OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-270-543-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable left shoulder injury on February 16, 2024 during the course and scope of her employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable and necessary medical benefits causally related to her left shoulder injury.

FINDINGS OF FACT

1. Claimant works as an Equipment Operator for Employer. Her job duties involve driving a dump truck to carry debris from street sweepers to a landfill. Claimant also operates the dump truck as a snowplow during winter months.

2. Claimant explained that on February 16, 2024 she slipped on ice and flailed her arms while exiting a glass building. She did not fall during the incident.

3. The record reveals that on February 16, 2024 Claimant sent an e-mail to Equipment Operator II [Redacted, hereinafter SS] and Operations Supervisor [Redacted, hereinafter IC]. She specified that earlier in the day she had slipped on ice on a sidewalk while exiting a glass building. Claimant remarked that she twisted her right ankle but did not desire medical treatment.

4. Claimant explained that she noticed left shoulder pain on the night of February 16, 2024. She reported her left shoulder injury to IC[Redacted] in his office on the morning of February 20, 2024.

5. On February 20, 2024 IC[Redacted] conducted a toolbox meeting. A toolbox meeting is an employee safety gathering. The February 20, 2024 meeting discussed common causes of slips, trips and falls in the workplace and was designed to promote a culture of safety through preventive measures. IC[Redacted] acknowledged that Claimant mentioned a slip on ice and corresponding "dance" at the meeting. However, Claimant did not note a left shoulder injury.

6. Claimant did not seek medical treatment. However, she testified she was unable to lift her left arm over her head or perform her regular job duties.

7. Claimant commented that on March 11, 2024 she aggravated her left shoulder symptoms while shoveling debris in the median of a road at the request of Employer. On March 18, 2024 Claimant told IC[Redacted] that she was planning to contact Employer's Ouchline on the following day because her arm was "still very bad." IC[Redacted] responded "[i]f you're

feeling that way why not call today." Claimant did not want to leave Employer short-handed but was going to call. IC[Redacted] replied "let them know this stems from February 16th a month ago."

8. Claimant completed a Personal Statement for Employer on March 18, 2024. She recounted that she slipped on ice, injured her right ankle and swung her arms to the side and above her head to prevent falling. Claimant remarked that she was "babying" left shoulder for a few weeks but on March 11, 2024 she irritated her symptoms while shoveling debris from a median. Because her left shoulder was still hurting on March 18, 2024 she contacted the Ouchline.

9. The record reveals that Claimant has suffered a prior history of left shoulder problems. Notably, Claimant was assessed with impingement syndrome. For the period from November 13, 2018 through December 28, 2023 Claimant received left shoulder steroid injections during nine separate visits to Conifer Family Medical Center.

10. Claimant testified that in approximately February of 2021, she injured her left shoulder when her "grandson stood up in his high chair and he started to fall out and I caught him with my left arm before he hit the floor." On February 15, 2021 Claimant underwent a left shoulder MRI. The imaging reflected a supraspinatus tendon tear, tendinosis of the supraspinatus tendon, "a strain or incomplete tear of the infraspinatus muscle," arthritis of the acromioclavicular joint, and mild acromioclavicular joint arthritis. Personal care provider David Linn, M.D. noted that the left shoulder "showed some partial tears/fraying of rotator cuff." He assessed Claimant with "[c]hronic left rotator cuff partial tears, tendinosis – improved with steroid, but recurs."

11. On March 18, 2024 Claimant visited Authorized Treating Physician (ATP) Concentra Medical Centers for an examination. Claimant recounted that on February 16, 2024 she slipped on ice at work but did not fall. She flailed her arms and irritated her left shoulder. Although the shoulder was improving, she recently aggravated her symptoms while shoveling snow for Employer. Physician's Assistant Eric N. Anderson assessed Claimant with a left shoulder strain and recommended physical therapy. He concluded that objective findings were consistent with a work-related mechanism of injury.

12. On April 3, 2024 Claimant returned to Concentra for an evaluation. Angela Giampaolo, M.D. noted that Claimant sustained a left shoulder injury at work on February 16, 2024. Dr. Giampaolo assessed Claimant with a left shoulder strain and recommended an MRI. She assigned temporary work restrictions of no maximum lifting, repetitive lifting or pushing/pulling in excess of 15 pounds. Dr. Giampaolo also noted no overhead reaching or driving a work vehicle. She concluded that objective findings were consistent with a work-related mechanism of injury.

13. On April 16, 2024 Claimant again visited Concentra for an evaluation. A left shoulder MRI revealed two partial rotator cuff tears. Physician's Assistant Valerie M. Skvarca detailed that the imaging specifically showed a traumatic, near complete tear, of the rotator cuff. She referred Claimant to orthopedics for an evaluation. PA-C Skvarca determined that objective findings were consistent with a work-related mechanism of injury.

14. On April 23, 2024 Claimant visited ATP orthopedic surgeon Cary Motz, M.D. at Advanced Orthopedic and Sports. Claimant recounted that on February 16, 2024 she slipped on ice at work and "threw her arms up violently to maintain her balance." She suffered persistent discomfort in her left shoulder during the intervening weeks. Claimant subsequently suffered increasing pain while shoveling heavy snow. She experienced continued symptoms and underwent a left shoulder MRI. The imaging revealed a new full-thickness supraspinatus tear with some calcification in the area. Dr. Motz determined Claimant had reached a point in treatment where surgery was appropriate. He noted the complex nature of the injury, the impact on her functional abilities and the exhaustion of conservative treatment options.

15. On April 24, 2024 Dr. Motz sought surgical authorization. He specifically pursued approval for a left shoulder scope, rotator cuff repair, and subacromial decompression.

16. On April 30, 2024 Respondent denied the surgical request. Respondent predicated the denial on Claimant's failure to establish the compensability of the claim.

17. On May 13, 2024 Claimant returned to PA Skvarca at Concentra. PA-C Skvarca remarked that Claimant had been working light duty including driving and holding signs. She commented that the MRI specifically reflected a complete disruption of the supraspinatus tendon, calcific tendinosis super rotator cuff, a low grade tear and tendinosis subscapularis tendon. Physical therapy was ineffective and Claimant was awaiting left shoulder surgical authorization.

18. On June 11, 2024 Claimant again visited Concentra and saw Nicolas Cheesman, M.D. He commented that Claimant had a history of pre-existing left shoulder injury "but there is evidence of exacerbation present on MRI." Dr. Cheesman assessed Claimant with a left shoulder strain and a complete traumatic tear of the left rotator cuff. The surgical request was still pending. Dr. Cheesman concluded that objective findings were consistent with a work-related mechanism of injury.

19. On July 30, 2024 Claimant again visited PA-C Skvarca at Concentra for an examination. Claimant reported that she was still awaiting surgical approval. Surgical authorization had been denied because of her pre-existing left shoulder problems. Claimant had been unable to continue with physical therapy because of pain. PA-C Skvarca continued to diagnose Claimant with a traumatic, complete tear of the left rotator cuff.

20. Claimant has established it is more probably true than not that she suffered a compensable left shoulder injury on February 16, 2024 during the course and scope of her employment with Employer. Initially, Claimant explained that on February 16, 2024 she slipped on ice and flailed her arms while exiting a glass building. She did not fall during the incident. Claimant subsequently developed left shoulder pain. She mentioned her injury to IC[Redacted] on February 20, 2024, but did not seek medical treatment. Claimant testified that on March 11, 2024 she aggravated her left shoulder symptoms while shoveling debris from the median of a road. On March 18, 2024 Claimant advised IC[Redacted] about contacting Employer's Ouchline to report her injury. During a text message exchange, IC[Redacted] mentioned "let them know this stems from February 16th a month ago." Claimant also completed a Personal Statement for

Employer on March 18, 2024. She recounted that she slipped on ice, injured her right ankle and swung her arms to the side and above her head to prevent falling. Claimant remarked that she had been "babying" her left shoulder for a few weeks but on March 11, 2024 irritated her symptoms while shoveling debris from a median.

21. The medical records corroborate Claimant's chronology of the development of left shoulder symptoms. Although Claimant suffered from a pre-existing left shoulder condition, it is evident that the February 16, 2024 incident aggravated her symptoms. Claimant did not immediately seek medical treatment, but credibly remarked that she was unable to lift her left arm over her head or perform her regular job duties after the February 16, 2024 incident. Furthermore, Claimant explained she was taking it easy on her left shoulder for a few weeks until she irritated her symptoms while shoveling debris out of a median on March 11, 2024. When she then sought medical care, numerous Concentra providers consistently maintained that objective findings were consistent with a work-related mechanism of injury. Specifically, orthopedic surgeon Dr. Motz noted that Claimant suffered persistent discomfort in her left shoulder during the intervening weeks after the February 16, 2024 incident in which she "threw her arms up violently to maintain her balance." Moreover, Dr. Cheesman acknowledged that Claimant had a history of a pre-existing left shoulder injury "but there is evidence of exacerbation present on MRI."

22. Despite Claimant's pre-existing left shoulder condition, the record demonstrates that the February 16, 2024 incident constituted the proximate cause of her need for medical treatment. Although Claimant did not seek medical treatment until after she irritated her left shoulder while shoveling debris at work on March 11, 2024, the February 16, 2024 event triggered her development of symptoms and increased limitations. The February 16, 2024 event was a significant, direct, and consequential factor in her disability. The persuasive evidence thus supports a conclusion that Claimant suffered an injury to her left shoulder that necessitated evaluation and medical care. Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable left shoulder injury during the course and scope of her employment with Employer on February 16, 2024.

23. Claimant has demonstrated it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical benefits for her February 16, 2024 left shoulder injury. Initially, although Claimant was diagnosed with a left shoulder strain, a subsequent MRI revealed two partial rotator cuff tears. Claimant then continued to receive reasonable, conservative medical treatment through Concentra. Dr. Motz subsequently determined Claimant had reached a point in treatment where surgery was appropriate. He noted the complex nature of the injury, the impact on her functional abilities and the exhaustion of conservative treatment options. Claimant's medical treatment including medications, physical therapy, diagnostic testing, and the shoulder surgery recommended by Dr. Motz is reasonable, necessary and causally related to her February 16, 2024 left shoulder injury. Claimant is thus entitled to receive continuing reasonable, necessary and causally related medical care including the recommended left shoulder surgery.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

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

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

2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001). As noted in *Seifried v. Indus. Claim Appeals Off.,* 736 P.2d 1262, 1263 (Colo. App. 1986) "If a disability were 95% percent attributable to a pre-existing, but stable, condition and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling." Nevertheless, the injury "must be 'significant' in that it must bear a direct causal relationship between the precipitating event and the resulting disability." *Seifried v. Indus. Claim Appeals Off.,* 736 P.2d 1262, 1263 (Colo. App. 1986).

7. As found, Claimant has established by a preponderance of the evidence that she suffered a compensable left shoulder injury on February 16, 2024 during the course and scope of her employment with Employer. Initially, Claimant explained that on February 16, 2024 she slipped on ice and flailed her arms while exiting a glass building. She did not fall during the incident. Claimant subsequently developed left shoulder pain. She mentioned her injury to IC[Redacted] on February 20, 2024, but did not seek medical treatment. Claimant testified that on March 11, 2024 she aggravated her left shoulder symptoms while shoveling debris from the median of a road. On March 18, 2024 Claimant advised IC[Redacted] about contacting Employer's Ouchline to report her injury. During a text message exchange IC[Redacted] mentioned "let them know this stems from February 16th a month ago." Claimant also completed a Personal Statement for Employer on March 18, 2024. She recounted that she slipped on ice, injured her right ankle and swung her arms to the side and above her head to prevent falling. Claimant remarked that she had been "babying" her left shoulder for a few weeks but on March 11, 2024 irritated her symptoms while shoveling debris from a median.

8. As found, the medical records corroborate Claimant's chronology of the development of left shoulder symptoms. Although Claimant suffered from a pre-existing left shoulder condition, it is evident that the February 16, 2024 incident aggravated her symptoms. Claimant did not immediately seek medical treatment, but credibly remarked that she was unable to lift her left arm over her head or perform her regular job duties after the February 16, 2024 incident. Furthermore, Claimant explained she was taking it easy on her left shoulder for a few weeks until she irritated her symptoms while shoveling debris out of a median on March 11, 2024. When she then sought medical care, numerous Concentra providers consistently maintained that objective findings were consistent with a work-related mechanism of injury. Specifically, orthopedic surgeon Dr. Motz noted that Claimant suffered persistent discomfort in her left shoulder during the intervening weeks after the February 16, 2024 incident in which she "threw her arms up violently to maintain her balance." Moreover, Dr. Cheesman acknowledged that Claimant had a history of a pre-existing left shoulder injury "but there is evidence of exacerbation present on MRI."

9. As found, despite Claimant's pre-existing left shoulder condition, the record demonstrates that the February 16, 2024 incident constituted the proximate cause of her need for medical treatment. Although Claimant did not seek medical treatment until after she irritated her left shoulder while shoveling debris at work on March 11, 2024, the February 16, 2024 event triggered her development of symptoms and increased limitations. The February 16, 2024 event was a significant, direct, and consequential factor in her disability. The persuasive evidence thus supports a conclusion that Claimant suffered an injury to her left shoulder that necessitated evaluation and medical care. Claimant's work activities aggravated, accelerated

or combined with her pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable left shoulder injury during the course and scope of her employment with Employer on February 16, 2024.

Medical Benefits

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

11. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her February 16, 2024 left shoulder injury. Initially, although Claimant was diagnosed with a left shoulder strain, a subsequent MRI revealed two partial rotator cuff tears. Claimant then continued to receive reasonable, conservative medical treatment through Concentra. Dr. Motz subsequently determined Claimant had reached a point in treatment where surgery was appropriate. He noted the complex nature of the injury, the impact on her functional abilities and the exhaustion of conservative treatment options. Claimant's medical treatment including medications, physical therapy, diagnostic testing, and the shoulder surgery recommended by Dr. Motz is reasonable, necessary and causally related to her February 16, 2024 left shoulder injury. Claimant is thus entitled to receive continuing reasonable, necessary and causally related medical care including the recommended left shoulder surgery.

ORDER

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

1. Claimant suffered a compensable left shoulder injury during the course and scope of her employment on February 16, 2024.

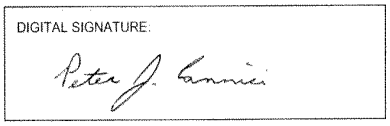
2. Claimant shall receive reasonable, necessary and causally related medical care, including the recommended surgery, for her left shoulder injury.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver,

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

DATED: October 3, 2024.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-249-514

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable work injury resulting from nasopharyngeal PCR testing in October 2021.

II. If Claimant proved she sustained a compensable work injury, whether Claimant proved by a preponderance of the evidence she is entitled to reasonably necessary and related medical benefits.

III. If Claimant proved she sustained a compensable work injury, whether Claimant's medical care from October 2021, until her surgery in May 2023, was reasonable, necessary, related and authorized treatment.

FINDINGS OF FACT

1. Claimant is a 36-year-old woman who worked for Employer as a charge nurse. Claimant alleges she sustained a work injury as a result of undergoing mandatory COVID-19 testing implemented by Employer.

2. Due to the COVID-19 pandemic, Employer implemented a policy requiring employees to receive the COVID-19 vaccine. Employer notified employees of the impending policy in July 2021, which became effective on October 1, 2021. Pursuant to the policy, employees with approved exemptions from vaccination were required to test twice a week for COVID-19 using a nasopharyngeal PCR test, beginning October 3, 2021. The tests occurred greater than 72 hours apart.

3. Claimant took issue with Employer's policy mandating COVID-19 vaccination and testing. In an undated letter, Claimant wrote to Employer voicing concerns regarding the policy.

4. On August 14, 2021, Claimant presented to her primary care physician, Katha Maguire, PA-C at Rocky Mountain Family Physicians (RMFP) with complaints of anxiety due to work stress. PA-C Maguire noted,

> She is having symptoms of depression and anxiety. She is being discriminated against by co-workers and her employer for not getting vaccinated (covid-19 vaccine). She meets with her pastor tomorrow to acquire a religious exemption. She is told she will need to get tested twice a week and worries about the trauma to the nasal mucosa with frequent nasal swabs and inquires about how to prevent nasal irritation, bloody noses, and/or potential trauma/sinus infection.

Ex. S, p. 000094.

5. Claimant's prior medical records do not document consistent ear, nose and throat complaints or treatment. A November 14, 2014 medical record from RMFP notes the review of systems was positive for nasal congestion, nasal obstruction and tinnitus. Medical records dated 2015-2018 do not document any sinus or nasal complaints or treatment. A September 27, 2019 medical record notes the review of symptoms was positive for nasal congestion and post-nasal drainage, but negative for mouth sores, nasal drainage, nasal obstruction, olfactory disturbance, and taste change. Claimant's November 2, 2020 evaluation for a physical does not note any nasal symptoms or treatment.

6. In September 2021, Employer approved Claimant for a medical or religious exemption from Employer's COVID-19 vaccine mandate. As Claimant received an approved exemption, Employer policy required her to undergo twice-weekly nasopharyngeal PCR testing.

7. In total, Claimant took six nasopharyngeal PCR tests as required by Employer policy. These tests occurred between October 4, 2021 and October 22, 2021.

8. Claimant testified at hearing on her own behalf. Claimant testified she had concerns over the frequency of the testing and whether it was safe and effective. She testified she was concerned regarding the chemicals and what she believes are carcinogens on the nasal swabs. Claimant testified she experienced adverse effects from Employer's PCR testing. She testified she developed sores in the back of her throat and bilateral nostrils after taking the tests. Claimant did not recall the exact date she first noticed the symptoms. She testified that the sores cleared after she stopped testing and had resolved by November 11, 2021. Claimant alleges she also developed chronic sinusitis and altered taste and smell as a result of the testing.

9. Claimant continued to voice her concerns and symptoms to multiple members of Employer's management, including emails dated October 23, November 11 and November 13, 2021. Claimant inquired, in part, as to why saliva PCR testing was not an acceptable alternative. On November 11, 2021, [Redacted, hereinafter KW], Manager of Employee Health for Northern Colorado, spoke to Claimant by telephone and encouraged her to file an injury report with Employer and a workers' compensation claim if she believed she sustained a work injury. Claimant declined to do so at the time because her symptoms had resolved post-testing.

10. Employer terminated Claimant on November 16, 2021 for failure to comply with the COVID-19 testing requirements pursuant to Employer policy.

11. KW[Redacted] testified at hearing on behalf of Respondents. KW[Redacted testified she spoke to Claimant on November 11, 2021 to ensure Claimant understood the process of filing an injury report. Claimant attempted to engage with her regarding Employer's vaccination policy, over which KW[Redacted has no authority. KW[Redacted testified that she encouraged Claimant to follow-up with Employer's occupational

medicine clinic if Claimant believed she sustained a work injury. She testified that termination of Claimant's employment did not terminate Claimant's right to file a worker's compensation claim nor her right to seek treatment.

12. Claimant testified she has filed injury reports with Employer for prior unrelated injuries. Claimant testified she did not file an injury report for the alleged injury at issue because she was terminated from her employment five days after speaking with KW[Redacted and thus did not have the opportunity to do so. Claimant testified she believed reporting her concerns directly to upper management was the proper course of action under the circumstances. Claimant testified she later became aware she could file a worker's compensation claim after her termination.

13. Claimant's former co-worker at Employer, [Redacted, hereinafter SR], testified on behalf of Claimant. She testified that she and Claimant discussed symptoms they both attributed to Employer's PCR testing. SR[Redacted] testified she witnessed sores in Claimant's nose and throat when they met with KW[Redacted on November 11, 2021, as well as prior to that. She testified that Claimant's sores appeared to be resolving but were still present as of November 11, 2021.

14. Between October 2021 and March 2022 did not seek medical treatment for her symptoms, instead attempting homeopathic treatments at home.

15. Claimant saw PA-C Maguire on March 1, 2022 for a physical. No abnormal physical exam findings are documented. PA Maguire noted,

> Hx COVID illness 8-2021 and completely recovered. She started testing October 2021 and quit testing October 30 due to sores in mouth, nasal cavity, back of throat. They went away after she quit testing however ever since then she has a weird smell of burning hair all the time and a lot of foods taste terrible, she cannot stand to eat or smell vegetables due to putrid smell and taste. She c/o once a week post-nasal drainage thick neon-orange drainage.

Ex. U, p. 000102.

16. PA Maguire assessed, in relevant part, chronic sinusitis. PA Maguire recommended a course of antibiotics, which she noted Claimant declined because Claimant was doing a 75-day detox. Claimant agreed to do nasal saline rinses twice daily.

17. At some point Claimant underwent an antibody test result confirming the presence of COVID-19 antibodies.

18. Claimant did not seek additional treatment until October 24, 2022, when she attended a phone appointment with PA Maguire. PA Maguire noted,

> [Claimant] continues to have strange neon yellowish thick nasal discharge similar to what she was having at her last office visit over 1 year ago in 8-

> 14-2021. She was needing to comply with work and was required to have repeated Covid PCR nasal swabs since she chose not to get the Covid Vaccine because of her complicated past medical history. At that time in August 2021, she deferred oral antibiotics however she is becoming very concerned…Her taste still has not improved.

Ex. V, p. 000108.

