system. (Ex. B).

28. At hearing, Claimant testified his work for Employer was labor intensive, and that he worked more hours than other employees. He testified that he was injured when pulling a dolly up a ramp while making a delivery, but he did not recall the specific date or the location where he was injured. Claimant testified that had his condition been preexisting, he would not have been able to perform a labor-intensive job, and that he had no leg or back problems prior to his alleged injury. Claimant testified that he underwent back surgery in June 2023, and now he is better.

29. Claimant's co-worker, [Redacted, hereinafter SY] testified at hearing that he has worked with Claimant for frequently, and does not recall seeing Claimant limp or exhibit signs of an injury before September 2022. He confirmed that Claimant's job is labor intensive, and that Claimant worked a lot of hours.

30. [Redacted, hereinafter BL], Employer's general manager, testified at hearing that Claimant worked full -time from September 2022 through October 2022. BL[Redacted] testified that Claimant reported an injury on October 20, 2022, and Claimant has not worked for Employer since.

31. The admitted evidence is insufficient to permit the ALJ to determine Claimant's average weekly wage.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant

demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

Claimant has failed to establish that he sustained an injury arising out of the course of his employment with Employer. Claimant testified and reported to various medical providers that he was injured in early September 2022. Claimant's claim that he sustained an injury in the course of his employment with Employer is not credible for multiple reasons. First, although Claimant was evaluated at least four times from September 3, 2022 through September 21, 2022, by physicians at UC Health and by chiropractor Dr. Padua, he did not report a work injury to these providers. Claimant indicated to these providers that he had a history of left leg pain for approximately one year prior to September 2022. The ALJ does not find it credible that Claimant would seek care from multiple providers without reporting to any of them alleged incident which he claims caused his pain. Nor is it credible that four different providers failed to document a report of the alleged incident.

Next, Claimant did not report a work-related injury until October 20, 2022, more than six weeks after it allegedly occurred. When Claimant did report the incident, as described on the First Report of Injury, he did so in vague terms, without identifying the location where the incident allegedly occurred. In testimony, Claimant could not recall the date of the alleged incident. The ALJ does not find it credible that Claimant cannot recall the location of the alleged injury, or the date on which it occurred.

Next, Claimant was able to work full-time for all of September 2022, until reporting an injury to Employer on October 20, 2022. Claimant's assertion that he would not be able to work if his injury was preexisting is inconsistent with his ability to work full-time for approximately six weeks after it allegedly occurred. Moreover, the surveillance videos are inconsistent with his reports to medical providers, and demonstrate that Claimant's condition was not as represented.

The ALJ credits the opinions of Drs. Cebrian and Chan that Claimant's symptoms are not work-related. Although Claimant's treating providers have opined that his condition is work-related, these opinions rely on the Claimant's self-report of the mechanism of injury and the emergence of symptoms. Those reports are inconsistent with his contemporaneous reports to his providers prior to October 20, 2022. Although Claimant had pathology at the L4-L5, and L5-S1 levels, the evidence does not establish that these conditions were caused by or aggravated by his employment with Employer.

At hearing, and in position statements, Claimant appears to contend that Respondents' payment for medical care helps establish that he sustained a work-related

injury. Although Insurer apparently paid for medical treatment Claimant received for his back and left leg, the payment of medical services is not in itself an admission of liability, and such payments do no prevent respondents from challenging the compensability of a claim. *See Ashburn v. La Plata School Dist. 9R*, W.C. No. 3-062-779 (ICAO May 4, 2007); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO Jun. 3, 2020) (Provision of medical care "does not necessarily establish that claimant was injured, it only establishes that the claimant claimed she was injured.")

Based on the totality of the evidence, the ALJ concludes that Claimant has failed to meet his burden to establish that it is more likely than not that he sustained an injury to either his lower back or left leg arising out of the course of his employment with Employer.

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.

Temporary Total Disability

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* Sections 8-42-103 (1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by 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.

Average Weekly Wage

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

Because Claimant has failed to establish that he sustained a compensable injury, determination of Claimant's average weekly wage is moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that he sustained a compensable injury to his back or left leg arising out of the course of his employment with Employer.

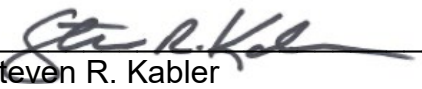
2. Claimant's claim for medical benefits is denied and dismissed.