19. Claimant agreed to take a course of antibiotics. PA Maguire referred Claimant for evaluation by an ear, nose and throat physician due to the reported worsening of symptoms over the past several months.

20. PA Maguire testified at hearing on behalf of Claimant. PA Maguire was Claimant's primary care physician from September 2017 to October 24, 2022. PA Maguire testified that she did not treat Claimant for any prior chronic sinus issues or allergies. PA Maguire testified that, in August 2021, Claimant reported worries about upcoming testing mandated by Employer, months prior to the testing occurring. She testified that Claimant did not seek medical treatment from her for the purported sores and that she did not see any evidence of the sores when she evaluated Claimant in March 2022. PA Maguire testified that she referred Claimant to an ear, nose and throat specialist in October 2022 because Claimant was becoming very concerned and her reported symptoms had not improved. PA Maguire further testified that she has not treated under any worker's compensation claims, has not taken any Colorado worker's compensation courses, nor is she familiar with medical causation under Colorado worker's compensation guidelines.

21. On November 22, 2022, Claimant presented to Blake Hyde, MD at Alpine ENT for evaluation of her sinuses. Claimant reported she began experiencing symptoms after undergoing COVID-19 testing. Dr. Hyde noted,

> She started to notice that two weeks after she started testing she had sores in her left nostril. Shortly after noticing sores she had thick orange/yellow drainage coming from her left nostril. This comes and goes and can always tell when it's starting as she will start to get pressure in her left check and distorted taste. She has seen her PCP who had her try rinses. 75 day cleanse and most recently two weeks ago she was placed on a zpak. She does not feel that any of these have helped her. She does not react well to being on antibiotics.

Ex. W, p. 000111.

22. Dr. Hyde performed a nasal endoscopy and diagnosed Claimant with other specified disorders of the nose and nasal sinuses as well as chronic maxillary sinusitis. He ordered Claimant undergo a CT scan of the sinuses.

23. Claimant returned to Dr. Hyde on January 31, 2023 and underwent an in-house CT scan. The impression was "Mild mucosal thickening in the bilateral anterior ethmoids and right sphenoid without occlusion. Bilateral severe maxillary sinus mucosal

thickening and air-fluid levels consistent with chronic sinusitis." Ex. X, p. 000114. Dr. Hyde diagnosed Claimant with chronic maxillary and ethmoidal sinusitis. Dr. Hyde did not document an opinion as to how Claimant developed chronic sinusitis. He prescribed Claimant another course of antibiotics, noting that if her symptoms did not improve, his next recommendation would be surgery.

24. Claimant underwent sinus surgery on May 8, 2023, performed by Dr. Hyde. Claimant reported improvement of her symptoms at follow-up visits with Dr. Hyde on May 16, 2023 and June 6, 2023.

25. Claimant subsequently filed a claim for worker's compensation. Insurer filed a Notice of Contest on September 15, 2023.

26. [Redacted, hereinafter BS] testified on behalf of Respondents. BS[Redacted] works as an adjuster for Insurer and is the adjuster on Claimant's claim. BS[Redacted] filed the Notice of Contest dated September 15, 2023. She testified Claimant's claim remains under denial. BS[Redacted] further testified that the treatment Claimant received for the alleged work injury was not authorized by Insurer, nor was the treatment performed by any authorized designated provider.

27. On January 22, 2024, Carlos Cebrian, MD performed an independent medical examination (IME) at request of Respondents. Dr. Cebrian issued an IME report dated February 12, 2024. Claimant complained of permanent damage in taste, permanent change in smell, chronic fatigue, and stress and depression. Claimant reported first noticing symptoms around October 23, 2021, with sores in her nose and the back of her throat, as well as a distinctive difference in taste and smell, and neon orange-green discharge from her nose. She reported that, at the time, palpating her sinuses was uncomfortable but that she had no fever. Claimant attributed her symptoms to Employer's twice-weekly nasal PCR testing. Claimant denied any prior sinus infections. Dr. Cebrian performed a brief physical examination with normal findings. He reviewed Claimant's medical records dated 3/31/2015 through 6/6/2023.

28. Dr. Cebrian concluded Claimant did not have any claim-related diagnoses. He opined that Claimant's development of an infection that turned into chronic sinusitis was independent, incidental and unrelated to her October 2021 worker's compensation claim or her work for Employer. Dr. Cebrian explained that the reported lesions in Claimant's mouth would not be consistent with nasal swab testing. He further explained that widespread lesions in the nose and mouth are typical of a viral or bacterial upper respiratory illness. Dr. Cebrian noted Claimant did not seek medical care for almost five months after the development of symptoms in October 2021 and then refused antibiotics until October 2022. He explained that any infection that was present would have worsened over this period due to the delayed treatment.

29. Dr. Cebrian opined Claimant's reported altered smell and taste may be secondary to delayed parosmia. He explained that, although delayed parosmia is a rare condition, it has been seen as a result of a COVID-19 infection, which it is documented Claimant had. Dr. Cebrian opined that, although Claimant may have had some localized

irritation to her nose after the PCR testing, it is not medically probable any infection would have occurred or that any treatment was necessary as a result of that exposure. He further opined that the surgery performed by Dr. Hyde was unrelated to Claimant's claim, and that further treatment under worker's compensation is not medically reasonable, necessary, or related.

30. Michelle Barron, MD testified on behalf of Respondents. Dr. Barron is the senior medical director of infection prevention and control for Employer and is responsible for developing Employer policies and procedures related to the prevention of infections. Dr. Barron was involved in the implementation of Employer's COVID-19 prevention policies and procedures. She explained that Employer's COVID-19 policies and procedures were the result of an August 2021 rule passed by the Board of Health requiring anyone working in an acute healthcare setting to receive the COVID-19 vaccine to prevent to further spread of the virus. Dr. Barron testified that the nasal swabs and testing method used by Employer is the standard of care. She explained that there are not carcinogens on the nasal swabs used in the PCR tests and that the swabs are those regularly used in patient care and approved for use. Dr. Barron testified that she is unaware of any evidence linking those nasal swabs to any sort of condition or sinusitis.

31. Dr. Barron testified that the PCR tests Claimant underwent were nasopharyngeal swab tests, which required swabbing further back towards the oral cavity for approximately 15 seconds on each side. Dr. Barron testified that she has not seen any evidence linking nasal swab testing to the development of a sinus infection months later. On cross-examination, Dr. Barron acknowledged that, anytime you insert something in an individual's nose there is a potential a risk of injury and, despite proper training, it is theoretically possible someone administering such test could cause an injury.

32. Dr. Cebrian testified at hearing on behalf of Respondents as an expert in family practice, occupational medicine and assessment of medical causation for work injuries in Colorado. Dr. Cebrian testified consistent with his IME report. Dr. Cebrian explained that a temporal relationship is important in terms of medical causation, noting Claimant did not present to her doctor until March 2022 after allegedly incurring a work injury in October 2021. He testified that the sores reported by Claimant would not be consistent with localized trauma and any secondary infection from the PCR testing. Dr. Cebrian explained that widespread sores would be caused by specific viruses or some bacterial infections. He testified that an injury resulting from nasopharyngeal PCR testing would not present in the way Claimant reported.

33. Dr. Cebrian testified that sinus infections usually start with supportive care, and sometimes nasal rinses and decongestants. If symptoms persist, antibiotics are indicated, which was recommended by PA Maguire. He testified that there is a good chance Claimant would have avoided surgery had she not let seven months pass before taking antibiotics, as antibiotics were initially recommended by PA Maguire in March 2022.

34. Dr. Cebrian testified Claimant's sinus infection was not caused by the nasal swab testing done in October 2021. He further testified there is no medical information in the records or in the medical literature he has reviewed establishing that nasal swabbing would result in any kind of altered taste or smell as described by Claimant.

35. Dr. Cebrian further testified that COVID-19 infection has resulted in alterations in taste and smell, due to the effect on the small nerves that contribute to smell. He explained that, as documented in an August 2021 medical record, Claimant had a COVID-19 infection at some point. He testified that delayed parosmia - altered smell - can occur two or three months after an infection. Dr. Cebrian testified that it would be much more probable Claimant's altered smell and taste, and even her chronic sinusitis, was the result of a prior COVID-19 infection and not Employer's PCR testing. Dr. Cebrian opined within a reasonable degree of medical probability none of the symptoms Claimant developed are related to the nasal swab testing or her employment with Employer.

36. On cross-examination, Dr. Cebrian acknowledged that he could not say there are no situations in which an injury can occur from nasal PCR testing. He testified, however, that such type of localized trauma and resulting symptoms would have a temporal relationship and more specific findings than what was seen in Claimant's case. Dr. Cebrian testified that it would be extremely rare for a sinus infection to cause permanent-type alteration in taste and smell and that symptoms from chronic sinusitis would not present in the same way as reported by Claimant.

37. The ALJ finds the testimony of Dr. Cebrian, Dr. Barron, KW[Redacted] and BS[Redacted], as supported by the admitted exhibits, more credible and persuasive than the testimony of Claimant and SR[Redacted].

38. Claimant failed to prove it is more likely than not she sustained a compensable work injury as a result of Employer's October 2021 PCR testing.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge.

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

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

Compensability

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

The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is

unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). 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).

The ALJ acknowledges Claimant has several grievances regarding Employer's COVID-19 mandate and the circumstances surrounding her alleged work injury. Nevertheless, the reasonableness or necessity of Employer's mandate, the efficacy of nasopharyngeal PCR testing, Claimant's purported natural immunity, and Employer's response to Claimant's requests for accommodations are not relevant to nor dispositive of the specific issue before this Court, which is whether Claimant sustained a an injury arising out of and in the course and scope of her employment. As found, Claimant failed to prove by a preponderance of the evidence she sustained a compensable work injury.

Claimant attributes the development of her symptoms, including purported nose and mouth sores in October 2021 and, later, chronic sinusitis and altered taste/smell, to six nasopharyngeal PCR tests she underwent pursuant to Employer policy in October 2021. The record demonstrates Claimant's concerns about the testing, her reports of symptoms, and her development of chronic sinusitis for which she ultimately underwent surgery. Nonetheless, the existence of symptoms and Claimant's ascription of the testing as the cause of the symptoms is insufficient to meet her burden of proof. PA Maguire, who acknowledged she is unfamiliar with medical causation under Colorado worker's compensation guidelines, did not offer her own opinion as to the causality of Claimant's symptoms. She instead focused on what Claimant reported to her and what Claimant believed was the cause of her symptoms and condition. Similarly, Dr. Hyde did not opine as to causation, and merely noted in his records what Claimant reported regarding the timeline and cause of her symptoms. No other evidence was offered establishing a causal connection between Claimant's symptoms and condition and Employer's nasopharyngeal PCR testing.

Dr. Cebrian, a Level II accredited expert, credibly and persuasively opined Claimant's symptoms and treatment are unrelated to Employer's nasopharyngeal PCR testing and her employment. Dr. Cebrian credibly explained that it is not medically probable Claimant's symptoms, including the lesions, chronic sinusitis and altered taste/smell, occurred as a result of the testing. Dr. Cebrian's opinion is corroborated by Dr. Barron's credible and persuasive testimony. Dr. Barron testified she is unaware of any evidence linking nasal swab testing to the development of any sort of condition or sinusitis. She further testified to the lack of evidence indicating that the nasal swabs used in Claimant's tests contained carcinogens or were otherwise unsafe.

Both Drs. Cebrian and Barron acknowledged that they could not say there are absolutely no situations in which an injury could occur from nasopharyngeal PCR testing. Nonetheless, a theoretical possibility does not equate to probability. That something could possibly occur does not, by itself, establish it is more likely than not it did occur. Here, Claimant was required to prove it is more probable than not she

sustained a work injury arising out of and in the course and scope of her employment. Based on the totality of the evidence, Claimant failed to meet her burden of proof as she failed to demonstrate the requisite causal nexus between her symptoms/condition and Employer's mandated nasal PCR testing.

As Claimant failed to prove it is more likely than not she sustained a compensable work injury, the remaining issues are moot.

ORDER

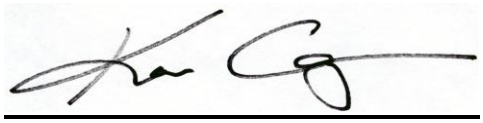
It is therefore ordered that:

1. Claimant failed to prove she suffered a compensable work injury resulting from Employer's October 2021 nasal PCR testing. Claimant's claim for benefits is denied and dismissed.

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

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

DATED: October 4, 2024



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
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ISSUES

I. Whether Claimant proved by a preponderance of the evidence she is entitled to temporary total disability (TTD) benefits from November 29, 2023 through May 30, 2024.

II. Whether Respondents proved by a preponderance of the evidence Claimant is responsible for her termination from employment.

STIPULATIONS

The parties stipulated at hearing that Claimant is entitled to temporary total disability (TTD) benefits from May 31, 2024, ongoing.

FINDINGS OF FACT

1. Claimant is a 57-year-old right-hand dominant woman who worked for Employer as an accounts payable specialist. Claimant began working for Employer as a temporary employee and worked in such capacity from January 16, 2024 to May 28, 2023. She became a permanent employee of Employer on May 29, 2023.

2. Claimant's job duties included entering and coding invoices, managing accounts payable mailboxes, and bank statement reconciliation. Claimant worked eight-hour shifts.

3. On October 9, 2023, Employer placed Claimant on a Performance Improvement Plan (PIP), listing the "Agreed End Date" of the PIP as October 31, 2023. The PIP detailed multiple areas of concern, including incorrect and untimely processing of invoices, and untimely responses to customers and co-workers. The PIP notes,

> On 8/15 the AP Manager had a 1:1 discussion with [Claimant] (follow-up with email) regarding performance and outlined several concerns noting an immediate change in performance. [Redacted, hereinafter JE] was giving (sic) from 8/15-10/1 to show improvement; as of Friday 10/6, little improvement has been made. Should you not meet these improvement expectations [Employer] will move forward with an extension of the Performance Improvement Plan (PIP) or termination.

Ex. E, p. 0025.

4. The PIP lists several improvement goals with a stated progress/performance check-in date of 10/16/2023, and several action plan items with a deadline of 10/31/2023.

5. [Redacted, hereinafter AM], Accounting Manager, reviewed the PIP with Claimant on October 9, 2023, which Claimant signed.

6. Claimant testified at hearing on her own behalf. Claimant testified Employer did not approach her about any issues with her work performance prior to being placed on the PIP in early October 2023. She testified that, prior to the October 2023 PIP, AM[Redacted] would have one-on-ones with the team every Monday to go over expectations for the week, at which time AM[Redacted] would notify the team of what was expected and what needed to be done. Claimant disputes receiving any verbal or written warning of any performance problems on August 15, 2023. On cross-examination, Claimant testified that prior to the October 2023 PIP she was made aware she was incorrectly processing invoices, as AM[Redacted] sent her emails on more than one occasion regarding necessary corrections.

7. Respondents did not offer into evidence any written warning dated on or around August 15, 2024.

8. Claimant testified that after being placed on the October 2023 PIP she attempted to meet the performance goals and comply with the requirements. She testified she met with AM[Redacted] on 10/16 and also received feedback in November 2023 indicating she made improvements.

9. Claimant further testified that, at some point, AM[Redacted] called Claimant into her office and AM[Redacted] and [Redacted, hereinafter NB], Controller, informed her that she would be taken off of the PIP and they we're going to "move forward." Claimant's understanding was that she completed the PIP.

10. Claimant sustained an admitted work injury on October 31, 2023. Claimant slipped and fell on ice while walking into her workplace. Claimant sustained injuries to her left hand, left shoulder and low back.

11. Claimant treated with authorized provider Concentra. She continued to work for Employer on modified duty earning her regular wages. As of November 16, 2023 she had the following temporary work restrictions: lifting up to 1 lb. with left hand/arm; no repetitive lifting; 1 lb. carrying/pushing/pulling; no crawling or climbing; and wear left hand splint at all times. Additionally, Claimant was to take a 5-minute break for every 20 minutes of typing.

12. On November 21, 2023 Concentra continued the same restrictions but added that Claimant should be allowed to stand and arrange her desk for standing, and that she may work from home on days that she needed sedating medications.

13. Claimant continued under the same restrictions as of November 28, 2023. Theodore Villavicencio, MD ordered MRIs and x-rays of the left shoulder and lumbar spine and additional occupational therapy.

14. Claimant did not have any prior restrictions for or functional problems with her left hand, left shoulder or low back. Claimant testified Employer accommodated her restrictions although, at times, she would not take the recommended breaks.

15. Employer terminated Claimant's employment on November 28, 2023. Employer issued a termination letter dated November 28, 2023 stating, in relevant part,

> Your termination is the result of poor performance as outlined below:
>
> 1. Failure to complete task accurately and timely
> 2. Inability to follow instructions and accounts payable processes.
> 3. Inability to communicate with your Manager.
>
> You were issued a written warning of these performance problems on August 15, 2023, via email you were notified, with clear instruction if there were no improvements by October 1st, the written warning would result in a Performance Improvement Plan or termination. On October 9th you were placed on a final warning in the PIP. Copies of these warnings were provided to you and are in your personnel file. Your acknowledgment on each warning indicates that you discussed it with your manager, including steps you could take to improve performance. As stated in your final warning, you needed to take steps to correct your performance by October 31, 2023. Your failure to do so has resulted in your termination.

Ex. F, p. 29.

16. AM[Redacted]testified at hearing on behalf of Respondents. AM[Redacted] testified she began to notice a decline in Claimant's work production in mid-June 2023. She testified she issued a written warning to Claimant on August 15, 2023 notifying Claimant of her performance issues, including untimely processing of invoices and multiple errors. AM[Redacted] testified that there are multiple emails notifying Claimant of these errors. She testified that, with the exception of bank transactions, Claimant's work performance did not improve after being placed on the October 2023 PIP.

17. AM[Redacted] testified that Employer made the decision to terminate Claimant prior to October 31, 2023, but did not terminate her until November 28, 2023 because members of management and human resources were out of the office at various times. AM[Redacted] stated she was out of the office 10/31/2023-11/4/2023 per COVID protocol and that the Vice President of Human Resources, [Redacted, hereinafter NS], was also out of the office around that time. AM[Redacted] testified that employer decided to wait to terminate Claimant until after the Thanksgiving holiday.

18. AM[Redacted] further testified that, after Claimant's work injury, Employer accommodated Claimant's work restrictions and removed certain job responsibilities and time-sensitive duties. After the injury Claimant was responsible for the mailbox but

no longer responsible for data entry. She testified that, after 10/31/2023, Claimant sent approximately 150 invoices for approval and 62 were returned as incorrect.

19. AM[Redacted] testified that she and NB[Redacted] met with Claimant on 11/4/2023 and informed Claimant that she did not satisfy the October PIP and that Employer would be extending the PIP. AM[Redacted] testified she extended the PIP to 11/14/2023. AM[Redacted] testified that Claimant would have been terminated on 10/31/2023 if the requisite members of management and human resources were in office.

20. Claimant has not worked since her termination from Employer. Claimant testified she attempted to obtain other employment, but that her work restrictions impacted her ability to perform her usual job tasks. Claimant wears a sling and her left finger is in a removable cast. Claimant is unable to type with her left hand, is a part of Claimant's regular job duties in her line of work.

21. On May 31, 2024 Bill J. Kim, MS at Mid-Wilshire Surgery Center removed Claimant from all work due to the work injury.

22. The ALJ finds Claimant proved it is more likely than not she is entitled to TTD benefits from November 29, 2023 to May 30, 2024. Respondents failed to prove it is more likely than not Claimant is responsible for termination from her employment.

CONCLUSIONS OF LAW

Generally

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

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

Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Responsibility for Termination

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). 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).

As used in the termination statutes, the word "responsible" "does not refer to an employee's injury or injury-producing activity." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002). Therefore, Colorado termination statute §8-42-105(4)(a), C.R.S. is inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *See Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Colorado Springs Disposal*, 58 P.3d at 1062. Notably, a separation from employment is not necessarily due to an injury simply because it occurs after the injury, and the injured employee need not be offered modified employment before discontinuation of benefits if his was responsible for the separation. *See Gilmore*, 187 P.3d 1129; *Ecke v. City of Walsenburg*, WC 5-002-020-02 (ICAO, May 5, 2017) (injury occurring one day before claimant's previously-announced retirement did not cause claimant's separation from employment or loss of wages). However, if the injury also leads to wage loss at a claimant's secondary employment, she is eligible for compensation for those wages, even if the separation from primary employer was voluntary or for cause. *Id.*

Both parties failed to offer sufficient documentary evidence in support of their testimony and, at times, both witnesses contradicted their own testimony. Nonetheless, it is Respondents' burden of proof to establish Claimant was responsible for her termination. As found, Respondents failed to meet their burden.

Respondents placed Claimant on a PIP on October 9, 2023, with a stated end date of October 31, 2023. Respondents contend Employer made the decision to terminate Claimant prior to October 31, 2023 but delayed the termination until November 28, 2023 because of the availability of management personnel and holidays. Thus, Employer's purported reason for termination is Claimant's alleged failure to improve her work performance between October 9, 2023 and October 31, 2023. AM[Redacted] testified that, subsequent to being placed on the PIP, Claimant made no improvement in her work performance, with the exception of bank transactions. Claimant credibly testified she was attempting to meet the performance requirements and was unaware of continued performance issues. No documentary evidence was offered demonstrating Claimant's alleged continued performance issues and errors. No evidence was offered indicating that, between October 9, 2023 and October 31, 2023, Employer notified Claimant of the alleged continued issues and errors.