3. Claimant's claim for temporary total disability benefits is denied and dismissed.

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

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

DATED: November 29, 2023



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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that all medical treatment after June 8, 2022 (including all recommendations and referrals made by Dr. Kennan Vance and Dr. Benjamin Sears) constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted September 20, 2021 work injury?

Have Respondents demonstrated, by a preponderance of the evidence, that Claimant experienced an intervening event on June 8, 2022 or June 9, 2022 that was sufficient to sever Respondents' liability?

Has Claimant demonstrated, by a preponderance of the evidence, that on August 30, 2023 she suffered further injury while in the quasi-course of employment?

FINDINGS OF FACT

1. Claimant worked for Employer as a cashier and "self check-out host". On September 20, 2021 Claimant suffered an injury to her right shoulder while lifting a case of beer while working for Employer. Respondents have admitted liability for the September 20, 2021 work injury.

2. Following the September 20, 2021 injury, Claimant was diagnosed with a torn right rotator cuff. On December 22, 2021, Dr. Keenan Vance performed a repair of Claimant's torn rotator cuff. Specifically, the procedure included "diagnostic operative arthroscopy of the right shoulder with extensive intra articular debridement", and "repair of a massive retracted rotator cuff tear and subacromial decompression including acromioplasty".

3. Unfortunately, the initial surgery failed and on May 17, 2022, Dr. Vance performed a right reverse total shoulder arthroplasty. In the operative report, Dr. Vance noted "63-year-old female with osteoporosis that failed her rotator cuff repair. Intraoperatively on the rotator cuff repair we had difficulty with her anchors holding into the bone."

4. At the completion of the May 17, 2022 surgery, x-rays were performed and showed that the hardware from the reverse total shoulder arthroplasty was "intact and well seated".

5. Thereafter in June 2022, Claimant suffered two falls at home. Claimant testified that the first fall occurred on June 8, 2022, when she was exiting her vehicle, and she slipped and fell onto her right side.

6. Claimant further testified that she fell a second time on June 9, 2022. In this instance, Claimant was on her porch and placing a water bowl for her cat. As she returned to standing, she began to feel lightheaded and fell backwards onto her buttocks.

7. In a medical record dated June 22, 2022, Claimant was seen by her primary care provider (PCP) Dr. Daniel Sullivan regarding recent shortness of breath. At that appointment, Claimant reported to Dr. Sullivan that she had fallen twice at home. Dr. Sullivan recorded that the first fall occurred when "she was getting some bags out of the trunk and she landed on her side and knees." Dr Sullivan also noted that with this first fall she thought she had broken ribs on her right side. With regard to the second fall, Dr. Sullivan noted that it was "a porch fall as she began to black out due to not having her oxygen. She landed on her bottom".

8. On July 6, 2022, Claimant returned to Dr. Vance. In the medical record of that date, Dr. Vance noted Claimant's report that she had fallen at home "a couple of weeks ago". Claimant informed Dr. Vance that she "tried everything not to fall on her shoulder but she did break [four] ribs and she fell on her knee." Based upon Claimant's report of a fall, Dr. Vance ordered x-rays.

9. On that same date, x-rays of Claimant's right shoulder revealed a heme fracture of the glenoid with dislodgement of the glenoid component. Dr. Vance listed it as an active problem of an acute periprosthetic fracture around the prosthetic joint.

10. Dr. Vance advised Claimant that due to this fracture, another revision surgery would be necessary. Dr. Vance noted that such a revision surgery would require bone grafting and a new glenoid component. As a result, Dr. Vance referred Claimant to another surgeon with experience with such complex procedures. This referral was made to Dr. Benjamin Sears in Denver, Colorado.

11. On August 3, 2022, Claimant was seen by Dr. Sears. In reciting Claimant's history, Dr. Sears noted that after the reverse total shoulder arthroplasty, Claimant "had another fall about [six] weeks later". Dr. Sears noted that the fall resulted in loosening the surgical hardware that is now "completely dislodged". Dr. Sears recommended a two stage procedure and placement of a custom glenosphere. Prior to scheduling the procedure, Dr. Sears also expressed concern about a possible infection and ordered a CT scan of Claimant's right shoulder. Dr. Sears also ordered nerve conduction studies.