It is contradictory that, per AM[Redacted] testimony, Employer would both decide to terminate Claimant prior to October 31, 2023 while also "extend" the PIP in November 2023. Respondents did not provide any documentary evidence of the extended PIP or evidence Claimant was made aware that the PIP was being extended. Claimant credibly testified she was not made aware of any extended PIP and believed her performance had improved as required.

While it is undisputed Claimant was placed on a PIP on October 9, 2023, the evidence offered by Respondents is insufficient to establish it is more likely than not

Claimant is responsible for her termination from employment. The preponderant evidence does not establish Claimant's performance failed to improve by October 31, 2023, that she was aware of such alleged failure, and that such failure was within her control.

TTD

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

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

As found, Claimant proved it is more probable than not she is entitled to TTD benefits from November 29, 2023 to May 30, 2024. As a result of the admitted October 31, 2023 work injury, Claimant wears a hand splint and was placed on work restrictions by her authorized provider limiting the use of her left hand and requiring multiple breaks throughout a work shift. Here, Employer accommodated Claimant's restrictions and continued paying Claimant her regular wages. However, subsequent to Claimant's termination, she was unable to obtain other employment due to her work restrictions, which impaired Claimant's ability to effectively and properly perform her regular job

duties. Therefore, the wage loss Claimant sustained after her termination was the result of the work injury and ensuing restrictions. The preponderant evidence demonstrates that, due to the October 31, 2023 work injury and resultant disability, Claimant did not earn any wages from November 29, 2023 through May 30, 2024, entitling her to TTD benefits for such period.

ORDER

It is therefore ordered that:

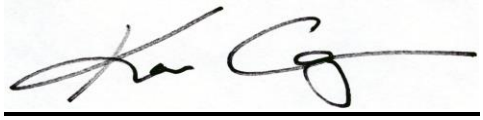
1. Respondents failed to prove by a preponderance of the evidence Claimant is responsible for her termination.

2. Respondents shall pay Claimant TTD benefits from November 29, 2023 to May 30, 2024.

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: October 8, 2024



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-265-609-001

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 February 9, 2024.

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

FINDINGS OF FACT

1. Claimant is a 34-year-old female who worked for Employer as a machine operator. Claimant worked with "auto pack" machines that shook string cheese into boxes. *See* Ex. F p. 24.

2. Claimant was working the night shift for Employer on February 8, 2024. The night shift begins at 6:00 p.m. and ends at 6:00 a.m.

3. As a part of her job, Claimant operated machines within nine lanes. Claimant had to walk along the lanes, and ascend and descend stairs between lanes.

4. At approximately 12:43 a.m. on February 9, 2024, Claimant stepped off a diamond-plated steel stair onto a concrete floor with tile slanted toward drains. Ex. O. Claimant testified that when her right foot touched the floor, she heard a "pop," "felt a sharp pain" in her right knee, and that her right knee "swelled instantly."

5. Claimant radioed for help and then ascended the stairs to flag down a co-worker. Claimant reported the incident to her manager who had her fill out an incident report. Ex. O. Claimant then went to the break room and iced her right knee.

6. At approximately 1:30 a.m., Claimant returned to work. However, Claimant avoided ascending and descending stairs for the rest of her shift.

7. When Claimant got off work, she returned home and went to sleep. Claimant testified that when she woke up at 11:30 a.m. her knee was causing her pain and that she reported to her manager that she was going to go to the emergency room. She then went to the East Morgan County Hospital Emergency Room, where she underwent an examination and radiographs. Ex. B; Ex. C.

8. Claimant saw Eric Schmieg, D.O., at the Emergency Room. Ex. B. The medical records from Claimant's emergency room visit state in pertinent part:

> Patient was at work approximately 12 hours prior to arrival walking down some stairs. When she stepped down on the last step she felt a pop in her knee and now has moderate pain and she points to her tibial plateau. No prior injury to the knee. She did not fall to the ground. She took ibuprofen several hours prior to arrival. States that it feels swollen. States it is not unusual for her knee to pop but not to have this level of pain.

Ex. B.

9. Examination of Claimant's right knee revealed no swelling. Ex. B. Similarly, the radiograph of Claimant's right knee showed no swelling. Ex. C. Dr. Schmieg's examination was "limited by pain but shows good firm ligamentous endpoints." Ex. B. Dr. Schmieg diagnosed Claimant with a right knee sprain. *Id.* at p. 13.

10. Employer filed a First Report of Injury or Illness with the Division of Workers' Compensation (Division) on February 9, 2024. Ex. 2.

11. Claimant returned to work on February 12, 2024. According to Claimant, Employer placed her on work restrictions for no stairs. Ex. D. Claimant worked a portion of her shift and then left work reporting swelling and pain in her right knee. Ex. F p. 28 ("Pt also reports knee swelled twice the size after returning to work for 1 hour and numbness started."). Claimant has not returned to that position with Employer. *See* Ex. I p. 42 ("Pt has not returned to prior job. She notes she is currently with a secondary company as does desk work related tasks.").

12. On February 14, 2024, Claimant saw Garrett Urban, M.D., at Banner Family Medicine. Ex. D. Dr. Urban noted "[t]enderness . . . to anterior, posterior, and medial aspects of patient's right knee. No edema, effusion, or ecchymosis noted. Unable to perform anterior or posterior drawer test, McMurry test, or Lachman test due to patient's pain." *Id.* at p. 18. At that time, Dr. Urban did not formally diagnose Claimant. *Id.* Dr. Urban did "send work restrictions for no standing or walking" and ordered an MRI "to further assess injury." *Id.* at p. 18.

13. On February 19, 2024, Claimant underwent an MRI of her right knee. Ex. E. The MRI showed "[n]o evidence of significant ligamentous or meniscal pathology, or acute internal derangement otherwise," "[m]ild chondral degenerative changes in the patellofemoral compartment . . . . No evidence of acute osseous or osteochondral pathology," and "[e]dema in the suprapatellar fat pad, which can be seen in the setting of suprapatellar fat pad impingement." *Id.* at p. 21-22.

14. Claimant underwent physical therapy following the MRI. Claimant attended twelve physical therapy appointments. Ex. 13. Claimant reported the pain from her right knee as a 7/10 on February 29, 2024, Ex. F p. 28, 6/10 on March 13, 2024, Ex. G p. 33, 8/10 on March 28, 2024, Ex. H p. 37, and a 9/10 on April 29, 2024, Ex. I p. 42.

15. On April 4, 2024, Claimant filed a Worker's Claim for Compensation with the Division. Ex. 1. Respondents filed a Notice of Contest with the Division. Ex. 3.

16. On April 19, 2024, Mark Failinger, M.D., performed an independent medical examination (IME) of Claimant at Respondents' request. Ex. J. Claimant described the mechanism of injury consistent with her testimony. Claimant reported continued high levels of pain in her right knee and occasional numbness in the right foot and toes. *Id.* at p. 47-50. Claimant also reported "popping that occurs in the knee that is accompanied by pain, and that can occur multiple times a day." *Id.* at p. 50.

17. Dr. Failinger was admitted as an expert in orthopedic surgery and sports medicine and testified at hearing. Based on his IME and review of Claimant's medical records, Dr. Failinger opined that the objective medical documentation recorded contemporaneously with Claimant's alleged injury established no structural damage to her right knee that would explain her reported levels of pain. Particularly, just over twelve hours after the alleged injury, Claimant's examination and radiograph showed no damage to the knee and no swelling. Similarly, Claimant's MRI contained no findings that would explain Claimant's reported levels of pain. Dr. Failinger also opined that Claimant's MRI did not show an edema in the suprapatellar fat pad.

18. Dr. Failinger further testified that when examining Claimant, if she was distracted she had no pain reaction to his touch but when focused on his examination she would immediately withdraw from his touch. Ex. J p. 52 ("There is withdrawal with any touching of the skin, but when distracted, there is no evidence of pain behaviors when touching the same areas. There is no effusion in the right knee that I can detect. She is very comfortable sitting at the side of the table with the knee bent 90 degrees. When supine, however, active flexion is only 65 degrees, with significant pain past that point, and, therefore, that is deferred. . . . However, she easily bends the knee more than 120 degrees when distracted and attempting to demonstrate patellar popping and with my hand on her knee, no withdrawal with my hand on her knee to palpate possible crepitus. I had a mildly firm grasp when performing such, and there were no pain behaviors noted at all."). The ALJ finds Dr. Failinger's opinion credible and persuasive.

19. On May 30, 2024, Claimant returned to Dr. Urban. Ex. K. Based on her continued reports of pain and numbness, Dr. Urban ordered a EMG and a physical medicine and rehabilitation consultation with Dr. Reichhardt. *Id.* at p. 62.

20. Respondents' denied Dr. Urban's requested EMG and consultation with Dr. Reichhardt on the basis compensability had not been established.

21. On June 20, 2024, Dr. Failinger issued an addendum to his IME. Ex. L. Dr. Failinger's addendum is consistent with his testimony concerning the lack of objective evidence of damage to Claimant's right knee.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado, section 8-40-101, *et. seq.*, C.R.S. (2024) 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). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 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, 318 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201.

Assessing the weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637, 641 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684, 687 (Colo. App. 2008). The 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, 191 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 165 Colo. 504, 506 (1968).

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

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); *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b); 8-41-301(1)(c); *see City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Blair*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires the 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).

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, 1001 (Colo. App. 2004).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, W.C. No. 5-102-109-001 (ICAO, Mar. 18, 2020).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl’s Dep’t Stores*, W.C. No. 5-020-962-001 (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. *Streeb*, 706 P.2d at 789; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Here, Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury to her right knee, because she has failed to establish that she sustained any injury to her right knee on February 9, 2024. Despite her consistent recounting of the events that occurred on February 9, 2024, the evidence does not establish it is more likely than not that Claimant sustained an injury on February 9, 2024 while working for Employer.

Had Claimant sustained an injury on February 9, 2024, it stands to reason that the emergency room notes and the radiographs completed just twelve hours later would have shown at least some evidence of damage to her right knee explaining her pain. While Claimant consistently reported swelling, sometimes as severe as swelling “twice the size” of her normal knee, all documented examinations of her right knee establish no swelling. Further, Claimant reported high levels of pain making it difficult for providers to adequately assess her knee, but in at least one instance with Dr. Failinger when distracted Claimant showed no pain behaviors.

To be sure, the MRI completed on February 19, 2024 lists an impression as "edema in the suprapatellar fat pad." However, the ALJ credits the testimony of Dr. Failinger regarding the interpretation of Claimant's MRI. Ultimately, the ALJ finds that Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury to her right knee on February 9, 2024.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), 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 a compensable injury, Claimant is not entitled to an award of medical benefits.

ORDER

It is therefore ordered that:

1. Claimant's claim for worker's compensation benefits for an alleged injury to her right knee on February 9, 2024 is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. § 8-43-301(2). 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). 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.

SIGNED: October 4, 2024.

Robin E. Hoogerhyde
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-248-400-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on August 16, 2023.

STIPULATION

1. The parties stipulated that If Claimant's claim is compensable, Respondents are liable for payment of medical bills for Claimant's August 16, 2023 medical visit.

FINDINGS OF FACT

1. Employer is a vacation property rental management company. Beginning in the summer of 2023, Claimant worked for Employer as a maintenance runner, with duties including minor maintenance tasks, stocking linens, towels, and other supplies, and driving to deliver supplies to various locations using a company van.

2. Claimant testified that on August 16, 2023, he performed his usual duties, unloading a van, putting supplies into a cart, and wheeling the car into a storeroom in Winter Park, Colorado to stock supplies. The "supplies" Claimant handle consisted of bundled linens, towels, and other items, that were delivered by a vendor in large rolling carts weighing between 200 and 500 pounds. Claimant testified that he typically maneuver the loaded carts in the storage area, but his testimony was unclear as to whether he maneuvered these carts on August 16, 2023, or this related to his general duties. Notwithstanding, after Claimant finished stocking supplies, he left the Winter Park facility and drove approximately two miles to the town of Fraser. During this drive, Claimant testified he began to experience pain in his back. Claimant indicated there was not a specific moment when he noticed an injury occurring while loading supplies, but believed that it was the accumulation of his work that cause his pain. Claimant reported an injury to his supervisor "[Redacted, hereinafter JE]," and Employer's general manager [Redacted. hereinafter BM] that morning.

3. On August 16, 2023, Claimant saw Todd Odegaard, D.O, at Middle Park Health reporting he injured his back while unloading heavy boxes from a van. Claimant reported "an accumulation of discomfort in his low back" which became significant. Claimant denied any incident causing a sudden onset of pain. Claimant reported a history of intermittent lumbar discomfort, but nothing significant until that day. Dr. Odegaard indicated that Claimant's history and objective findings were consistent with a strain of the lumbar spine and left piriformis resulting in left leg neuropathic pain. He recommended over-the-counter medication, prescribed a muscle relaxant, and imposed work restrictions including no lifting, carrying, or pushing more than ten pounds. (Ex. E).

4. On October 17, 2023, Claimant had a lumbar MRI which showed a left-sided L4-5 disc protrusion that "in combination with facet encroachment" affected the left L4 nerve root, and an L2-3 right sided protrusion affecting the right L3 nerve root. (Ex. H).

5. On October 23, 2023, Claimant saw Randall Allison, M.D, a neurosurgeon. Dr. Allison reviewed Claimant's MRI, and indicated that it showed degenerative disease throughout the lumbar spine, worse at L2-3, and L3-4, with some pain in an L4 distribution over the lateral thigh. Dr. Allison recommended an L3-4 epidural steroid injection (ESI), and physical therapy.

6. From October 25, 2023, through December 27, 2023, Claimant attended physical therapy sessions at Middle Park. (Ex. J & 2).[1]

7. On November 20, 2023, Claimant saw Matthew Eckermann, M.D., at Middle Park Health. Claimant reported he was unloading a van and pulling heavy carts through a narrow doorway when he injured his back. Dr. Eckermann noted that Claimant's MRI showed "minor disc bulging and protrusions affecting bilateral lumbar regions from L3-5" but that his pain was axial in nature, and did not present as a radiculopathy. He recommended a trial of L3-5 medial branch blocks, and then determine if a trial of epidural steroid injections would be warranted. (Ex. K). On December 11, 2023, Dr. Eckermann performed the ESIs at L3-4 bilaterally. (Ex. L).

8. Claimant returned to Dr. Eckermann on January 22, 2024, reporting temporary relief from the injections, and that he continued to have non-radiating axial back pain. Dr. Eckermann indicated that based on the MRI and physical examination, he believed Claimant's back pain could be related to bilateral facet arthrosis, and ordered bilateral L3-5 medial branch blocks. (Ex. O).

9. On March 7, 2024, Claimant attended a Respondent-requested independent medical examination (IME) with Anant Kumar, M.D. Dr. Kumar testified by deposition. He opined that Claimant's imaging studies, including x-rays and MRI show no signs of an acute injury, or neurological findings, and that Claimant's pain complaints represent "axial" pain. He indicated that although Claimant's MRI images show disc protrusions, Claimant's symptoms do not correlate with those symptoms, and that Claimant's facet pain is degenerative in nature. He further testified that Claimant's MRI images showed no acute injury, but that a sprain/strain injury would not show up on an x-ray or MRI.

10. Dr. Kumar opined that although Claimant may have sustained a sprain/strain injury, such an injury should have resolved with conservative treatment within ten weeks. He testified that Claimant's treating providers were treating degenerative conditions and axial back pain, and that Claimant had no neurological deficits.

11. On May 8, 2024, Claimant attended a Claimant-requested IME with John Hughes, M.D. Dr. Hughes opined that Claimant sustained a lumbosacral sprain/strain injury on

[1] With the exception of Claimant's initial physical therapy visit on October 25, 2023, no records of Claimant's physical therapy sessions were offered or admitted into evidence. Visits after October 25, 2023, are referenced in Respondents' expert's report, with little substantive information.

August 16, 2023, with persistent non-radicular low back pain and clinical findings suggestive of left lumbar facet joint arthropathy. He further opined that Claimant sustained a "traumatic facet joint arthropathy." Dr. Hughes offered no credible explanation as to how Claimant sustained a traumatic facet joint arthropathy. The ALJ finds Dr. Hughes' opinion that Claimant likely sustained a work-related lumbar strain/sprain injury credible.

12. Claimant has history of orthopedic conditions, including prior hip replacement surgery, and lower back issues. In December 2019, Claimant was treated for shooting pain and numbness and tingling into his into his right foot, and a reported foot drop. In January 2023, Claimant was treated for left hip pain, and received physical therapy for that condition. (Ex. A & B). No credible evidence was admitted demonstrating that Claimant's preexisting conditions contributed to his lumbar strain.

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 his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *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. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The 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, supra*; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his lower back on August 16, 2023. Specifically, Claimant has established that he sustained a lumbar strain/sprain. Claimant described the onset of symptoms while at work after performing his job duties, including unloading a van and stocking supplies. Although Claimant's description of the mechanism of injury is vague, a 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 interprets the Claimant's various descriptions of the mechanism of injury as his lay-person speculation as to what gave rise to his symptoms, and thus does not find the apparent inconsistencies to be significant.

The ALJ finds it more likely than not that Claimant strained his lower back while performing his job duties on August 16, 2023, including stocking supplies. The ALJ credits the opinion of Dr. Odegaard August 16, 2023, that Claimant sustained a lumbar strain. The ALJ also finds that Dr. Kumar's opinion that Claimant may have sustained a lumbar strain is consistent with Dr. Hughes' opinion, and with the contemporaneous diagnosis on August 16, 2023. Claimant has met his burden of establishing that it is more likely than not he sustained a compensable injury to his lower back.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his lower back arising out of the course of his employment with Employer on August 16, 2023.

2. Per the parties stipulation, Respondents shall pay for medical bills incurred by Claimant at his August 16, 2023 medical visit, according to the Workers' Compensation Medical Fee Schedule.

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

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

DATED: October 8, 2024

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his right shoulder arising out of the course of his employment on March 21, 2022.

2. Whether Claimant established by a preponderance of the evidence that right shoulder surgery performed on April 11, 2024 and post-surgical care was reasonable, necessary and to cure or relieve the effects of a work-related injury.

FINDINGS OF FACT

1. Claimant is employed by Respondent as an electrical inspection supervisor. On March 21, 2022, Claimant was involved in a single-vehicle accident while driving his work truck on an icy rural highway. Claimant's truck left the road, crossed two ditches, and came to rest in a field, sustaining damage to the front portion of the truck. Claimant testified he was traveling approximately 65 mph at the time of the accident.

2. Claimant testified that on March 21, 2022, at approximately 11:40 a.m., he was driving his work pickup truck south on Highway 59, in icy conditions. At a S-curve in the road, Claimant lost control of the vehicle, and it left the roadway, crossing two ditches approximately six-feet deep, and ending up in a field. Claimant testified that his right arm was on the steering wheel, and was forced into a downward motion during the accident. As a result of the accident, steering and front driver-side of the vehicle sustained damage. That afternoon, Claimant reported the accident to Employer, and completed an incident report. (Ex. 9). Claimant reported experiencing a stiff neck, sore right shoulder, and sore back. (Ex. 9).

3. Claimant testified that after the accident, he went home and began feeling aching and pain. When Claimant's pain did not resolve after a few days, Claimant went to the Peak Vista Clinic in Limon, Colorado on March 31, 2022.

4. Claimant testified that he had no problems with his right shoulder before the March 21, 2022 accident. No credible evidence was admitted demonstrating that Claimant had symptoms in his right shoulder or treatment for any right shoulder condition prior to March 21, 2022.

5. Claimant's first documented medical treatment occurred on March 31, 2022, with Amanda Judd, NP, at Peak Vista Community Health Center. He reported stiffness from his neck to lower back and right shoulder pain. Ms. Judd noted back tenderness, muscle spasms, and pain with right shoulder movement. She diagnosed neck pain, back spasms, and acute right shoulder pain, referring him to physical therapy and cervical x-rays. (Ex.

B). Claimant's differential diagnosis for his shoulder included rotator cuff tear, SLAP tear, labral tear, arthritis, and fracture.

6. Over the next few months, Claimant attended physical therapy and returned to Peak Vista, where he was examined by Dr. Ee-Leng DeJesus, reporting continued right shoulder and cervical spine pain. Claimant noted that physical therapy was helping. No records from these visits were submitted, but they are summarized in Respondent's expert witness report (Ex. C).

7. On July 27, 2022, Dr. DeJesus referred Claimant for a right shoulder MRI, which was performed on August 18, 2022. The MRI showed a pinhole tear of the supraspinatus tendon, tendinosis, moderate to severe degenerative changes of the acromioclavicular joint with an impinging spur, and mild fibrillation (*i.e.*, fraying or degeneration) of the glenoid labrum, but no frank tear (Ex. D).