12. On August 30, 2022, Claimant attended an independent medical examination (IME) with Dr. John McBride. In connection with the IME, Dr. McBride reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. McBride opined that Claimant's need for the initial rotator cuff repair and the reverse total arthroplasty were both related to the September 20, 2021 work injury. Dr. McBride also noted that both of those procedures were reasonable and necessary medical treatment. Dr. McBride further opined that Claimant's fall at home resulted in the fracture of Claimant's scapula and caused the glenosphere to become dislodged. Specifically, Dr. McBride noted that it was that fall

that was "the etiology for [Claimant's] need for revision of her reverse total shoulder replacement." Dr. McBride agreed that it would be wise to determine if there is an underlying infection in Claimant's shoulder. However, he further noted that if such testing was negative, then the trauma of the fall would be the cause of Claimant"s periprosthetic fracture, and therefore not related to the work injury.

13. Clamant resides in Grand Junction, Colorado and the IME with Dr. McBride was conducted in Denver. Respondents provided Claimant with air travel to attend the IME. On August 30, 2022, Claimant was at [Redacted, hereinafter DA] to take her flight back to Grand Junction. While at DA[Redacted], Claimant suffered another fall.

14. Claimant testified regarding her fall at DA[Redacted]. Specifically, she testified that the fall occurred while she was on a moving sidewalk. While on that moving sidewalk, she moved to the side and "blacked out". When she was next conscious she discovered she had fallen face first with both of her hands extended in front of her. On cross examination, Claimant confirmed that there was nothing specific about the moving walkway that caused her to fall. With regard to the reason for the loss of consciousness on this occasion, Claimant testified that Dr. Sullivan had diagnosed her with severe anemia.

15. Claimant further testified that emergency services were called and she was transported to the hospital by ambulance. Claimant was transported from DA[Redacted] to the emergency department (ED} at University of Colorado Hospital. Claimant testified that she remained in the hospital for two days.

16. On September 7, 2022, x-rays of Claimant's right humerus showed an acute oblique fracture of the midshaft of the right humerus "at the tip of the humeral component of the reverse total shoulder arthroplasty".

17. On September 22, 2022, Dr. Sears authored a letter to Respondents' counsel. In that letter, Dr. Sears again noted his concern that there may be an underlying infection in Claimant's right shoulder. Dr. Sears also stated his opinion that Claimant's current need for revision surgery is related to her workers' compensation injury. In support of this opinion, Dr. Sears stated that "[t]he complication of a catastrophic base plate failure requiring revision arthroplasty would only occur as a secondary condition to her placement of a reverse shoulder arthroplasty which was due to a [workers' compensation] accident." Dr. Sears also noted that the most recent fall on August 30, 2022 resulted in "a relatively nondisplaced midshaft fracture distal to the stem of the implant." Dr. Sears noted the most recent fracture was being treated nonoperatively.

18. On October 10, 2022, an x-ray of Claimant's right humerus showed a prosthetic fracture of the right humerus.

19. On November 8, 2022, Dr. Sears performed revis1on surgery on Claimant's right shoulder. Specifically, the procedure included resection arthroplasty right reverse shoulder arthroplasty; placement of long intramedullary (IM)nail; placement of allograft at the humeral shaft fracture and at the glenoid; and placement of a cement spacer.

20. On January 13, 2023, Dr. McBride authored an addendum to his September 2022 IME report after reviewing additional medical records. In the addendum Dr. McBride reiterated his opinion that Claimant's falls at home resulted in the periprosthetic fracture. Dr. McBride also addressed Claimant's fall on August 30, 2022 at DA[Redacted]. Dr. McBride opined that Claimant's falls that occurred after the successful reverse total shoulder arthroplasty are unrelated to the work injury.

21. Claimant testified that on April 25, 2023 she underwent the second revision surgery with Dr. Sears. Claimant testified that it is her understanding that in that second procedure Dr. Sears removed the IM nail from the humerus and performed a second replacement operation. Claimant testified she has improved since surgery and is now undergoing treatment with a bone clinic. Claimant testified that she is planning to undergo additional post-surgery physical therapy, as recommended by Dr. Sears.

22. Dr. McBride's testimony was consistent with his written reports. Dr. McBride testified that the procedures performed by Dr. Vance (the initial rotator cuff repair and the reverse total shoulder arthroplasty) were both reasonable, necessary, and related to Claimant's work injury. Dr. McBride noted that immediately following the reverse total shoulder procedure imaging showed that the hardware was intact and well seated. Dr. McBride testified that this indicates that the reverse total shoulder arthroplasty was successful. Dr. McBride further testified that the fall Claimant suffered that resulted in four broken ribs was a significant fall. Dr. McBride testified that he agrees with Dr. Vance that the periprosthetic fracture occurred secondary to that fall. With regard to Dr. Sears's concern related to infection, Dr. McBride testified that was a reasonable concern. Dr. McBride further testified that ultimately infection was ruled out in this case.