8. On September 28, 2022, Dr. DeJesus reviewed the MRI, opined that Claimant had sustained a traumatic tear of the right rotator cuff, and referred Claimant for an orthopedic evaluation. She indicated that Claimant's anterior shoulder pain was likely from a labral issue and that Claimant had a supraspinatus tear. (Ex. 6).

9. On October 19, 2022, Claimant saw Dr. Braden Mayer at Steadman Hawkins Clinic on referral from Dr. DeJesus, reporting right shoulder pain, locking, weakness, and radicular symptoms to his right hand from a March 21, 2022 vehicle accident. Dr. Mayer noted that Claimant's neck likely contributed to the symptoms and recommended further consultation. He suggested a platelet-rich plasma (PRP) injection for the shoulder after reviewing MRI and x-ray results. (Ex. 3).

10. On April 21, 2023, Claimant saw Lawrence Lesnak, D.O., for an independent medical examination at Respondent's request. As related to Claimant's right shoulder, Dr. Lesnak indicated that Claimant had no clinical evidence of symptomatic right shoulder joint pathology at his examination. He further opined that there "is absolutely no medical evidence to support that he has any type of symptomatic right shoulder joint pathology whatsoever, regardless of causality…" and that none of the findings on Claimant's shoulder MRI were related to his March 21, 2022 motor vehicle accident. (Ex. C).

11. On February 12, 2024, Claimant returned to Dr. Mayer after receiving an injection for radiating neck pain from another provider, reporting improvement in his neck symptoms but persistent shoulder pain. Dr. Mayer recommended a second shoulder MRI, performed on the same day. (Ex. A & 3).

12. The second MRI, performed on February 12, 2024, revealed mild-to-moderate supraspinatus and infraspinatus tendinosis, a partial-thickness tear in the anterior supraspinatus tendon measuring 4 x 7 mm, and moderate acromioclavicular osteoarthrosis. (Ex. D).

13. On February 12, 2024, Dr. Mayer reviewed the MRI, noting a slight progression in the rotator cuff tear. He recommended conservative management, with a follow-up MRI

in six to 12 months. If there was no improvement, arthroscopic rotator cuff repair surgery might be needed. (Ex. 3).

14. On February 24, 2024, Claimant requested to proceed with the arthroscopic rotator cuff repair. On March 4, 2024, Dr. Mayer's office sought authorization from Respondent for the surgery, which included a possible regen patch augmentation, subacromial decompression, debridement, and biceps tenotomy or tenodesis. (Ex. 3). Respondent denied authorization on March 8, 2024. (Ex. 11).

15. On April 11, 2024, Dr. Mayer performed arthroscopic surgery on Claimant's right shoulder, including rotator cuff repair, subacromial decompression, glenohumeral joint debridement, and bicep tenotomy. The post operative diagnosis included a 1 cm x 1 cm right shoulder rotator cuff tear, long head biceps tendon partial tearing, impingement, and superior labrum anterior posterior (SLAP) tear. Dr. Mayer also indicated Claimant would require postoperative rehab following surgery. (Ex. A).

16. Claimant received post-surgical follow-up care from Dr. Mayer through at least May 1, 2024, and physical therapy. Dr. Mayer recommended postoperative physical therapy beginning four weeks after surgery. (Ex. 3 & 4). Claimant testified that he has paid for his shoulder surgery and for post-surgical care.

17. On May 1, 2024, Dr. Mayer wrote that Claimant's February 12, 2024 MRI showed a progression of his rotator cuff tear, compared with the original MRI, and that surgical intervention was indicated. He stated: "Based on our clinical as well as radiographic findings I do feel it is appropriate to assume the [March 21, 2022] auto accident did cause/contribute to the right shoulder injury." (Ex. 5).

18. Dr. Lesnak testified at hearing and was admitted as an expert in physical medicine and rehabilitation. Dr. Lesnak testified that, in his opinion, the pinhole tear in Claimant's supraspinatus identified on the initial MRI was a "very early degenerative change" that came from "sustained or repetitive activities with your arm at shoulder level or above." He further testified that injuries to the supraspinatus muscle and tendon are caused by either a dislocation that overhead activities, and that one does not "sustain an injury to your supraspinatus tendon in a car accident that doesn't roll over and not being ejected." He later indicated that it was "anatomically impossible" for Claimant to have sustained a rotator cuff injury in the accident. Dr. Lesnak opined that Claimant's the accident was not a mechanism that would cause or aggravate any labral pathology or arthritis in the shoulder, and Claimant's shoulder condition is the result of a natural progression of degenerative conditions of his shoulder. The ALJ does not find Dr. Lesnak's opinions on this issue persuasive.

19. Dr. Lesnak testified that Claimant's August 18, 2022 MRI showed a pinhole tear and chronic inflammation of the supraspinatus tendon (tendinosis), and that the February 2024 MRI showed chronic inflammation of the supraspinatus and infraspinatus tendons, and the supraspinatus tear had increased in size as a result of natural degeneration. He further opined that none of the findings on the MRI were causally related to Claimant's work accident, and that the need for surgery was not work-related. Dr. Lesnak did not

review the images from either MRI, and his opinions are based on his review of the radiologist reports. The ALJ does not find Dr. Lesnak's interpretation of the MRI findings persuasive. He indicated that the Claimant's supraspinatus tear was related to both age, and repetitive or sustained shoulder-level activities, such as throwing activities. The record contains no information indicating that Claimant has a history of sustained or repetitive throwing or other shoulder-level activities.

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 his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). 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, supra*; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Here, there is no dispute that the March 21, 2022 auto accident arose out of the course of Claimant's employment. The primary issue is whether Claimant sustained an injury to his right shoulder in that accident.

Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his right shoulder in the March 21, 2022 auto accident. First, the ALJ does not find persuasive Dr. Lesnak's opinions it would be anatomically impossible for the Claimant to sustain a supraspinatus injury in the subject accident. Claimant has no history of right shoulder issues. On the day of the accident, Claimant reported experiencing right shoulder soreness, and continued to report shoulder pain over the two years following the accident. Claimant also reported neck pain and pain radiating into his fingers. Claimant's neck-related symptoms improved after receiving an injection in early 2024, but his shoulder pain continued, which demonstrates that Claimant's shoulder pain was not entirely neck-related.

The ALJ does not find credible or persuasive Dr. Lesnak's opinion that Claimant has no symptomatic shoulder pathology. While Claimant's August 18, 2022 MRI showed evidence of degenerative changes, including acromioclavicular spurs and glenoid labrum fraying, there is no credible evidence that these conditions were symptomatic. Similarly, whether the Claimant's "pinhole" supraspinatus tear was degenerative or traumatic, it was not symptomatic. While these degenerative findings likely pre-dated the accident, they also likely became symptomatic because of March 21, 2022 accident. No credible evidence was presented indicating that, in the absence of the March 21, 2022 accident, Claimant would have spontaneously become symptomatic or would have required treatment. Accordingly, the ALJ concludes that Claimant has met his burden of establishing, more likely than not, that he sustained an injury to his right shoulder arising out of the course of his employment on March 21, 2022.

Specific Medical Treatment

Respondents are responsible for medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a), C.R.S. When respondents challenge a claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits, including the causal relationship. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Trans. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009);

Snyder v. Indus Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997). Whether a claimant meets his burden of proof is a question of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

As found, Claimant likely had pre-existing, asymptomatic degenerative conditions in his right shoulder that became symptomatic because of his work accident. A preexisting condition or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the preexisting disease or infirmity to produce the 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). The ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

Claimant has established that the need for the shoulder surgery performed by Dr. Mayer is, more likely than not, causally-related to the March 21, 2022 motor vehicle accident. As found, Claimant's MRI demonstrates that Claimant probably had pre-existing degenerative pathology in his right shoulder. However, the ALJ finds credible Claimant's testimony that he had no prior right shoulder issues, and that his right shoulder was asymptomatic prior to the accident. Claimant received conservative treatment, including physical therapy, which did not resolve the pain, and reasonably required surgery to address his right shoulder condition. Similarly, post-surgical care, including physical therapy is reasonable and necessary for recovery from surgery. The ALJ concludes that Claimant has met his burden to establish that the right shoulder surgery performed by Dr. Mayer was reasonable, necessary and causally-related to his March 21, 2022 work injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable right shoulder injury arising out of the course of his employment with Employer on March 21, 2022.

2. Claimant's request for authorization of the right shoulder surgery performed by Dr. Mayer on April 11, 2024, post-surgical follow-up with Dr. Mayer and physical therapy as recommended by Dr. Mayer is granted. Respondent shall pay for the March 11, 2024 surgery, and post-surgical care pursuant to the medical fee schedule.

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: October 8, 2024

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. 5-262-940-001

PROCEDURAL HISTORY

On August 14, 2024, Claimant and Respondents [Redacted, hereinafter RA] and [Redacted, hereinafter PL] entered into a stipulation. In the stipulation RA[Redacted] and PL[Redacted] admitted liability, as the statutory employer, for Claimant's January 4, 2024 work injury. The stipulation was approved by the ALJ on that same date.

The scheduled August 14, 2024 hearing went forward on the sole issue of whether penalties should be assessed against Respondent [Redacted, hereinafter JN]. Claimant, with counsel, appeared at the appointed time ready to proceed with the hearing. Respondent [Redacted, hereinafter JN] did not appear.

At the outset of the hearing, the ALJ found that Respondent JN[Redacted] was provided appropriate notice of the August 14, 2024 hearing at the address of record of [Redacted, hereinafter SO]. Specifically, the ALJ noted that the following notices and pleadings were mailed to Respondent JN[Redacted] at the Montrose, Colorado address identified above:

1) A hearing confirmation was sent on May 22, 2024.
2) A Notice of Hearing was sent on May 23, 2024.
3) A Corrected Notice of Hearing was sent on May 23, 2024.
4) Claimant's Motion to Compel, which referenced the August 14, 2024 hearing, was sent on July 19, 2024.
5) An Order to Compel was sent on July 30, 2024.
6) Claimant's Case Information Sheet referencing the August 14, 2024 hearing was sent on August 6, 2024.
7) Respondents RA[Redacted]/PL[Redacted] Case Information Sheet referencing the August 14, 2024 hearing was sent on August 7, **2024.**

Based upon these findings of the ALJ, the hearing commenced as scheduled. Claimant testified at the hearing regarding his employment with JN[Redacated] and an accident that occurred on January 4, 2024. Claimant also submitted Exhibits 1 through 15, which were admitted into evidence. Claimant has asked the ALJ to order penalties against Respondent JN[Redacated] for failure to carry workers' compensation insurance pursuant to Section 8-43-408 C.R.S.

At the conclusion of the hearing, the ALJ directed Claimant to file a position statement no later than August 28, 2024. Claimant's position statement was received by the Office of Administrative Courts in Grand Junction, Colorado on August 26, 2024.

Given the nature and extent of penalties requested by Claimant, on September 5, 2024, the ALJ issued an Order to Show Cause. This order directed Respondent JN[Redacated] to show good cause, in writing, no later than October 8, 2024, for its failure to appear at the hearing.

Respondent JN[Redacated] did not respond to the September 5, 2024 Order to Show Cause. Now therefore, the ALJ issues this order.

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that penalties should be assessed against Respondent JN[Redacated] pursuant to Section 8-43-408 C.R.S. for failure to carry workers' compensation insurance?

FINDINGS OF FACT

1. On January 4, 2024, Claimant was working for Respondent JN[Redacated] at a construction site. Respondent JN[Redacted] was a subcontractor at this construction site. The general contractor was Respondent RA[Redacted].

2. On that date, Claimant was performing framing duties. While Claimant was cutting a piece of lumber, the saw slipped, and Claimant injured his left thumb and left Index finger. Claimant's thumb was completely severed as a result of the saw injury.

3. Another worker on site immediately transferred Claimant to Telluride Regional Medical Center. Claimant testified that this was an urgent care dinic. This clinic was unable to provide Claimant with the care he needed. As a result, Claimant was sent to a provider in Montrose, Colorado. It was determined that Claimant's injury was so severe that he was then airlifted to Swedish Medical Center in Englewood, Colorado.

4. While at Swedish Medical Center, Claimant underwent two surgeries on his left thumb. The first surgery was an attempt to reattach Claimant's left thumb. When that surgery was unsuccessful, Claimant underwent the second surgery which involved amputation of the left thumb.

5. As a result of the January 4, 2024 injury to Claimant's left hand/thumb and related medical treatment, Claimant has incurred medical bills totalling $64,890.01. Specifically the bills are as follows:

Swedish (inpatient) -	$ 6,463.48[1]
Swedish (outpatient visits)	$ 2,786.36

[1] The billing records admitted into evidence indicate inpatient billing of $230,331.81. However, those same records show a "contractual adjustment" of $224,152.14. Therefore, the balance after "adjustments" is $6,463.48. It is this balance that the ALJ has utilized in her calculations.

Swedish (occupational therapy)	$ 1,741.60
Swedish - Burn unit 1/23/24 -	$ 729.73
Swedish - Burn unit 3/12/24 -	$ 729.73
Telluride Regional Medical Center -	$ 2,674.01
Care Flight-	$36,971.00
Healthone Burn and Reconstruction -	$12,410.45
Critical Care	$ 383.75

6. In addition, pursuant to the stipulation entered into by Claimant and Respondent RA[Redacted], Claimant will be paid $9,670.29 in temporary total disability (TTD) benefits and related interest. Therefore, the ALJ calculates a grand total of $74,560.30 for medical treatment bills and indemnity benefits. ($64,890.01 + $9,670.29 = $74,560.30).

7. Claimant testified that Respondent JN[Redacated] did not provide him with any documentation that the company had workers' compensation insurance coverage.

8. In the current matter, Respondent RA[Redacted] has admitted liability for Claimant's injury as the statutory employer. The ALJ finds that this is further evidence that Respondent JN[Redacated] did not have workers' compensation insurance coverage at the time of Claimant's work injury.

9. The ALJ credits the records admitted into evidence and Claimant's testimony. The ALJ finds that Claimant has successfully demonstrated that it is more likely than not that at the time of his work injury Respondent JN[Redacated] did not have workers' compensation insurance coverage.

10. The ALJ further credits the records admitted into evidence and Claimant's testimony and finds that a total of $74,560.30 in medical treatment bills and temporary total disability benefits have been incurred. Additionally, Respondent RA[Redacted] has admitted liability for Claimant's injury as the statutory employer.

11. Fifty percent of $74,560.30 is $37,280.15.

12. Twenty-five percent of $74,560.30 is $18,640.08.

13. The ALJ further finds that although a statutory employer (Respondent RA[Redacted]) has admitted liability for Claimant's work injury, Respondent JN[Redacated] is still in violation of the statutory requirement that an employer obtain and maintain workers' compensation insurance coverage. Therefore, the ALJ also finds that Claimant has successfully demonstrated that penalties should be assessed against Respondent JN[Redacated] pursuant to Section 8-43-408 C.R.S.

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. Section 8-43-408, C.R.S. addresses remedies that may be taken against an employer for failure to obtain and maintain workers' compensation Insurance. The Colorado Court of Appeals has found that Section 8-43-408, C.R.S is designed to encourage cooperation with mandatory insurance requirements and to provide for additional compensation when the employer neglects or refuses to purchase insurance. *Merchants Oil, Inc. v. Anderson,* 897 P.2d 895 (Colo. App. 1995).

5. Section 8-43-408, C.R.S. provides, in pertinent parts:

> (1) If an employer is subject to articles 40 to 47 of this title 8 and, at **the time of an injury, has not complied with the Insurance provisions of those articles** or has allowed the required insurance to terminate, or has not effected a renewal thereof, the employee, if injured . . . may claim the compensation and benefits provided in those articles...

> (4) Any employer who **fails to comply with a lawful order or judgment** issued pursuant to subsection (2) or (3) of this section is liable to the employee, if injured, ... in addition to the amount in the order or judgment, **for an amount equal to fifty percent of such order or judgment** or one thousand dollars, whichever is greater, plus reasonable attorney fees incurred after entry of a judgment or order.
>
> (5) In addition to any compensation paid or ordered in accordance with this section or articles 40 to 47 of this title 8, **an employer who is not in compliance with the insurance provisions** of those articles 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.
>
> **(6)** An employer who fails to comply with a lawful order or judgment issued pursuant to subsection (2) or (3) of this section shall be ordered to 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 in addition to any other amount ordered pursuant to this section or articles 40 to 47 of this title 8. **(Emphasis added.)**

6. Claimant argues that he is entitled to receive from Respondent JN[Redacated] a fifty percent penalty pursuant to Section 8-43-408(4), C.R.S.

7. Claimant further argues that Respondent JN[Redacted] should also be assessed a twenty-five percent penalty payable to the Colorado uninsured employer fund pursuant to Section 8-43-40(5), C.R.S.

8. The prior version of 8-43-408, C.R.S., provided that the remedy available to a claimant against an uninsured employer was a fifty percent increase in compensation. As recited above, the current version of this section provides that an uninsured employer can be ordered to pay the Colorado uninsured employer fund twenty-five percent of the compensation or benefits to which a claimant is entitled. The remedy available to a claimant directly, Is a penalty of fifty percent of the amount of an "order or judgment".

9. Claimant argues in his position statement that the order approving the stipulation between Claimant and Respondent RA[Redacted] is such an "order or judgment". As the ALJ understands Claimant's argument, Respondent JN[Redacated] failed to comply with an order or judgment, as evidenced by a statutory employer having to step in as the liable respondent. In his position statement, Claimant further argues that the statute does not relieve an uninsured employer from potential penalties simply

because a statutory employer has admitted liability. The ALJ finds Claimant's argument compelling.

10. Now therefore, the ALJ concludes that penalties shall be assessed against Respondent JN[Redacated] for failure to carry workers compensation insurance at the time of Claimant's work injury. As found, an order has been issued in this matter approving the stipulation between Claimant and Respondent RA[Redacted]. This stipulation has resulted in a total amount of compensation and benefits of $74,560.30. The ALJ further concludes that pursuant to Section 8-43-408(4), C.R.S., Respondent JN[Redacated] shall pay Claimant the amount of $37,280.15.

11. As found, at the time of Claimant's work injury, Respondent JN[Redacated] Construction did not have workers' compensation insurance. Therefore, pursuant to Section 8-43-408(5), C.R.S., Respondent JN[Redacated] shall pay the Colorado uninsured employer fund the amount of $18,640.08, for failure to carry workers' compensation insurance coverage.

ORDER

It is therefore ordered:

1. Respondent JN[Redacated] shall pay $37,280.15 to Claimant.

2. Respondent JN[Redacated] shall pay $18,640.08 to the Colorado uninsured employer fund.

3. Respondent shall pay interest to the Colorado uninsured employer fund at the rate of statutory rate of four percent per annum on all amounts of compensation not paid when due.

4. In lieu of payment of the above compensation and benefits to Claimant, [Redacted, hereinafter JN] Construction shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $55,920.23 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 Division Trustee, c/o Mariya Cassin. The check shall be mailed to the Division of Workers' Compensation Revenue Assessment Unit, 633 17th St., Suite 400, Denver, CO 80202,

OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $55,920.23 with the Division of Workers' Compensation within ten (10) days of the date of this order:

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

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

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

5. [Redacted, hereinafter JN] shall notify the Division of Workers' Compensation of payments made pursuant to this order.

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

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

Dated October 9, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A)

and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **It is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WOKERS' COMPENSATION NO. WC 5-215-888-002 & WC 5-217-845-004

ISSUES

Prior to commencing the hearing, the [Redacted, hereinafter SM] Respondents advised the ALJ that they were reserving the medical benefit fee schedule for all treatment benefits ordered/awarded in the event that Decedent's injuries were found compensable and SM[Redacted] was determined to be Decedent's statutory employer. The parties also stipulated, during the course of the hearing, that Decedent was receiving $1032/month in Social Security benefits at the time of his death. The remaining issues raised at hearing concern compensability, average weekly wage, Claimant's entitlement to medical benefits, temporary total disability benefits, death benefits, funeral expenses and whether Claimant was an independent contractor at the time of his alleged industrial injury. The specific questions to be answered are:

I. Whether Claimant established, by a preponderance of the evidence, that Decedent sustained compensable injuries resulting in his sudden and unexpected death after falling from a ladder on August 12, 2022.

II. If Claimant established that Decedent suffered compensable injuries on August 12, 2022, whether the SM[Redacted] Respondents established that Decedent was an independent contractor, thus precluding Claimant's entitlement to compensation and benefits payable under the Act.

III. If Claimant established the compensable nature of Decedent's injuries/death and the SM[Redacted] Respondents failed to prove that Decedent was an independent contractor on August 12, 2022, whether Claimant established, by a preponderance of the evidence, that she is entitled to TTD from August 13, 2022 through September 2, 2022, with an offset for Decedent's receipt of Social Security Retirement benefits.

IV. If Decedent's injuries/death are proven compensable and the SM[Redacted] Respondents failed to establish that Decedent was an independent contractor on August 12, 2022, whether Claimant established that the SM[Redacted] Respondents are liable for all reasonable, necessary and related medical treatment associated with Decedent's August 22, 2024 work-related injuries.

V. If Decedent's injuries/death are compensable and the SM[Redacted] Respondents failed to establish that Decedent was an independent contractor on August 12, 2022, whether Claimant established that the SM[Redacted] Respondents are responsible to reimburse Claimant for Decedent's funeral expenses pursuant to C.R.S. § 8-42-123.