23. Prior to the June 8 and June 9, 2022 falts at her home, Claimant has a history of other falls. Medical records entered into evidence show that in October 2018, Claimant underwent x-rays following a "fall into tub back in August". On June 11, 2020, Claimant underwent a number of imaging studies (including x-rays of her right wrist and cervical spine, and a CT scan of her pelvis) after suffering a fall. This June 2020 fall is further addressed by Dr. Sullivan in a July 19, 2020 medical record. At that time, Dr. Sullivan noted that Claimant had suffered a sacral and pubic rami fracture in a fall.

24. The ALJ credits the medical records and the opinions of Drs. Vance and McBride. The ALJ finds that Claimant's fall at home on June 8, 2022 resulted in four broken ribs and the fracture to the reverse total shoulder hardware. That fall was not related to the admitted work injury. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that medical treatment she received after the

June 8, 2022 fall is related to the work injury. The ALJ also finds that Respondents have successfully demonstrated that it is more likely than not that the June 8, 2022 fall at home was an intervening event sufficient to sever Respondents' liability for the September 20, 2021 work injury.

25. With regard to specific medical treatment requested in this case, the ALJ finds that although the two revision surgeries performed by Dr. Sears were reasonable and necessary in treating Claimant's condition, those procedures are not related to Claimant's work injury.

26. Although the ALJ has determined that Respondents' liability in this matter was severed as a result of the June 8, 2022 fall at home, the ALJ must now turn to the August 30, 2022 fall at DA[Redacted]. Specifically, the ALJ must determine whether the quasi-course of employment doctrine is applicable to that fall. Furthermore, if that fall did occur within the quasi-course of employment, the ALJ must consider Claimant's pre-existing condition of anemia and determine if there was any special hazard present at the time of the August 30, 2022 fall.

27. The ALJ finds that it is clear that on August 30, 2022, Claimant was within the quasi-course of employment as she was traveling home after attending the IME with Dr. McBride. However, the ALJ finds that Respondents have successfully demonstrated that Claimant's fall on August 30, 2022 was precipitated by her pre-existing conditions of anemia and syncopal episodes. As noted above, Claimant has a history of falling. The ALJ credits Dr. McBride's opinion that Claimant's falls that occurred after the successful reverse total shoulder arthroplasty are unrelated to the work injury. The ALJ finds that it was Claimant's dizziness and "blacking out" on August 30, 2022 that resulted in the fall on that date. Although the fall occurred at an airport while Claimant was utilizing a moving walkway, the ALJ credits Claimant's testimony that there was nothing specific about the moving walkway that caused her to fall. The ALJ further finds that there was no special hazard present at the time of the fall.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that medical treatment after June 8, 2022 is related to the admitted September 20, 2021 work injury. As found, the medical records and the opinions of Drs. Vance and McBride are credible and persuasive on this issue.

6. If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See Post Printing* & *Publishing* Co. *V. Erickson,* 94 Colo. 382, 384, 30 P.2d 327, 328 (1934). Respondents are only liable for subsequent injuries which "flow proximately and naturally" from the compensable injury. *Standard Metals Corp. V. Ball,* 172 Colo. 510,474 P.2d 622 (1970).

7. As found, Respondents have demonstrated, by a preponderance of the evidence, that on June 8, 2022, Claimant suffered an intervening event that was sufficient to sever Respondents' liability related to the admitted work injury. As found, the medical records and the opinions of Drs. Vance and McBride are credible and persuasive on this issue.

8. Under the quasi-course of employment doctrine injuries sustained while undergoing or traveling to and from authorized medical treatment are compensable, even though they occur outside the ordinary time and place limitations of normal employment. *Excel Corp. V. Industrial Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1998); *Schreiber v. Brown* & *Root, Inc.,* 888 P.2d 274 (Colo. App. 1993). The rationale for this principle is that because an employer is required to provide medical treatment, and because the claimant is required to submit to treatment in order to receive benefits, travel to receive authorized treatment is an "implied part of the employment contract." *Turner V. Industrial Claim Appeals Office,* 111 P.3d 534 (Colo. App. 2004).