VI. If Decedent's injuries/death are compensable and the SM[Redacted] Respondents failed to establish that Decedent was an independent contractor on August 12, 2022, whether Claimant established that the SM[Redacted]Respondents are liable for death benefits, payable to Claimant beginning September 3, 2022, and continuing until these benefits can be properly terminated by operation of law.

VII. What is Decedent's average weekly wage?

Because the undersigned ALJ concludes that the evidence presented supports a conclusion that Decedent was an independent contractor at the time of his fall, this order does not address issues III-VII above.

FINDINGS OF FACT

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

Background

1. Claimant and Decedent were married for more than fifty years. (See SRHE F, p. 26; SRHE G, p. 28). They married on June 16, 1972 and were separated by death on September 3, 2022. (Hrg. Tr. 74:11-23). The evidence presented supports a finding that Claimant is a presumed dependent widow who was wholly reliant on the Decedent for support. (Tr. 74:24 – 75:1; C.R.S. § 8-41-501(1) (a)).

2. As of August 12, 2022, the Decedent had retired from his long time profession as a painter. (Hrg. Tr. 76:10-11; 77:11-14; 104:6-22). Decedent owned and operated a painting company under the title of [Redacted, hereinafter CA] for approximately 20 years. (Hrg. Tr. 103:1-5; 133:7-18). According to Claimant, Decedent liked to remain active and found the leisure associated with retirement challenging. (Hrg. Tr. 76:10-16). Because he did not like to sit around and enjoyed helping others, Decedent would help his son with painting projects. Indeed, Claimant testified: ". . . I would hear [Decedent] telling me, 'Hey, I feel bad that I am here at home when my son is there working by himself. . . . I would hear my son call [Decedent] and saying, 'Hey, Boss, can you come help me?" (Hrg. Tr. 76:20-25). Claimant testified that Decedent also had many friends and knew many people, including acquaintances from his days as a painter for Ca[Redacted]. Similar to the situation with his son, these people would ask Decedent for help and he would assist them with projects such as painting a door or a bathroom or "something like that". (Hrg. Tr. 105-106:17-21). Claimant testified she did not know whether Decedent was paid by those friends and acquaintances for this work.

3. On August 12, 2022, Decedent was helping his son, [Redacted, hereinafter GL] paint a building owned by SM[Redacted]. At the time, GL[Redacted] was the primary painter for GD[Redacted], a company owned by his now ex-wife [Redacted, hereinafter KS]. GD[Redacted] had contracted to paint the building for [Redacted, hereinafter EY], the owner and operator of "[Redacted, hereinafter IG]". EY[Redacted] testified that he met GL[Redacted] "driving down the road" one day. (Hrg. Tr. 46:2-9). Upon learning that GL[Redacted] was a painter, EY[Redacted] asked him if he was interested in taking on additional work as part of a job EY[Redacted] was performing for SM[Redacted]. Id. The two worked out the details for completion of the work and EY[Redacted] testified that he then contracted with GD[Redacted] to do the painting on the SM[Redacted] project, noting that he would provide the supplies and perform the repair work. (Hrg. Tr. 46:10-18).

4. On August 12, 2022, Decedent was alone at the SM[Redacted] property. Although it is unclear what Decedent was doing in the moments before, he was found on a concrete walkway by SM[Redacted] employees bleeding and injured. The record reflects that paramedics were first dispatched to the property at 4:54 pm and arrived four minutes later. (SRHE H, p. 31). Based on the injury pattern, Paramedics concluded that Decedent likely fell from atop a ladder approximately 20 feet to the ground. Decedent appeared to have braced for impact with his hands and arms, but struck the ground with his face, the right side of his head, and his right shoulder. Id. at 37-38.

5. Decedent was transported to and treated at UCHealth Memorial Hospital for emergent treatment. Sadly, Decedent succumbed to his injuries on September 3,

2022. (SRHE I, p. 41). His final diagnoses included polytrauma and septic shock. Id.

The Testimony of EY[Redacted]

6. EY[Redacted] testified as the owner and operator of IG[Redacted] Services. EY[Redacted] testified that he contracted with GL[Redacted] to perform the painting work associated with a contract he had with SM[Redacted]. (Hrg. Tr. 46:10-18).

7. According to EY[Redacted], GL[Redacted] owned GD[Redacted] and the Decedent assisted him when GL[Redacted] "needed help" or when Decedent "needed some work to do". (Hrg. Tr. 49:18-21). EY[Redacted] testified that Decedent only spoke Spanish so he could not communicate with him effectively. Rather he spoke with and coordinated the work to be done with GL[Redacted]. (Hrg. Tr. 45:12-24). EY[Redacted] testified that he advised GL[Redacted] that they could not have anybody on SM[Redacted] property by themselves, stating, "I instructed GL[Redacted] that we cannot have anyone at SM[Redacted] by themselves regardless who they work for, they cannot speak English and we cannot communicate with them." (Hrg. Tr. 48:9-24). Nonetheless, EY[Redacted] testified that Decedent showed up to the job site several times on his own at which time he (EY[Redacted]) would escort Decedent from the property. (Hrg. Tr. 48:24-25, 49:1-6, 51:17-18). EY[Redacted] testified that over the course of a month, he saw Decedent assisting GL[Redacted] "probably, maybe . . . three or four times." (Hrg. Tr. 49:12-14). He added that Decedent would drive himself to and from the job site. (Hrg. Tr. 66:22-25, 67:1-9).

8. EY[Redacted] understood that Decedent received his instructions directly from GL[Redacted] (Hrg. Tr. 50:11-17), but GL[Redacted] explained to him that Decedent was the more experienced painter and that Decedent "knew more than GL[Redacted] did." (Hrg. Tr. 56:18-23). Nonetheless, they both knew what they were doing. Id.

9. EY[Redacted] recalled personally witnessing GL[Redacted] and Decedent painting at the SM[Redacted] job on August 12, 2022. He witnessed them until around noon, at which time he had to leave to tend to another jobsite. (Hrg. Tr. 52:17-23). EY[Redacted] testified that, aside from the few times he had to escort the Deceased off the job site for being alone, "I don't ever remember [the Decedent] being there by himself. Either GL[Redacted] and him left together or [the Decedent] showed up after GL[Redacted] got there." (Hrg. Tr. 55:4-15). GD[Redacted] was the only painting contractor EY[Redacted] hired for the SM[Redacted] job. (Hrg. Tr. 56:5-8). EY[Redacted] was asked if GL[Redacted]or the Deceased ever represented to him that Decedent had his own trade name. EY[Redacted] did his best to recall the conversation he had about this, which led him to believe that Decedent previously owned the business, but GL[Redacted] now owned it. (Hrg. Tr. 57:10-18).

10. EY[Redacted] testified that he did not specifically know if Decedent did "side work" for anyone other than GD[Redacted]. He just knew that Decedent was "71 years old, that he "loved to stay busy and did "a lot of extra work." (Hrg. Tr. 57:1-5). However, EY[Redacted] added, "I do understand that he did other side jobs" and that he did these jobs "for himself. (Hrg. Tr. 57:4-9).

11. EY[Redacted] testified there was no "invoice" sent to him for the work performed by GD[Redacted] and that they simply had a "verbal contract" and he made payment directly to GL[Redacted] for the work performed. (Hrg. Tr. 62:4-12; 66:2-8). EY[Redacted] acknowledged he did not have workers' compensation insurance as of August 12, 2022. (Hrg. Tr. 66:16-19). He testified he spoke to GL[Redacted] shortly after the incident and it was his understanding that Decedent had been painting at SM[Redacted] when he fell. (Hrg. Tr. 67:16-24). The ALJ

finds this conclusion speculation as Decedent was alone at the property when he fell. Because he was alone, it is unknown if Decedent was working or preparing to descend the ladder to leave the worksite for the day.

The Testimony of [Redacted, hereinafter AZ]

12. Claimant testified she and the Decedent were married for more than fifty years. They married on June 16, 1972 and were separated by Decedent's death on September 3, 2022. (Hrg. Tr. 74:11-23). They were living together and not separated at the time of Decedent's 2022 fall. (Hrg. Tr. 74:24 – 75:1). The evidence presented persuades the ALJ that Claimant was entirely supported by the Deceased and is a presumed dependent of his for purposes of these joined claims.

13. Claimant provided her insight into her late husband's working relationship with GD[Redacted] and his son GL[Redacted]. She discussed that the Decedent used to run his own business, CA[Redacted] Painting, until he "retired." She testified that after his retirement, Decedent felt bad that his son was working by himself to which she would say, "Hey, but he should get someone else" and Decedent would say, "if I stay here, oh man, no, forget about it . . . I better go help him for a few hours." (Hrg. Tr. 86:24-25, 87:1-5). Claimant's view of the working relationship was that her late husband and son had essentially switched roles after he closed CA[Redacted] Painting and started helping GL[Redacted]. Indeed, Claimant testified, "Well, when the company belonged to [Decedent], of course he was the one who would give the orders to my son, right? But then, when the company belonged to [GL[Redacted]] – or – then [GL[Redacted]] or Christina would be the ones who would give out the orders to him." (Hrg. Tr. 88:16-23). Claimant could not recall any specific instance where Decedent was ordered to perform particular work for GL[Redacted] or KS[Redacted]. (Hrg. Tr. 89:1-6).

14. Claimant agreed that Decedent would perform side jobs for people other than her son, but she focused on how he "wanted to help his son" and the help he wanted to give GL[Redacted] is "how he (Decedent) tried to manage" his side jobs. (Hrg. Tr. 105:13-17). Claimant added that Decedent was doing less side work in 2022, but he would go help GL[Redacted] "because he would feel bad about staying at home." (Hrg. Tr. 107:2-7).

15. Claimant was not aware if Decedent was paid by the hour or by the day. (Hrg. Tr. 84:17-21). She testified that he was paid "mostly" in cash by KS[Redacted] but sometimes she would pay by check. (Hrg. Tr. 85:3-10, 86:7-9). Claimant explained that Decedent would occasionally come home with a check and $400.00 cash for payment of his work. (Hrg. Tr. 86:10-15). She would ask "[w]hy don't they put everything together in the check" to which Decedent would respond, "Just get what I am giving to you." Id. at 13-15. Claimant would typically spend the cash on household items like groceries. (Hrg. Tr. 87:14-18). She would rarely, if ever, deposit the cash into she and Decedent's joint bank account. Moreover, she was not entirely sure whether Decedent deposited all of his checks into their bank account. (Hrg. Tr. 87:25 – 88:6). Checks would be made payable to Decedent personally rather than to a trade or business name. (Hrg. Tr. 85:21025).

16. Claimant testified that GL[Redacted] informed her that he had left the job site early on August 12, 2022 to go inspect a new job. According to Claimant, GL[Redacted] was going to see a known acquaintance ([Redacted, hereinafter GR]), to discuss this upcoming job. Accordingly, GL[Redacted] was not at the SM[Redacted] jobsite when Decedent fell. Per Claimant, GL[Redacted] stated he was not there when his father fell because GR[Redacted] had called him in order to confirm that the aforementioned job he left to inspect would begin on Monday." (Hrg. Tr. 83:1 – 84:19).

The Testimony of KS[Redacted]

17. KS[Redacted] testified as the owner/operator of GD[Redacted]. She testified that she opened GD[Redacted] in June of 2016 and closed it in December of 2023. (Hrg. Tr. 131:13-20). She explained that GL[Redacted], who was her husband at the time the business was opened, was "like the co-owner" of the company and that he did mostly everything when it came to getting the contracts and getting the painting done, while she did the office work for the company. (Hrg. Tr. 132:4-19).KS[Redacted] and GL[Redacted] were married on June 1, 2006 and subsequently divorced. At the time of their marriage, GL[Redacted] was working with Decedent at CA[Redacted] Painting. KS[Redacted] explained when the Decedent was running CA[Redacted] Painting, he was "the boss" and GL[Redacted] was the subordinate. (Hrg. Tr. 133:7-18). She testified she formed GD[Redacted] in June of 2016, because she and GL[Redacted] wanted to open their own business. Once GD[Redacted] was open, KS[Redacted] and GL[Redacted] stopped working for CA[Redacted] Painting. KS[Redacted] testified she was not sure when Decedent stopped operating CA[Redacted] Painting, but confirmed he could have started helping GL[Redacted] at GD[Redacted] within a month or two after it was opened in 2016. (Hrg. Tr. 147:2-18).

18. KS[Redacted] testified that Decedent was not and had never been an employee of GD[Redacted]. Indeed, she testified that GD[Redacted] had no employees outside of herself and GL[Redacted]. (Hrg. Tr. 134:15-24). KS[Redacted] testified that GL[Redacted] would call Decedent and ask for help only when GD[Redacted] had a "big" job or if they were running behind on their work. (Hrg. Tr. 135:13-18). According to KS[Redacted], it was common for GL[Redacted] to complete GD[Redacted] painting jobs by himself and she characterized Decedent's presence on GD[Redacted] work sites as "irregular." (Hrg. Tr. 135:16-24). KS[Redacted] added that GD[Redacted] provided no benefits, i.e. insurance/health insurance to Decedent. (Hrg. Tr. 141:14-20). She testified that Decedent was free to work for others whenever and however he wanted before adding that Decedent had no set work schedule when he helped GL[Redacted] paint. (Hrg. Tr. 141:20-25). Regarding work outside of GD[Redacted], KS[Redacted] testified that GL[Redacted] told her Decedent was working for others in 2022, including [Redacted, hereinafter ET]. (Hrg. Tr. 144:15-25).

19. KS[Redacted] testified that she handled payments for the company, including Decedent's pay. (Hrg. Tr. 136:9-14). Regarding Decedent's pay, KS[Redacted] testified that [GL[Redacted]] would tell [her] how much it would be" and that he would instruct her to "write a check or get – to get cash out." (Hrg. Tr. 136:13-14). KS[Redacted] confirmed that Decedent was paid by both check and cash and reiterated that GL[Redacted] would tell her how much to pay Decedent. (Hrg. Tr. 136:18-20, 137:4-6). She testified that Decedent was not paid by the hour or a set salary. (Hrg. Tr. 142:1-4). KS[Redacted] added that Decedent was not provided a minimum monthly payment nor was he guaranteed any number of hours or jobs to complete with/for GD[Redacted]. (Hrg. Tr. 142:5-13). She also confirmed that no taxes were withheld from Decedent's pay. (Hrg. Tr. 143:4-9). Decedent was issued a 1099 NEC (Non-employee Compensation) form from GD[Redacted] for 2021. (SRHE B). GL[Redacted] corroborated KS[Redacted]' testimony noting that Decedent was paid by the number of days it took to complete a job, so his pay was never the same. (Hrg. Tr. 170:22-25, 171:1-14). He also agreed with KS[Redacted] that GD[Redacted] never paid any type of benefits to Decedent or promised him a certain number of hours per week/month or a certain amount of money per month. (Hrg. Tr. 171:15-17, 172:11-15). Finally, GL[Redacted] testified consistently with KS[Redacted], that he would tell her how much to pay Decedent. (Hrg. Tr. 172:16-22).

20. When asked if she had any idea of what percentage of his pay was cash versus check, KS[Redacted] testified, “To be honest, no.” (Hrg. Tr. 144:12-14). She was subsequently asked, if she did not know the percentage amount of Decedent’s pay was cash versus check, how was the amount of earnings reflected in the 1099 from 2021 calculated? In response, KS[Redacted] testified that she and her ex-husband would “sit down and work out the numbers.” (Hrg. Tr. 148:2-5). GL[Redacted] too was unable to provide an explanation for the exact figure reflected on the 1099 from 2021. (Hrg. Tr. 176:17 – 177:2).

The Testimony of GL[Redacted]

21. GL[Redacted] testified that he is the son of Claimant and the Decedent, and the ex-husband of KS[Redacted]. (Hrg. Tr. 154:9-25). GL[Redacted] testified that GD[Redacted] was a painting business with a focus on “mostly” residential work. (Hrg. Tr. 155:16-20). To complete their work, GD[Redacted] provided their own equipment, including sprayers, drop cloths, rollers, ladders, buckets and stirrers. (Hrg. Tr. 156:15-25). Supplies not provided by GD[Redacted] were purchased by the contractor for whom GD[Redacted]was working. (Hrg. Tr. 156:3-8).

22. GL[Redacted] testified that he worked for Decedent at CA[Redacted] Painting for a “very long time.” He did not own any part of the company and he was clear that Corona Painting belonged to his late father. (Hrg. Tr. 157:9-23). GL[Redacted] could not recall when Decedent retired and closed CA[Redacted] Painting, testifying that “I just know that when me and him, we talked about, you know, me going on my own so I started my – the company with KS[Redacted]. (Hrg. Tr. 158:20-25). At some time after Decedent retired and closed CA[Redacted] Painting, GL[Redacted] reached out to him to see if he wanted to help work some GD[Redacted] jobs because they “[liked] to help each other out.” (Hrg. Tr. 159:16-25, 160:1-4).

23. GL[Redacted] testified that if GD[Redacted] did not have any work for him then Decedent would go work for someone else for a day to two but he would always return to GD[Redacted]. (Hrg. Tr. 161:2-7). He added that Decedent “[liked] to help other guys.” (Hrg. Tr. 168:14-17). When questioned about “when and why” he would ask Decedent to help out at GD[Redacted], GL[Redacted] testified, “Well because I needed some help and then, you know . . . we would like to work each – with each other, so [I] would ask [Decedent] if [your] not doing anything, you want to come and help me . . .” (Hrg. Tr. 164:22-25, 165:1-3). Concerning his work outside of GD[Redacted], the ALJ finds it reasonable to infer that as an experienced painter, who owned his own painting company for many years, Decedent probably had his own tools and equipment that he used to complete the jobs he performed for friends/acquaintances.

24. GL[Redacted] testified that on the date of Decedent’s fall, he and Decedent were working together at SM[Redacted] Ministries when he (GL[Redacted]) received a call at about 4:00 p.m. to come and check out another job site. (Hrg. Tr. 165:25, 166:1-2). According to GL[Redacted], he “talked” to Decedent telling him that they would leave around 4:30, 4:45 p.m. to check out the other job but when the time came, Decedent was still working and did not want to leave. (Hrg. Tr. 166:2-6). GL[Redacted] then left Decedent alone at the job site alone around 4:25-4:30 p.m. and approximately 15 minutes later got a call that Decedent had been “hurt in an accident.” (Hrg. Tr. 166:6-8).

25. GL[Redacted] reiterated that GD[Redacted] had specific times they were allowed to be on SM[Redacted] property and that Decedent needed to be with him when on site. (Hrg. Tr. 167:16-25, 168:1-4). Decedent drove himself to/from the job site and GL[Redacted] testified that if Decedent wanted to show up a little late or leave a little early, that was not an issue. (Hrg. Tr. 167:12, 168:5-11). GL[Redacted] testified that he would bring the supplies and tools to the jobsite for Decedent to use to complete his work. (Hrg. Tr. 170:17-20).

26. According to GL[Redacted], Decedent was "mostly" always ready to "help" because he was his "son and everything." (Hrg. Tr. 171:18-22). Nonetheless, GL[Redacted] added that Decedent turned down his requests for help "maybe" once or twice when he was tired or something. (Hrg. Tr. 171:23-25, 179:3-8). GL[Redacted] did not specially ask Decedent if he was performing side jobs around the time that GD[Redacted] was opened. (Hrg. Tr. 158:23-25, 159:1-4).

27. GL[Redacted] testified that Decedent was an experienced painter and that he did not have to train or instruct him on how to complete a painting job. (Hrg. Tr. 170:8-10, 188). Nonetheless, GL[Redacted] testified that he would sometimes check Decedent's work to assure it was done properly. (Hrg. Tr. 180:22-25, 181:1-9). GL[Redacted] added that when they were on a jobsite for any given day, that he would tell Decedent what he should and should not be doing for work. GL[Redacted] explained he did that because, "that was my – well, part of my job [was] to tell him, kind of, like, how we going to do this one. Because every single house, you know, is different. So we have to make sure that we would do it, you know, properly." (Hrg. Tr. 181:15-22). GL[Redacted] testified that Decedent would also sometimes check his work. (Hrg. Tr. 187:20-22).

28. GL[Redacted] testified that he called Decedent Jefe instead of calling him dad from a young age because he was the main guy. According to Mr. GL[Redacted], Jefe was just a word that we used for Decedent. (Hrg. Tr. 185:11-18). Based upon the evidence presented, the ALJ finds that GL[Redacted]'s use of "Jefe" when referring to or conversing with Decedent was a term of endearment rather than an acknowledgement that Decedent was the boss while helping GL[Redacted] on GD[Redacted] jobs. GL[Redacted] testified that he treated Decedent like an independent contractor, but because Decedent had worked with him for a long time, GL[Redacted] felt like Decedent had become an employee. (Hrg. Tr. 173:10-25).

The Additional Testimony of EY[Redacted]

29. EY[Redacted] was called by Respondents for additional testimony. He challenged GL[Redacted]' suggestion that Decedent was with him "all the time" during the work being performed at SM[Redacted] Ministries. EY[Redacted] testified that sometimes GL[Redacted] was on the job site alone because he (EY[Redacted]) would have schedule his daughter or son to be on the job site to hold the ladder for EY[Redacted] since no one was to be working from a ladder by themselves. (Hrg. Tr. 190:13-25, 191:1-20).

The Bank Record Evidence

30. A question that plagues this case is the extent of Decedent's work and income earned from GD[Redacted] compared to income earned from any other entity. It is clear that Decedent was sometimes paid by check and other times by cash or a combination of both. The bank statements from [Redacted, hereinafter WF] Bank admitted into evidence as CHEs 18-21 and SRHEs N-O give insight into Decedent's income. Based on the banking record evidence, the ALJ is convinced that Decedent earned income in 2021 and 2022 from sources other than GD[Redacted]. In 2021, GD[Redacted] paid claimant $24,759.00 (SRHE B, pg. 13) by cash and checks as testified to by KS[Redacted]. Claimant testified Decedent only deposited checks into their job bank account, never depositing the cash he received from work. Excluding the direct deposits of Decedent's monthly Social Security Retirement benefits ($974.00 in 2021). Decedent deposited $27,978.00 into WF[Redacted] from January 1, 2021 through December 31, 2021. This is $3,219.00 more than the total paid in cash and checks to Decedent by

GD[Redacted], which supports a reasonable inference that Decedent earned income from sources other than GD[Redacted].

31. The ALJ finds the deposits into the joint checking account were also irregular, fluctuating, and of vastly different amounts ranging from $300 to $3,200. The ALJ is persuaded that these deposits are in amounts consistent with being paid a flat rate for work performed rather than being paid for work on an hourly basis. Claimant testified she did not know if Decedent was paid a flat rate or by the hour. GL[Redacted] and KS[Redacted] testified that Decedent was paid a flat amount agreed to between GL[Redacted] and Decedent depending on the duration of the job Decedent helped with. Moreover, GL[Redacted] did not track Decedents' time spent at a job.

32. Decedent and AZ[Redacted] did not pay federal or state taxes on income earned in 2021 and 2022. Decedent's 2020 tax return sheds light on his earnings from 2020 with GD[Redacted] and other entities. (SRHE O). In 2020, the 1099 for Decedent's work for GD[Redacted] reflects that he was paid $15,462. Id. at 67. There is also a 1099 from 2020 for work performed with MTZ Construction LLC in the amount of $6,150. Id. at 66.

33. A review of the checks KS[Redacted] wrote Decedent on and after January 2, 2022 (SRHE A) and comparison with Decedent's 2022 WF[Redacted] Bank checking account statements (CHE 19) supports a finding that Decedent made many deposits in 2022 that were not checks issued by GD[Redacted]. KS[Redacted] testified that Exhibit A contains all checks written to Decedent by GD[Redacted] in 2022, and that in 2022 GD[Redacted] would pay Decedent some cash. Claimant testified Decedent would only deposit checks into the joint WF[Redacted] checking account. On January 2, 2022, GD[Redacted] issued two checks to Decedent, $1,100.00 and $550 (SRHE A, pgs. 3 and 4). There is only one deposit in January 2022 into the joint checking account for $1,140.00 (CHE 19, pg. 121). In February, March, and April 2022 Decedent deposited checks totaling $7,345.00 (CHE 19, pgs. 124-138). GD[Redacted] paid claimant nothing in those three months. On May 17, 2022, Decedent deposited $950.00 into the WF[Redacted] account (CHE 19, pg. 143), matching a check written on May 6, 2022 by GD[Redacted] for work done April 20 to April 27, 2022 (SRHE A, pg. 5). However, another check written May 17, 2022 for work done between May 1 and May 9, 2022, by GD[Redacted] (Ex. A, pg. 6) was not deposited into the joint checking account (CHE 19, pg. 143). Similarly, a $1,000 check from GD[Redacted] numbered 371 was written July 13, 2022, and another $1,000 check numbered 372 was written July 20, 2022, by GD[Redacted]. However, only one $1,000 deposit is shown in the WF[Redacted] statements in July and August 2022 (CHE 19, pgs. 148 and 153-154). A plausible explanation that is consistent with Claimant's testimony that she and Decedent had only the one account at WF[Redacted] Bank where all money was deposited, and Decedent deposited all his checks, is that Decedent was cashing or depositing checks at other institutions or check cashing businesses. Indeed, on June 29, 2022, Decedent deposited $500 in the WF[Redacted] joint checking account (CHE 19, pg. 148). That was not a payment from GD[Redacted] found in Exhibit A. On July 26, 2022, GD[Redacted] wrote a check number 373 to Decedent for $1,000. There is no corresponding $1,000 deposit into the WF[Redacted] joint checking account. There is a $500 deposit on July 26, 2022 (See CHE 19). Based upon the totality of the evidence presented, the ALJ is persuaded that Decedent was probably earning substantial income from entities and/or people other than GD[Redacted]. The ALJ is also convinced that Decedent was probably not depositing all the checks from GD[Redacted] into his bank account and was probably cashing some checks at check cashing businesses. Decedent's bank deposit records are not consistent with Claimant's testimony that Decedent was not at all busy with work outside of GD[Redacted] in 2022.

CONCLUSIONS OF LAW

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

A. 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).

Statutory Employer Principles

B. Under Colorado's Workers' Compensation Act, the test for whether an alleged employer is a statutory employer is whether the work contracted out is part of the employer's regular business as defined by its total business operation. Elliot v. Turner Const. Co., 381 F.3d 995, 999 (10th Cir. 2004); See Also Humphrey v. Whole Foods Mkt. Rocky Mountain/Sw. L.P., 250 P.3d 706, 709 (Colo. App. 2010). A company that contracts out work to an uninsured contractor as part of its regular operations can be liable for workers' compensation benefits to the injured worker. Finlay v. Storage Technology Corp., 764 P.2d 62 (Colo. App. 1988). The key factor for determining statutory employer status is whether the subcontracted work is part of the contracting party's regular business.

C. In Finlay, it was held the subcontractor's electrical work for the contractor was work integral to the regular business of the contractor and thus made the contractor the statutory employer. Id. In other words, contractors who delegate part of their regular business work remain responsible for ensuring workers' compensation coverage for subcontracted employees. "[T]here is no absolute requirement that the tasks ordinarily be performed by the statutory employer's own employees. Instead, the court must examine the nature of the business as a whole and determine whether, absent the contractor's services, the service would of necessity be provided by the employer's own employees. Melody Homes, Inc. v. Lay, 610 P.2d 1081 (Colo. 1980); See Also Campbell v. Black Mountain Spruce, Inc., 677 P.2d 379, 381 (Colo. App. 1983)

D. The statute addressing statutory employers is clear in that there is no stated exception for a subcontractor that may lie or mislead a general contractor regarding the existence of workers' compensation insurance:

Any person, company, or corporation operating or engaged in any business by contracting out any part or all of the work thereof to any subcontractor, sub-lessee, or other person not covered by insurance as provided by articles 40 to 47 of this title shall be construed to be and be an employer as defined in this section...and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said subcontractor and said lessees and their employees.

C.R.S. § 8-41-401(1) (a). Whether a subcontractor lied or misled a contractor about having workers' compensation coverage is not relevant to the analysis and is contrary to the purpose of ensuring worker coverage. C.R.S. § 8-41-401 establishes statutory employer liability when an employer contracts out work that is part of its regular business operations, and the subcontractor fails to secure workers' compensation insurance. In such a case, the contracting

employer, SM[Redacted] in the present matter, becomes responsible for providing workers' compensation benefits to the injured worker. The evidence presented supports a conclusion that SM[Redacted] hired IG[Redacted] to perform various construction, maintenance, and painting tasks at their property that would otherwise have to be performed by their own employees. IG[Redacted] did not perform all of that work and instead subcontracted part of this work to GD[Redacted], including the tasks assigned to the Decedent. The ALJ is convinced that the work performed by IG[Redacted] and GD[Redacted] Superior Painting was integral to SM[Redacted]Ministries' operations. The painting and maintenance work was essential for maintaining the functionality and aesthetics of SM[Redacted] property. Courts have found that when contracted work is a part of the "regular business" of the principal, it is sufficient to establish statutory employer status. Finlay v. Storage Tech. Corp., 764 P.2d 62, 65 (Colo. 1988). In Finlay, the Colorado Supreme Court ruled that a principal is a statutory employer when the work performed by the contractor is part of the regular business activities of the principal, even if the principal does not directly engage in the specific activity on a regular basis. The work performed by GD[Redacted] was not specialized or peripheral, but was instead part of the regular maintenance required by SM[Redacted]. IG[Redacted] was hired for the specific purpose of fulfilling SM[Redacted] need for repairs and painting, who in turn subcontracted out a portion of their work, thereby making SM[Redacted] liable as a statutory employer under Colorado law. Nonetheless, questions regarding the compensable nature of Decedents injuries/death and his status as an employee versus an independent contractor must be answered before SM[Redacted] can be held responsible for benefits under the Worker's Compensation Act.

Compensability & Independent Contractor Status

E. An employee's right to compensation initially hinges upon a determination that he/she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. Younger v. City and County of Denver, 810 P.2d 647, 649 (Colo. 1991); In re Question Submitted by U.S. Court of Appeals, 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. Popovich v. Irlando, 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. Horodyskyj v. Karanian, 32 P.3d 470, 475 (Colo. 2001). It is the burden of the claimant to establish causation by a preponderance of the evidence. Faulkner v. Indus. Claim Appeals Office, 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. Finn v. Industrial Commission, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. Ringsby Truck Lines, Inc. v. Industrial Commission, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); Industrial Commission v. Royal Indemnity Co., 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. Industrial Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).

F. In this case, the evidence presented supports a conclusion that Decedent was, more probably than not, performing services for GD[Redacted] for a wage when he fell approximately 20 feet to the ground suffering significant trauma to multiple parts of his body on August 12, 2022. These injuries required emergent lifesaving medical attention and treatment. Nonetheless, they proved fatal with Decedent succumbing to his injuries on September 3, 2022. Because the ALJ is convinced that Decedent's injuries occurred in the course and scope and arose out of his work activities for GD[Redacted], the ALJ concludes that Decedents injuries and subsequent death are compensable. Accordingly, the burden of proof shifted to SM[Redacted] Ministries, as a statutory employer, to establish that Decedent was an independent contractor rather than an employee of GD[Redacted] at the time of his fall. Stampados v. Colorado D & S Enterprises, Inc., 833 P.2d 815 (1992).

G. Only employees of an employer are entitled to compensation for work-related injuries. (See C.R.S. §8-41-301(1) (a) (noting that an injury is compensable if, "at the time of the injury, both employer and employee are subject to the provisions of said articles…"). Individuals who are "free from control and direction in the performance of [a] service" for an employer are not employees. (C.R.S. §8-40-202(2) (a)). Such individuals are referred to as "independent contractors." (See C.R.S. §8-40-202). The party asserting "independent contractor" status bears the burden of proving independence by a preponderance of the evidence. In this case, SM[Redacted]t Ministries may establish that Decedent was an independent contractor because he was free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." (C.R.S. § 8-40-202(2) (a)). Moreover, pursuant to § 8-40-202(2) (b) (I), C.R.S. independence may be demonstrated through a written document that complies with the statute. See §8-40-202 (2) (b), C.R.S.

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

I. Section 8-40-202(2) (b) (II), C.R.S. enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or an independent contractor. However, the test considered by the Colorado Supreme Court in the unemployment insurance case of Indus. Claim Appeals Office v. Softrock Geological Services, 325 P.3d 560 (Colo. 2014) concerning whether a worker is an employee or an independent contractor applies to Workers' Compensation claims. The test requires the analysis of not only the nine factors enumerated in § 8-40-202(2) (b) (II), C.R.S. but also the nature of the working relationship and any other relevant factors. Pella Windows & Doors, Inc. v. Industrial Claim Appeals Off., 458 P.3d 128 (Colo. App. 2020). The Softrock decision noted the requirement that there be indicia that would normally accompany the performance of an ongoing separate business in the field and including whether: the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. The Court held that whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of circumstances test that

evaluates the dynamics of the relationship between the individual and the putative employer. Softrock Geological Services, supra. Because no document establishing independence was submitted in this case, the ALJ has considered the collateral evidence presented and analyzed this matter pursuant to § 8-40-202(2)(b)(II) by applying a totality of the circumstances test that evaluates the dynamics of the relationship between Decedent and the putative employer. See generally, Industrial Claim Appeals Office v. Softrock Geological Services Inc., 325 P.3d 560 (Colo. 2014).

Section 8-40-202(2) (b) (II), C.R.S.

J. Pursuant to § 8-40-202(2) (b) (II) "to prove independence it must be shown that the person for whom services are preformed does not:"

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

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

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

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

- Provide more than minimal training for the individual;

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

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

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

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

K. While the ALJ must consider the factors listed in the statute, the fact that the party asserting independence does not prove one of the factors is not conclusive evidence that the claimant is an employee. See C.R.S. §8-40-202(b); Nelson v. Industrial Claim Appeals Office, supra. Rather, §§ 8-40-202(b) (I) and (II) create a "balancing test" requiring the party asserting independence to overcome the presumption of an employment relationship contained in § 8-40-202(2) (a) and establish instead, independent contractor status. Nelson v. Industrial Claim Appeals Office, supra. As noted above, once an injured worker establishes that he/she was injured in the performance of services for an alleged employer for a wage, the burden shifts to the alleged statutory employer to prove that the injured worker was not an employee by

demonstrating that he/she was free from direction and control and customarily engaged in an independent business.

L. In concluding that Decedent was, more probably than not, an independent contractor at the time of his August 12, 2022 fall, the ALJ finds the testimony of EY[Redacted], KS[Redacted] and GL[Redacted] credible and more persuasive than the contrary testimony of Claimant. Analysis of the nine factors supports the following conclusions:

• Decedent was not required to work exclusively for GD[Redacted]. Indeed, the SM[Redacted] Respondents presented evidence establishing that Decedent performed services of a variety of people and entities upon his retirement from CA[Redacted] Painting. The evidence presented also supports a conclusion that Decedent did not work regularly for GD[Redacted]. Consequently, the ALJ finds that the evidence presented concerning this factor supports a conclusion that Claimant was acting as an independent contractor rather than an employee of GD[Redacted].

• The second enumerated factor is critical to the determination of whether Decedent was an independent contractor or an employee at the time of his August 12, 2022 fall. As noted, an employee is a person who is subject to their employer's control over the means and methods of their work, as well as the results. Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office, 859 P.2d 278 (Colo. App. 1993). It is the power to control, and not the fact of control being exercised, which is the primary factor in distinguishing an employee from a contractor. Industrial Commission of Colorado v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934). Here, Decedent attempted to demonstrate, through the testimony of GL[Redacted], that he was under the control and direction of the putative employer by suggesting that GD[Redacted] set a quality standard for the work performed because GL[Redacted] would sometimes inspect his work and the two would get together and form a plan of attack for completion of the work. Contrary to Claimant's suggestion, the ALJ is convinced that the relationship between GL[Redacted] and Decedent was one of collaboration based upon mutual respect and enjoyment in spending time with one another rather than one of direct supervision between an employer and his employee. Indeed, GL[Redacted] testified that Decedent would inspect his work. Moreover, he suggested that Decedent knew the job well, did not need instruction, would work independently on different tasks and did not supervision. Accordingly, the ALJ is convinced that the evidence presented surrounding this factor supports a conclusion that Decedent was acting as an independent contractor at the time of his August 12, 2022 fall.

• GD[Redacted] paid Decedent a flat contract rate based upon the time it took for completion of the work and did not track Decedent's time. Indeed, the evidence supports a reasonable conclusion that Decedent would negotiate with GL[Redacted] to set the flat price and payment for performing any work for GD[Redacted] Based upon the testimony of Ms. KS[Redacted] and GL[Redacted], the ALJ concludes that the evidence surrounding this factor tips in favor of Decedent behaving/acting as an independent contractor.

• Decedent was never terminated during his period of engagement with GD[Redacted] for violating the terms of his service contract or failing to produce a result acceptable to GL[Redacted]. As presented, the evidence surrounding this factor is insufficient to establish that Decedent was acting as an independent contractor at the time of his August 12, 2022 fall.

• Decedent was a skilled painter with decades of experience. Based upon the evidence presented, the ALJ is convinced that Decedent was knowledgeable in all aspects of completing a variety of painting jobs, large and small. Indeed, Decedent owned and operated his own

independent painting business for at least 20 years before retiring. GL[Redacted] admitted that Decedent was an accomplished painter- at least as good as he was and that he knew what he was doing. Accordingly, Decedent did not required training to complete the job tasks he was performing for GD[Redacted]. Because he did not require instruction/training, the evidence presented concerning this factor tips in favor of Decedent being an independent contractor at the time of his August 12, 2022 fall.

• As Decedent was a proficient painter, who had owned/operated a painting company for many years, he had the necessary tools/equipment to complete the tasks he was performing for GD[Redacted]. Nonetheless, the evidence presented clearly establishes that GD[Redacted] provided all the necessary tools to Decedent to complete his work, while IG[Redacted] supplied the materials for the SM[Redacted] Ministries painting job. As presented, the evidence surrounding this factor persuades the ALJ that Decedent was working akin to how an employee of GD[Redacted]would have been the time of his August 12, 2022 fall.

• As with Factor 2, careful analysis of Factor 7 is critical to the determination of whether Decedent was working as an independent contractor or an employee of GD[Redacted] at the time of his August 12, 2022 fall. Factor 7 involves dictating the time of performance of the job. Based upon the evidence presented, the ALJ agrees with SM[Redacted] Ministries that factor weighs in favor of Decedent being an independent contractor rather than an employee of GD[Redacted]. Here, the evidence supports a conclusion that there was no work contract between Decedent and GD[Redacted]. KS[Redacted] testified that Decedent's work for GD[Redacted] was irregular and that he had no set work schedule. GL[Redacted] echoed this sentiment testifying that Decedent was free to work when he wanted, i.e. he could and did decline GD[Redacted] work and requests for assistance to do work for other people. Moreover, GL[Redacted] testified that Decedent was free to arrive late and leave the job site early. Accordingly, the ALJ is not convinced that GL[Redacted] exercised significant day-to-day control over Claimant's work activities. Indeed, the evidence presented convinces the ALJ that on the date of Decedent's fall; GL[Redacted] informed Decedent that they would leave the job site around 4:30-4:45 p.m. so he could check out another job. Decedent protested advising GL[Redacted] that he was not done working for the day. Rather than exercising control over his asserted employee by requiring that Decedent descend the ladder immediately at the appointed time, GL[Redacted] yielded to Decedent leaving him to work alone. Based upon the evidence presented, the ALJ is convinced that GD[Redacted] did not dictate the time of performance for Decedent or the time when Decedent had to complete a job. Instead, it appears that Decedent was allowed to work the hours he wanted. Accordingly, the ALJ finds the evidence presented concerning this factor to support a conclusion that Claimant was acting as an independent contractor at the time he fell from the ladder on August 12, 2022.

• All checks cut by GD[Redacted] to pay Decedent for his services were made out to him personally rather than a trade or business owned/operated by Decedent. Consequently, the ALJ concludes that Factor 8 above tips in favor of Claimant being an employee of GD[Redacted] rather than an independent contractor.

• No evidence was presented concerning factor nine enumerated at § 8-40-202(2) (b) (II).

M. While the evidence supports a conclusion that the nine factors outlined above tip the scales in favor of Decedent being an independent contractor at the time of his fall, the nine criteria are not exhaustive in proving "customary engagement" in an independent trade or business. Accordingly, the ALJ must also conduct "an inquiry into the nature of the working relationship between Decedent and the putative employer, i.e. GD[Redacted]. Softrock

Geological Services, supra; See also, Pella Windows and Doors, Inc. v. Industrial Claim Appeals Office, 458 P.3d 128 (Colo. App. 2020). When applying a totality of the circumstances test that evaluates the dynamics of the relationship between Decedent and the putative employer, it is necessary to evaluate the intent of the parties concerning Decedent's activities for GD[Redacted]. Here, the record supports a conclusion that Decedent was struggling with the transition to retirement. He liked being active and enjoyed helping others complete jobs/projects around their homes, which the ALJ finds from the evidence, including the bank records, he probably did more frequently than Claimant and GL[Redacted] cared to admit. In keeping with this "service to others" character, Decedent liked to help his son and his son enjoyed his company and work ethic. Based upon a totality of the circumstances, the ALJ is convinced that the intent of the parties surrounding Decedent's work for and relationship with GD[Redacted] was not one of an employer and his employee but one of a son accommodating a father who wanted to get out of the house, remain active, feel valued and earn some additional money in retirement. Based upon the evidence presented, the ALJ is persuaded that GL[Redacted] respected his dad, enjoyed his company and benefitted from the informal working relationship involving his dad because he was "mostly" always ready to "help" if GL[Redacted] was behind in his work or if he needed assistance on a "big" job.

N. The record also supports a conclusion that Decedent had many customers he performed services for independently of GD[Redacted], which GL[Redacted] made no effort to control. Indeed, GL[Redacted] and KS[Redacted] testified that Decedent was free to and did take on independent work for others. When considered in its totality, the ALJ is convinced that the evidence substantiates that Decedent was customarily engaged in an independent trade related to the service he was performing for GD[Redacted] at the time of his August 12, 2022 fall. Moreover, the ALJ is persuaded that Decedent was both free from direction and control in the performance of the services he provided to GD[Redacted].