9. If the precipitating cause of an injury is a preexisting health condition that is personal to the claimant, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the pre-existing condition to contribute to the accident or the injuries sustained. *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (ICAO July 29, 1999); *Stanley Alexander v. Emergency Courier Services,* W.C. No. 4-917-156-01 (ICAO Oct. 14, 2014). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition lacks sufficient causal relationship to the employment to meet the arising out of employment test. *Ramsdell v. Hom,* 781 P.2d 150 (Colo. App. 1989); *Stanley Alexander v. Emergency Courier Services, supra.* In order for a condition of employment to qualify as a "special hazard" it must not be a "ubiquitous condition" generally encountered outside the workplace. *Ramsdell v. Hom, supra; Joan Briggs v. Safeway,* Inc. W.C. No. 4-950-808-01 (I.C.A.O July 8, 2015). Conversely, if the precipitating cause of the injury involves conditions or circumstances of the employment, there is no need to prove a "special hazard" in order for the injury to arise out of the employment. *Cabe/a v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *H&H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

10. As found, the August 30, 2022 fall, while within the quasi-course of employment, occurred due to Claimant's preexisting conditions and no special hazard was present. Therefore, the injuries sustained on August 30, 2022 are not compensable. As found, the medical records, Claimant's testimony, and Dr. McBride's opinions are credible and persuasive on this issue.

ORDER

It is therefore ordered that Claimant's request for medical treatment after June 8, 2022 is denied and dismissed.

Dated November 30, 2023.

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

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

ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 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. 5-229-784-001

ISSUE

I. Claimant's average weekly wage.

FINDINGS OF FACT

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

1. This case involves an admitted claim.
2. Claimant started working for Employer on or about August 7, 2022.
3. Claimant was injured on January 16, 2023.
4. Claimant earned the following wages:

Pay Period Ending	Gross Earnings
8/14/2022	$1,170.00
8/21/2022	$150.00
8/28/2022	$1,330.00
9/4/2022	$1,076.25
9/11/2022	$630.00
9/18/2022	$1,400.00
9/25/2022	$1,400.00
10/2/2022	$1,120.00
10/9/2022	$1,382.50
10/16/2022	$1,400.00
10/23/2022	$1,400.00
10/30/2022	$1,400.00
11/6/2022	$1,400.00
11/13/2022	$1,400.00
11/20/2022	$1,120.00
11/27/2022	$280.00
12/25/2022	$560.00
1/1/2023	$576.00
1/8/2023	$576.00
1/15/2023	$1,440.00
Total Wages	**$21,210.75**

5. From August 7, 2022, through January 15, 2023, a 23-week period, Claimant earned $21,210.75. Claimant contends that in order to fairly calculate his average weekly wage, his total earnings over the 23-week period should be used. Using Claimant's earnings over the entire 23-week period results in an average weekly wage of $922.21.
6. From October 3, 2022, through January 15, 2023, a 15-week period, Claimant earned $12,934.50. Respondents contend that in order to fairly calculate Claimants' average weekly wage, a period of 15 weeks should be used. Using Claimant's earnings over this 15-week period results in an average weekly wage of $862.30.
7. Both Claimant's and Respondents' calculations consider that Claimant did not work and earn any wages from November 28, 2022, through December 18, 2022. Plus, Claimant earned less than usual from November 21, 2022, through January 1, 2023.
8. There was no testimony provided by either party regarding why Claimant's wages varied during any weekly period. Moreover, there was no testimony that established Claimant had to be available for 40-hours week – if the work was available.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and

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

I. Claimant's average weekly wage

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

There was no testimony presented at the hearing regarding why Claimant's wages varied during the 23-week period. The only evidence submitted and admitted into evidence was Claimant's wage records. As found, Claimant worked 23 weeks before he suffered his work injury. During this period, Claimant's weekly earnings varied – and Claimant did not work for an approximate three-week period. The 15-week period urged by Respondents is arbitrary and disproportionately impacts Claimant's average weekly wage, in a negative way, based on the three weeks Claimant did not work during that period.

Thus, based on the fluctuation of Claimant's wages during the 23-week period, the ALJ finds and concludes that the most reasonable calculation to determine Claimant's average weekly wage is to take his total earnings over the 23-week period of $21,210.75 and divide it by 23 weeks. While the ALJ considered using the $1,440 amount Claimant earned the week he was injured, the ALJ ultimately finds and concludes that the most reasonable and fair method to determine Claimant's average weekly wage is the method proposed by Claimant.

Therefore, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that his average weekly wage is $922.21-which is the $21,210.75 amount divided by 23 weeks.

ORDER

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

1. Claimant's average weekly wage is $922.21.
2. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: November 30, 2023.

/s/ Glen Goldman

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