O. As noted above, C.R.S. §8-40-202 (2) (b) (II), does not establish any precise number or combination of factors which is decisive in determining whether an alleged injured worker is an employee or an independent contractor. Rapouchova v. Frankie's Installation, W. C. No. 4-630-15 (August 17, 2005). Rather, it is for the ALJ to determine, based on the dynamics of the relationship between Decedent and the putative employer, whether or not particular factors are present to establish whether a Decedent was an employee of GD[Redacted] or independent contractor based on the totality of the evidence presented. In this case, the ALJ finds that there is ample record evidence to support a conclusion that not only was Decedent customarily involved in an independent trade, i.e. painting but that GD[Redacted] did not control the means, methods and/or results of Claimant's work. Indeed, Decedent free to pursue other employment opportunities. The testimony of Claimant, KS[Redacted], and GL[Redacted] is persuasive evidence that Decedent worked regularly for others painting, and Decedent's bank records supports a conclusion that he had regular, substantial and sustained income from sources besides GD[Redacted] in 2022.

P. Furthermore, Decedent was not supervised or instructed in how to discharge his duties to GD[Redacted] and GD[Redacted] did not control when Decedent had to get to work, the hours or times Decedent worked, when Decedent could stop work, when Decedent could leave work, and whether Decedent would work at all. In fact, GL[Redacted] testified that he did not keep track of Decedent's time on the job and the evidence clearly demonstrates that when GL[Redacted] attempted to stop Decedent from working after 4:30 p.m. on the day of his fall, Decedent refused resulting in GL[Redacted] leaving him alone on the job site despite Mr. EY[Redacted] unrefuted testimony that Decedent was not supposed to be on the property alone.

Q. Based on the totality of the evidence presented, the ALJ finds and concludes the SM[Redacted] Respondents have proven that Decedent was an independent contractor and not an employee of GD[Redacted] on the date of his fall. Accordingly, Claimant's claim for benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits arising out of injuries sustained after falling from a ladder on August 12, 2022, is denied and dismissed.

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

DATED: October 10, 2024

/s/ Richard M. Lamphere_____

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on August 20, 2023, during the course and scope of his employment with Employer.

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 injuries.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to Temporary Total Disability (TTD) benefits for the period August 20, 2023, until terminated by statute.

4. Whether Claimant is entitled to select his authorized treating physician.

NOTICE

In his Position Statement, Respondent argues that he did not have adequate notice of the hearing. Specifically, he stated:

> There is another issue my Facetime hearing was not fully programmed for they said I declined. Which wasn't so. For the initial hearing I was advised it would be Facetime. But 45, minute before the live hearing I received an Email from Stateemployee [Redacted, hereinafter MY]. I would have gladly attended the hearing if I had known. Same with this Show Cause received the Email today 9/25/24.

The Court notes that the live hearing was set for August 20, 2024, at 1:30 P.M., and a Notice of Hearing was sent to Respondent's e-mail address of [Redacted, hereinafter OS], on July 11, 2024, more than six weeks prior to the hearing date, notwithstanding Respondent's insinuation that he received only forty-five minutes' notice of the hearing. The Notice of Hearing notified the parties of the time and place where the hearing was to take place. Respondent acknowledged that he received other e-mails from the Court sent to the same e-mail address, including the Court's September 23, 2024 Order to Show Cause. The Court finds that Respondent had sufficient notice of the August 20, 2024 hearing and has failed to show good cause for his failure to appear.

Nevertheless, the Court considers those arguments and additional evidence submitted by Respondent.

FINDINGS OF FACT

1. On August 20, 2023, Claimant was employed by Respondent, [Redacted, hereinafter PP]. Claimant was paid $900.00 per week.

2. Employer did not carry worker's compensation insurance on August 20, 2023.

3. On August 20, 2023, Claimant was performing work for PP[Redacted]. On that day, Claimant fell off ladder twenty feet to the ground. Claimant landing on his feet. Claimant injured both of his lower extremities. Employer was notified of the injury that same day.

4. On that same day, Claimant was taken to the Denver Health Emergency Department, where he was admitted. An x-ray of Claimant's left ankle was performed, which showed a fracture and diffuse swelling. A CT scan was taken sometime later, which showed a comminuted distal tibial fracture. Claimant was diagnosed with a pilon fracture of the left ankle.

5. On August 21, 2023, Dr. Richard Raveesh, M.D., performed surgical repair on the left ankle including application of an external fixation device. He was instructed to keep all weight off his leg.

6. On September 6, 2023, was admitted again to the Denver Health Hospital Dr. Raveesh performed a second surgery for removal of the fixation device and open reduction and internal fixation. Claimant was discharged the next day with crutches.

7. After his second surgery, Claimant continued to treat with Denver Health. His treatment consisted of physical therapy sessions. Fourteen weeks after the surgery, Claimant remained on crutches.

8. The Court finds the foregoing treatment to have been reasonably necessary to cure and relieve Claimant of the effects of his August 20, 2023 injury.

9. Claimant's condition has improved but he continues to experience pain and physical limitations. He has difficulty walking and standing, and his ankle swells up when he stands for too long.

10. Claimant did not work from the day of his injury until June 28, 2024, when he started working as a delivery driver.

11. Employer never provided a list of designated providers to Claimant. Claimant, through his actions, selected Denver Health as his authorized treating provider.

12. The testimony of Claimant is credible.

13. The opinions of the providers at Denver Health are credible.

CONCLUSIONS OF LAW

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 seek 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.

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).

Claimant has proven that it was more likely than not he was injured in the course and scope of his employment with Respondent on August 20, 2023, when he fell twenty feet off ladder to the ground, injuring his left lower extremity.

Respondent argued in its position statement that Claimant was not an employee of Respondent at the time of injury. However, Claimant credibly testified that he did in fact work for Alfredo Lopez at the time of the injury. Therefore, as found, the Court concludes that Claimant was an employee of Respondent at the time of the injury.

The Court concludes that Claimant sustained an injury on August 20, 2023, arising out of and in the course of his employment with Respondent.

Medical Benefits

Employer 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).

The Court concludes as found above that the treatment summarized herein was reasonably necessary to cure and relieve Claimant of the effects of his August 20, 2023 injury.

Temporary Total 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. *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).

Claimant’s testimony and the medical records from Denver Health demonstrate that Claimant was either unable to work, or under restrictions from the day of his injury of August 20, 2023. Claimant continues to experience physical limitations arising out of his work-related injury. Claimant has not been placed at maximum medical improvement, pursuant to the records submitted by the parties. Claimant has shown that he is entitled to temporary disability benefits from August 20, 2023, until terminated by law.

Authorized Treating Physician

Under § 8-43-404(5), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith," or the right of selection passes to the claimant. Rogers v. Industrial Claim Appeals Off., 746 P.2d 565 (Colo. App. 1987). To properly exercise its right of selection, the employer must give the claimant a list of at least four providers from which he can choose. Section 8-43-404(5)(a)(I)(A).

In this case, as found, Respondent did not provide Claimant with a list, at any time, of at least four providers from which Claimant could choose to treat for his work injury, and Claimant through his actions selected Denver Health as his authorized treating provider. As a result, the Court finds and concludes that Denver Health is Claimant's authorized treating provider.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable injury on August 20, 2023, during the course and scope of his employment with Respondent.

2. Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary, and causally related medical benefits for August 20, 2023, injury.

3. Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits for the period August 21, 2023, until terminated by statute.

4. Denver Health is Claimant's authorized treating provider for the August 20, 2023 injury.

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

review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 14, 2024.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-243-082-002

ISSUES

- Did Claimant prove she suffered a compensable injury on November 20, 2022?

If the claim is compensable, the following issues will be addressed:

- Did Claimant prove treatment received before February 20, 2023 is authorized?
- Did Claimant prove Pueblo Community Health Center is authorized?
- What is Claimant's average weekly wage?
- Did Claimant prove entitlement to TTD benefits commencing March 13, 2023?
- Did Respondents prove TTD is barred by a full-duty release from an ATP?
- Did Respondents prove Claimant was responsible for termination of employment?

FINDINGS OF FACT

1. Claimant was employed as a production worker at Employer's commercial laundry processing facility.

2. Claimant reported an alleged injury to her supervisor, [Redacted, hereinafter JZ], on February 20, 2023. JZ[Redacted] documented that Claimant said she did not know what caused the injury, or when it started. Claimant said she believed cold air from an open loading door caused her pain. JZ[Redacted] also documented Claimant stated the pain was from arthritis and "getting old." She did not reference any specific injury.

3. Claimant pursued treatment from several providers before reporting the injury to Employer. On November 25, 2022, she saw Devin McNabb, PA-C, at Pueblo Community Health Center (CHC) for multiple complaints, including low back pain "x 2 weeks." Claimant stated she "stands on feet all day at job and uses her arms to stretch clothes." Examination of the low back showed no abnormalities, but she was tender to palpation of the paraspinous muscles in the right thoracic area. [Redacted, hereinafter MB] diagnosed "acute on chronic" right-sided thoracic pain. He prescribed muscle relaxers and recommended stretching exercises.

4. Claimant offered no testimony at hearing that her back pain was caused by stretching clothes at work.

5. Claimant went to the St. Mary Corwin Hospital emergency room on December 3, 2022, for "upper back pain for 2-3 weeks." Claimant said she thought she

strained her back “while cleaning . . . a couple weeks ago.” Examination showed tenderness to palpation of the upper thoracic paraspinal muscles, and pain with flexion at the waist. Claimant was diagnosed with upper back pain. She was given muscle relaxers and lidocaine patches and advised to take 3-5 days off work.

6. Claimant returned to the emergency room on December 28, 2022. She stated the symptoms started “a couple months ago.” Claimant reported “a lot of heavy lifting” at work but denied any specific injury. She was diagnosed with a myofascial strain, prescribed lidocaine patches and a muscle relaxer, and advised to follow up with her PCP.

7. Claimant followed up with MB[Redacted] at Pueblo CHC on January 5, 2023. She had tried ibuprofen, Tylenol, and muscle relaxers, but “nothing is helping.” She stated the pain had been present for 2-3 months. She said her back did not hurt at home, but the pain increased to 10/10 after two hours at work. Examination showed right-sided tenderness in the lower thoracic area. Examination of the low back was normal. MB[Redacted] opined the thoracic pain was “clearly caused” twisting while processing laundry at work. He showed her how to modify her work to avoid twisting her upper back.

8. MB[Redacted] opinion is consistent with an occupational disease theory of causation. However, at hearing, Claimant stated her claim is for an accidental injury and not an occupational disease.

9. Claimant went to the Parkview Hospital emergency room on February 10, 2023, for right-sided thoracic pain. Her presenting complaint was “nontraumatic right flank pain that started in November.” There is no mention of any work activity or injury. She was discharged with a Tramadol prescription and advised to follow up with her PCP.

10. Claimant saw Dr. Richard King at Pueblo CHC on February 17, 2023. She reported pain that started “about November 20 on her mid-back. She denies any injury but works for a laundry place.” Dr. King ordered an MRI. He described the reason for the MRI as “chronic mid back pain – no injury.”

11. Claimant went to the Parkview ER on February 21, 2023, complaining of back pain. Claimant reported, “She has had this pain since a work-related injury in November, it seems to be triggered by use of a specific machine at work. She is employed doing laundry for a hospital. Pain used to come on while at work but it has started to occur while at home too.” The ER physician noted that “Patient does not have significantly reproducible tenderness in her back, particularly not in the midline, but even off to the lower thoracic on the right side where she is having the most pain, I am not finding the ability to significantly reduce any tenderness.” A thoracic CT scan showed “age-related” degenerative changes but no fracture or other acute abnormality. Claimant wanted an MRI, but there were no exam findings to justify additional imaging on an emergent basis.

12. Claimant returned to the emergency room on February 25, 2023. The report states, “she developed back pain four months prior to admission which she describes a sharp, located mostly in the right thoracic aspect of her back but also in the left low back.” There is no mention of any potential work-related cause for her symptoms. Examination

showed tenderness to palpation along the thoracic paraspinal musculature from T4-T12. There was also some mild tenderness to palpation along the midline of the back and the left lateral paraspinal musculature. Straight leg raises were negative. The ER physician ordered thoracic and lumbar MRIs. The thoracic MRI was normal. The lumbar MRI showed multilevel degenerative changes, with moderate bilateral neuroforaminal narrowing at L4-L5, and moderate to severe bilateral neuroforaminal narrowing at L5-S1. No acute pathology was identified.

13. As noted previously, Claimant reported an alleged injury to Employer on February 20, 2023. Employer gave Claimant a list of providers, from which she chose CCOM in Pueblo. Claimant saw Brendon Madrid, NP at Concentra[1] on February 27, 2023. MB[Redacted] documented the following mechanism of injury: "was next to the heater at work and someone opened the door bringing in the freezing air. With the freezing air, and the twisting and bending mid back on Rt side. After some time pain went from lower back to Rt side shoulder and was a burning sensation." The physical examination was unremarkable, but MB[Redacted] diagnosed myofascial low back pain based on Claimant's reported symptoms. MB[Redacted] concluded Claimant suffered no work-related injury. Specifically, he opined "the patient did not sustain a traumatic injury. She was exposed to cold air and warm air without a true mechanism of injury. I advised the patient to continue working with her PCP." He indicated Claimant was at MMI and released her from care.

14. Claimant followed up with Dr. King on March 2, 2023. She stated she was originally injured at work doing laundry. Claimant described the job as "fairly physical," and said, "she has to bend and lift and fold many things." However, there is no mention of any specific incident or injury at work.

15. Claimant filed a Workers' Claim for Compensation on June 16, 2023, alleging a low back "sprain" occurring on November 20, 2022. She described the mechanism of injury as "working a heavy-duty machine, asked for a different position and was never moved, machine was too heavy for me to operate." The assertion that Claimant was "never moved" from a particular machine is contradicted by [Redacted, hereinafter SZ] credible testimony that Claimant regularly rotated between stations and tasks.

16. After receiving the claim, Respondents authorized another evaluation at Concentra. Claimant saw Dr. Tanya Hrabal at Concentra on July 11, 2023. For the first time, Claimant mentioned numbness and weakness radiating down her left leg. Claimant denied any trauma and stated, "the pain comes and goes." The physical exam was generally benign, except thoracic pain with lateral movement. Dr. Hrabal diagnosed myofascial low back pain and chronic bilateral thoracic back pain. She concluded Claimant suffered no work-related injury and that further treatment at Concentra would not be covered "without a work-related mechanism of injury." She opined Claimant was at MMI, with no impairment and no restrictions.

[1] Concentra purchased the CCOM clinics in 2021.

17. Claimant testified that she experienced pain in her lower back at work on November 20, 2022. She testified she was not certain what caused the pain, but confirmed she thought at the time it was from exposure to a draft of cold air from an overhead door that was opened periodically for truck deliveries. Claimant's counsel agreed this claim is for a traumatic injury and not an occupational disease. Claimant said her pain started on her right side in the middle of her back but then moved to the left side. Claimant explained she sometimes had no pain, while on some days she experienced pain. Claimant testified that she told SZ[Redacted] on an unknown date that she sustained an injury at work. He took her to a meeting with Ms. Montoya where he interpreted the conversation for Claimant. JZ[Redacted] and Ms. Montoya confirmed the meeting occurred on or about February 23, 2023, and that Claimant denied any injurious incident and attributed the onset of symptoms to cold air from the open door.

18. Claimant failed to prove she suffered a compensable injury on November 20, 2022.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which they seek benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The mere fact that an employee experiences symptoms while working does not compel an inference the work caused an injury. *E.g., Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). Moreover, 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 they were injured. *Washburn v. City Market*, W.C. No. 5-109-470 (June 3, 2020). A referral to a medical provider may be made so that the respondent does not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id*. Although a physician provides diagnostic evaluations, treatment, or work restrictions based on a claimant's reported symptoms, it does not necessarily follow that the claimant sustained a compensable injury. *Fay v. East Penn Manufacturing Co., Inc*., W.C. No. 5-108-430-001 (April 24, 2020).

As found, Claimant failed to prove she suffered a compensable injury on November 20, 2022. The records from Pueblo CHC and the emergency departments contain multiple conflicting descriptions of the alleged mechanism of injury, including stretching clothes, cleaning, and twisting. On other occasions, Claimant cited no specific cause and denied any traumatic injury. Claimant told Employer the pain developed from cold air blowing on her, which she also relayed to Concentra and at hearing. The Workers' Claim for Compensation form states the injury occurred from Employer's refusal to move Claimant from a machine that was "too heavy" for her, which is contradicted by SZ[Redacted]

testimony that Claimant regularly rotated between stations and tasks. At hearing, Claimant testified about "repetitive" twisting, but specifically denied this is a claim for an occupational disease. Claimant has the burden of proof in this matter, and these numerous discrepancies prevent a "probable" determination of causation based on her testimony or documented statements. Additionally, the x-rays and MRI showed only degenerative changes and no structural pathology that was likely caused or aggravated by Claimant's work on or about November 20, 2022. At most, Claimant could have suffered a minor soft-tissue strain. But she testified she was still having pain at the time of by the hearing, despite having been off work for more than a year. This supports an inference that Claimant's symptoms are a manifestation of her underlying degenerative condition, without contribution from her work.

Because Claimant failed to prove a compensable injury, the remaining endorsed issues are moot.

ORDER

It is therefore ordered that:

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

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

DATED: October 15, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-248-524-001

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that his right shoulder condition is causally related to the admitted August 17, 2023 work injury?

If Claimant's right shoulder is found to be a compensable body part, has Claimant demonstrated, by a preponderance of evidence, that treatment of his right shoulder (including visits with Grand Valley Orthopedics and Drs. Bjorn Irion and John Rawlings) is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted work injury?

FINDINGS OF FACT

1. Employer operates a heavy equipment rental company. Claimant began working for Employer in February 2023 as a delivery driver. Claimant's job duties include loading, transporting, and unloading equipment to and from customer locations.

2. On August 17, 2023, Claimant was tasked with picking up equipment in Crested Butte, Colorado and Gunnison, Colorado. The first pick-up in Crested Butte occurred without incident. In Gunnison, Claimant was to pick up a trencher that was on its own small trailer. As he already had another piece of equipment on his trailer, Claimant opted to have the trencher and its small trailer placed on the larger trailer. To complete this task, an employee of the customer used a forklift to lift the trencher and trailer onto the larger trailer. While Claimant and this individual were in the process of doing this, the trencher trailer began to tip. Claimant reached out with his arms to grab the smaller trailer to keep it from falling.

3. Claimant testified that he immediately felt soreness and pain in the left side of his torso and down into his groin. Claimant further testified that he had pain all over, including his shoulders, arms, and legs. Claimant testified that the area causing the greatest level of pain was his left side.

4. The following day, Claimant continued to have pain. At that time, he reported the incident to Employer. Claimant was instructed to communicate with Insurer's third party administrator, [Redacted, hereinafter CL]. Claimant testified he and [Redacted, hereinafter EF], General Manager with Employer, made that phone call. During that call, Claimant described the August 17, 2023 incident and reported general soreness across his body. Claimant further reported that pain in his abdomen and groin were the most painful.

5. Due to ongoing pain, on August 20, 2023, Claimant sought treatment with an urgent care clinic, Community Care Grand Valley. At that time, Claimant was seen by Merri May, Nurse Practitioner. Claimant reported pain in his left side down into his groin.

Claimant also reported that he had previously experienced a hernia, and likened his current symptoms to that prior hernia. NP May diagnosed Claimant with an umbilical hernia and an abdominal muscle strain. Claimant was prescribed muscle relaxers and referred to an occupational medicine physician.

6. On August 29, 2023, Claimant was seen by Dr. Joshua Fullmer at Grand Valley Occupational Medicine. Dr. Fullmer is Claimant's authorized treating physician **(ATP)** for the August 17, 2023 injury. In the August 29, 2023 medical record, Dr. Fullmer noted that the urgent care providers had identified an umbilical hernia and a left inguinal hernia. Dr. Fullmer agreed with these diagnoses and referred Claimant for a general surgical consultation. No other body parts were addressed or otherwise diagnosed at that time.

7. On September 29, 2023, Respondents filed a General Admission of Liability (GAL).

8. On September 5, 2023, Claimant was seen by Dr. David Lundy at Surgical Associates of the Grand Valley. Dr. Lundy recommended laparoscopic left inguinal hernia repair.

9. On September 26, 2023, Claimant returned to Dr. Fullmer and reported that Dr. Lundy recommended hernia repair surgery. At that time, Claimant reported continuing abdominal symptoms that were worsened by activity.

10. On October 19, 2023, Claimant returned to Dr. Fullmer. In the medical record of that date, Dr. Fullmer noted Claimant's report of new right shoulder pain. On examination of Claimant's right shoulder, Dr. Fullmer noted a proximal biceps deformity and bruising. Based upon this examination, Dr. Fullmer opined that Claimant had a proximal biceps tendon rupture, and recommended Claimant pursue an orthopedic consultation. Dr. Fullmer further opined that Claimant's right shoulder symptoms were not related to the August 17, 2023 work injury. As a result, he noted that any treatment of Claimant's right shoulder should be handled by Claimant's private insurance.

11. On October 26, 2023, Dr. Lundy performed a robot assisted laparoscopic left inguinal hernia repair.

12. On November 6, 2023, Claimant again sought treatment with Community Care Grand Valley. At that time, Claimant was seen by Dr. Robert Miley. Claimant reported pain in his right shoulder and right arm. Specifically, Claimant described pain that was primarily in his right bicep, with radiating pain into his shoulder. On examination, Dr. Miley noted tenderness to palpation over the supraspinatus, biceps tendon, the anterior aspect of the shoulder joint, and the scapula. Dr. Miley diagnosed Claimant with a biceps tendon rupture and rotator cuff dysfunction. Claimant was instructed to use a sling and he was referred for an orthopedic consultation.

13. While at urgent care on November 6, 2023, Claimant underwent right shoulder x-rays. The x-rays showed mild left glenohumeral osteoarthritis, no displaced rib fractures, and no gross soft tissue abnormalities.

14. On November 10, 2023, Claimant sought treatment for his right shoulder at Grand Valley Orthopedics. At that time, Claimant was seen by Dr. Bjorn Irion. Claimant reported that his right shoulder symptoms included sharp and stabbing pain, popping, locking, weakness, and giving way. On examination, Dr. Irion noted a "Popeye deformity". Dr. Irion opined that the August 17, 2023, "eccentric load would be consistent with the injury mechanism for biceps rupture". Dr. Irion recommended Claimant undergo magnetic resonance imaging (MRI) of his right shoulder.

15. Claimant returned to Dr. Fullmer on November 16, 2023, and reported that the hernia repair procedure went well. Claimant also reported that he had ongoing right shoulder symptoms, and had been seen by Dr. Irion. In the November 16, 2023 medical record, Dr. Fullmer repeated his opinion that Claimant's right shoulder condition was not related to the work injury. In support of this opinion, Dr. Fullmer noted that there was no clear temporality between the injury and the onset of the right shoulder symptoms. Dr. Fullmer noted that it was possible that Claimant's mechanism of injury could result in a shoulder injury, and it was also possible that any shoulder symptoms were overshadowed by Claimant's hernia related symptoms. However, Dr. Fullmer also stated that "it is difficult to clearly tie the two together".

16. On November 27, 2023, Claimant underwent the recommended right shoulder MRI. The MRI showed tears involving the superior and posterior glenoid labrum; a complete tear of the biceps tendon long head; and paralabral cysts.

17. On November 29, 2023, Claimant returned to Dr. Irion to discuss the MRI findings. At that time, Dr. Irion referenced the tear in the right glenoid labrum and superior glenoid labrum lesion. Dr. Irion recommended that Claimant undergo a surgical evaluation.

18. On December 5, 2023, Claimant was seen in Dr. Irion's practice by surgeon, Dr. John Rawlings. At that time, Dr. Rawlings diagnosed a circumferential tear of the glenoid labrum, a superior labral tear, and complete rupture of the long head of the biceps, with retraction. Dr. Rawlings recommended Claimant undergo formal physical therapy for his right shoulder. Dr. Rawlings noted that if physical therapy did not improve Claimant's symptoms, surgical intervention would be considered. Specifically, Dr. Rawlings referenced an arthroscopic labral tear with capsulorrhaphy and possible SLAP[1] repair.

19. On December 7, 2023, Claimant was seen by Dr. Fullmer and reported ongoing treatment of the right shoulder. Dr. Fullmer repeated his opinion that there was a lack of temporality between the August work injury and the October onset of right shoulder symptoms. Also on December 7, 2023, Dr. Fullmer authored a letter to Insurer

[1] Superior labrum anterior to posterior.

requesting confirmation regarding whether Claimant's right shoulder was considered part of the workers' compensation claim. Specifically, Dr. Fullmer wrote:

> I saw [Claimant] in clinic today for follow up evaluation. I have been treating him for his unilateral inguinal hernia that was secondary to a work injury on [8/17/2023]. Approximately two months after the date of injury (Claimant] noted some right shoulder symptoms. He had clear findings of deformity. Initially I struggled to connect this with his [original] injury. Although the mechanism of injury could fit, there was no temporality. [Claimant] did point out that he was out of work since the injury, was focused on the significant abdominal/inguinal symptoms, and was not doing any lifting or exertional exercises immediately following the injury. This could potentially have contributed to the delayed acknowledgement of shoulder symptoms. [Claimant] was later evaluated by Dr. Irion....
> He also noted that the mechanism of the injury that caused the hernia (eccentric load) could fit for the shoulder as well. After an **MRI,** Dr. Rawlings evaluated [Claimant] and recommends moving forward with surgical repair of the shoulder.

20. On February 8, 2024, Claimant returned to Dr. Fullmer and continued to report right shoulder symptoms. In the medical record of that date, Dr. Fullmer again noted the lack of temporality between Claimant's work injury and his right shoulder symptoms. However, at that time, Dr. Fullmer noted that it was possible that the August 17, 2023 incident at work could have caused the rupture of the long head of the biceps. Dr. Fullmer also noted that without any other alternative explanation for Claimant's right shoulder injury, it was "leading [Dr. Fullmer] to lean toward it being more likely than not work related". As a result, Dr. Fullmer referred Claimant for physical therapy treatment of the right shoulder.

21. On February 20, 2024, Claimant attended an independent medical examination (IME) with Dr. Mark Faillinger. In connection with the IME, Dr. Failinger reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In the IME report, Dr. Failinger identified Claimant's work related diagnoses as a left inguinal hernia and a strain of the left thoracic region. Dr. Failinger noted on examination that Claimant had mild to moderate loss of range of motion of the right shoulder, tenderness to palpation, and a Popeye deformity. Dr. Failinger opined that the condition of Claimant's right shoulder is not related to the August 17, 2023 work injury. In support of this opinion, Dr. Failinger noted that Claimant did not report any right shoulder symptoms until October 19, 2023. Dr. Failinger also noted that if Claimant's right shoulder had been injured on August 17, 2023, Claimant would have had immediate and noticeable symptoms. In addition, the bruising noted by Dr. Fullmer on October 19, 2023, would not have been from August, as such bruising typically resolves within two weeks. Finally, Dr. Failinger noted that if the Popeye

deformity was caused on August 17, 2023, that deformity would have been noted on examination well before October 19, 2023.

22. On April 12, 2024, Dr. Fullmer authored a letter regarding Claimant's right shoulder. Dr. Fullmer stated his agreement with Ors. Irion and Failinger that Claimant's mechanism of injury could cause a rupture of the long head of the biceps. Dr. Fullmer also stated that he would defer to the orthopedic specialists regarding whether Claimant's right shoulder condition is related to the work injury.

23. Dr. Failinger's testimony was consistent with his IME report. Dr. Failinger testified that Claimant's August 17, 2023 incident at work could have resulted in the shoulder lesions. However, Dr. Falinger does not believe that to be the case due to the late reporting of Claimant's shoulder related symptoms. Dr. Failinger also testified that bruising was first noted by Dr. Fullmer at the October 19, 2023 appointment. Dr. Failinger explained that this is significant because bruising typically appears within a few days of a biceps tear, and typically resolves in approximately two weeks. As the October 19, 2023 appointment with Dr. Fullmer was a full two months after the work incident, it is Dr. Failinger's opinion that it was "virtually impossible" for Claimant's bruising to have occurred as a result of the August 17, 2023 work incident.

24. Claimant testified that immediately following the August 17, 2023 incident, he felt soreness primarily in the left side of his abdomen. Claimant further testified he also felt pain in his low back, legs, and arms. However, the abdominal pain was the worst. Claimant also testified that while he rested due to the hernia condition, soreness in his back and legs lessened. However, he noticed that pain in his right arm and right shoulder did not resolve. Claimant testified that he did have bruising in his right shoulder area shortly after the August 17, 2023 injury, but he does not recall the specific timing of that bruising. Claimant also testified that his abdominal pain was the worst area of pain. As a result, that was the focus of both his complaints and his initial treatment.

25. Claimant testified that he returned to work on light duty after the initial hernia surgery. Claimant testified that he was not lifting anything heavy on a return to work, and avoided using his right arm and shoulder. Claimant also testified prior to August 17, 2023, he had never experienced any right shoulder problems. Claimant testified that between August 17 and October 14, 2023 (the date Dr. Fullmer first noted right shoulder issues) he did not sustain any other injuries to his shoulder.

26. The ALJ credits Claimant's testimony and finds that Claimant was experiencing arm and shoulder pain from the outset of this injury. The ALJ also finds that the focus of Claimant's pain complaints, and thus his medical treatment, was initially related to his hernia and abdominal pain. The ALJ also credits Claimant's testimony that while awaiting hernia surgery, he was sedentary. Therefore, the ALJ finds that it is unlikely that Claimant engaged in activities that could have caused a subsequent injury to his right shoulder.

27. In addition, the ALJ credits the medical records and the opinion of Ors. Irion and Fullmer over the contrary opinions of Dr. Failinger. Therefore, the ALJ finds that Claimant has proven it is more likely than not that as a result of the August 17, 2023 incident at work, he injured his right shoulder.

28. The ALJ also finds that Claimant has proven that it is more likely than not that he is entitled to reasonable medical treatment of his right shoulder that is necessary to cure and relieve him from the effects of the August 17, 2023 work injury. The ALJ finds Claimant has proven that it is more likely than not that he is entitled to medical benefits including but not limited to, examinations with Drs. Irion and Rawlings with Western Slope Orthopedics.

CONCLUSIONS OF LAW

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

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

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

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

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

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

6. As found, Claimant has demonstrated, by a preponderance of the evidence, that his right shoulder condition is causally related to the admitted August 17, 2023 work injury. As found, Claimant has demonstrated, by a preponderance of evidence, that treatment of his right shoulder (including visits with Grand Valley Orthopedics and Ors. Irion and Rawlings) is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted work injury. As found, Claimant's testimony, the medical records, and the opinions of Ors. Irion and Fullmer, are credible and persuasive.

ORDER

It is therefore ordered:

1. Respondents shall pay for reasonable medical treatment necessary to cure and relieve Claimant from the effects of the August 17, 2023 injury to his right shoulder, including visits with Grand Valley Orthopedics and Ors. Bjorn Irion and John Rawlings.

2. Any medical benefits payments shall be in accordance with the Colorado Workers Compensation Medical Fee Schedule.

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

Dated October 16, 2024.

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

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

service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-263-944-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the periods December 26-27, 2023 and January 8, 2024 until July 6, 2024, except for May 28-31, 2024.

2. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant was responsible for his January 6, 2024 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.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period July 7, 2024 until terminated by operation of law.

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to recover penalties under §8-43-203(2)(a), C.R.S. and WCRP 5-2(C) for Respondents' failure to file a Notice of Contest within 20 days of the First Report of Injury.

5. 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 §8-43-203(4), C.R.S. by failing to timely produce the claim file.

STIPULATION

The parties agreed that between December 12, 2023 and January 31, 2024 Claimant's Average Weekly (AWW) was $1,755.76. After February 1, 2024, due to Claimant's COBRA eligibility, his AWW increased to $1,937.77.

FINDINGS OF FACT

1. Employer provides fracturing ("fracking"), hydraulic fracturing, and wire line services in the oil and gas industry.

2. On December 12, 2023, the last day of a two-week shift, Claimant sustained an admitted injury while in the course and scope of his employment with Employer. Specifically, a fracking boom backed into him and pressed him up against a chemical tote.

3. On December 13, 2023 Employer filed a First Report of Injury (FROI). Insurer received the FROI on December 13, 2023 at 11:47:47.

4. Claimant worked for two weeks on and two weeks off. He was not scheduled to work again until December 26, 2023. Upon his return, Claimant would be scheduled to work from 4:00 pm to 4:00 am for the ensuing two-week period.

5. On December 26, 2023 Claimant communicated with multiple supervisors, including [Redacted, hereinafter MS], [Redacted, hereinafter BW], and [Redacted, hereinafter LW], to tell them he was not going to be able to make it into work. Notably, his back was still hurting from his work injury.

6. LW[Redacted] testified at hearing in his capacity as a service leader who generally supervised crew leader BW[Redacted]. LW[Redacted] confirmed that he had approximately 11 years of experience with Employer, and was familiar with the attendance policy.

7. On December 27, 2023 Claimant reported to BW[Redacted] and LW[Redacted] in a text message that he would not be able to work following a physical therapy appointment because his back was still painful.

8. On December 28, 2023 Claimant reported to work for a brief period but had to leave early. He did not assert that he needed to leave work due to his work injury. Instead, Claimant explained he had to take his fiancée, [Redacted, hereinafter MM], to the hospital because she was experiencing breathing issues. Direct supervisor, BW[Redacted], gave him permission to leave on the condition that he obtain a doctor's note. In a text message, BW[Redacted] confirmed that Claimant needed to obtain a doctor's note for his visit to the hospital.

9. On December 29, 2023 Claimant sent a text message with a photograph of a doctor's note to BW[Redacted] that confirmed Claimant had accompanied his fiancée to the emergency room. Claimant remarked that MM[Redacted] had contracted influenza A.

10. Claimant subsequently returned to work in a modified capacity from December 29, 2024 through January 1, 2024. In his modified role, Claimant was "running sand," which involved standing in a box and pushing buttons without any lifting requirements. Claimant's schedule remained the same and he was not required to do any pushing, pulling, repetitive twisting or bending.

11. On January 2, 2024 at approximately1:40 pm, Claimant reported to BW[Redacted] and LW[Redacted] that he believed he had contracted influenza from his fiancée. BW[Redacted] reiterated Claimant's need to obtain a doctor's note to excuse the absence. LW[Redacted] also commented that Claimant needed to see urgent care and submit a doctor's note as well. Claimant replied with the word "Copy," which suggested he understood the need to visit urgent care and provide a note for his illness.

12. On January 3, 2024 LW[Redacted] reached out to Claimant to reiterate the need for a doctor's note to excuse his absence from the prior day. He also requested a

note for Claimant's missed doctor's appointment on the preceding day. Claimant responded that "I didn't miss I called to reschedule because I couldn't get out of bed and they said that it's a good idea. When my wife went they told her it was highly contagious. I'll get one to you when I go."

13. LW[Redacted] testified that he did not interpret Claimant's text message to mean that Claimant would also be missing January 4, 2024. Claimant then did not come to work on January 5, 2024. LW[Redacted] summarized that Claimant failed to communicate with him or anyone at Employer that he would be missing his regularly scheduled work shifts on January 4-5, 2024.

14. On January 6, 2024, at around 4:25 pm, after the 4:00 pm start time of his shift that day, LW[Redacted] advised Claimant he had been terminated in the following text message.

~~[Redacted, hereinafter LY] – photo contains employers name~~

At the hearing, LW[Redacted] clarified that he intended to write "three days" instead of "three weeks" in the preceding message.

15. Claimant did not supply LW[Redacted] with any reason for why he had not communicated with Employer since January 3, 2024. He also never provided Employer with a doctor's note to justify his missed shift. Instead, Claimant remarked at hearing that he had simply stayed in bed from January 2, 2023, through January 6, 2023, when he received the preceding message from LW[Redacted]. Claimant acknowledged that he did not provide a doctor's note for his illness or communicate again with LW[Redacted] or anyone else after January 3, 2023.

16. Claimant testified that he had communicated with LW[Redacted] two days earlier and his condition had not changed. He explained that he did not know what to say on January 4-5, 2024 because he was still lying in bed sick and unable to breathe. Claimant reasoned that Employer was already aware that, like his fiancée, he was suffering from highly contagious influenza. He was simply unaware of a continuing obligation to correspond with Employer because his condition had not changed. Claimant was thus surprised when he received the termination text message on January 6, 2024.

17. During cross-examination, Claimant acknowledged that he was familiar with Employer's attendance policy and always communicated if there was any reason he would miss a shift. Notably, for each of Claimant's absences prior to the missed shifts on January 4-6, 2024, Claimant notified his supervisors that he would not be at work. Moreover, Claimant agreed he had received Employer's Handbook when he was hired and also certified his acknowledgement. By signing that document, Claimant expressly "Agree[d] to follow the policies and procedures outlined in the employee handbook and any future amendments to it."

18. Employer's Handbook contained an attendance policy that stated, in relevant part, as follows:

> If an employee cannot come to work or will be late for any reason, he/she must contact his/her direct supervisor as soon as possible. It is not acceptable to leave a message on your supervisor's voice mail. Follow up calls must be made until supervisor is reached. If you are accustomed to communicating with your supervisor via text message and have not received a response, you must call until you reach him or her. Absenteeism or tardiness, that is excessive in the judgment of the Company, will not be tolerated. Employees who are absent for two consecutive working days, without notifying their supervisor, will be terminated. Rotational employees who miss (unexcused) two days of work, consecutive or not, during any scheduled work period, will be terminated.

The Handbook further clarified, "If an employee misses two or more days during the scheduled rotational work period, consecutive or not, due to unforeseen illness, he/she will be required to provide a doctor's note excusing the missed days and permitting the employee to return to work with no restrictions."

19. LW[Redacted] testified that Claimant was terminated for violating Employer's attendance policy. He explained that the attendance policy is uniformly applied to all employees and he had previously terminated employees for failing to communicate absences. LW[Redacted] remarked that Claimant's work injury had nothing to do with his termination.

20. [Redacted, hereinafter JR] also testified on behalf of Employer as an 11-year employee who worked as the frack manager. He managed the frack crews and supervised both LW[Redacted] and BW[Redacted]. JR[Redacted] confirmed that Claimant was terminated for failing to provide a doctor's note for his illness to justify his absences. He also corroborated LW[Redacted] testimony that employees have previously been terminated for a lack of communication for two consecutive days without providing a doctor's note.

21. On January 8, 2024, after Claimant was terminated, he attended the rescheduled medical appointment with Dr. Young. The medical record states, "of note he does report missing his last physical therapy session as well as his last appointment with me secondary to being ill with an upper respiratory infection." In addition, Dr. Young assigned Claimant temporary work restrictions of no lifting, repetitive lifting, carrying or pushing/pulling in excess of 10 pounds. He also directed Claimant not to engage in any bending/twisting.

22. Following his termination on January 6, 2024, Claimant retained his attorney. On January 26, 2024 Claimant's counsel sent a letter of representation to Insurer. In that correspondence, Claimant's counsel requested a complete copy of the claim file under §8-43-203(4), C.R.S.

23. On February 14, 2024 Respondents filed a Notice of Contest (NOC). The reason listed for the denial was "[f]urther Investigation for Medical Records."

24. On approximately February 20, 2024 [Redacted, hereinafter FR], a senior resolution manager for [Redacted, hereinafter GR], was assigned Claimant's Workers' Compensation claim. FR[Redacted] testified that she was aware of WCRP 5-2(C) that requires either an admission or a NOC to be filed within 20 days of the filing of the FROI. FR[Redacted] agreed that, even though the FROI was filed on December 13, 2023, the NOC was not filed until February 14, 2024. She remarked that the NOC was filed almost three months before Claimant filed his application for hearing on May 7, 2024 asserting penalties.

25. FR[Redacted] also testified that she is familiar with the requirements to produce claim files when requested in Colorado claims. She acknowledged that Claimant's attorney's introduction letter made a request to produce the claim file on January 26, 2024.

26. FR[Redacted] recognized that Claimant's attorney sent a second letter on February 15, 2024 to GR[Redacted] adjuster, [Redacted, hereinafter LE], stating the following:

> We requested this claim file from you on January 26, 2024. Please see attached letter. The required claims file was due on February 10, 2024 under 8-43-203(4). Please produce the claim file immediately, this is a penalty situation. Because of the failure to provide any privilege log, any claim of privilege has been waived.

27. Respondents proceeded to produce a copy of the complete claim file with redactions and a privilege log on February 23, 2024.

28. On March 29, 2024 Respondents filed a General Admission of Liability (GAL). The document acknowledged medical benefits only because Respondents maintained that Claimant had not lost any wages as a result of his injury and was terminated for cause on January 6, 2024.

29. Claimant testified that following his admitted work injury on December 12, 2023, he has remained under work restrictions. His restrictions have loosened over time. Claimant has not asserted that worsening restrictions have caused his wage loss.

30. Claimant confirmed he is not seeking temporary disability benefits during a period when he worked a job laying tile with his fiancée MM[Redacted] from May 28-31, 2024. They split the $5,000 they earned from the project.

31. On July 7, 2024 Claimant started training for a new job as a driver with [Redacted, hereinafter BN]. He is still employed by BN[Redacted] and continues to work within his assigned restrictions.

32. The record reflects Claimant's earnings while working for BN[Redacted]. From July 7, 2024 through July 13, 2024 Claimant's gross pay was $800.00. From July 18, 2024 through July 20, 2024 Claimant earned $910.40. From July 23, 2024 through July 27, 2024 Claimant's gross pay was $944.05. Finally, from July 30, 2024 through August 3, 2024, Claimant earned $1,365.44.

33. Claimant has failed to establish it is more probably true than not that he is entitled to receive TTD benefits for the period prior to his January 6, 2024 termination from employment. Claimant has been on restrictions from his regular duties as a result of his compensable work injury. Following his injury, Claimant was not scheduled to work for another two weeks from December 13, 2023 through December 25, 2023. During the period from December 26, 2023 through January 5, 2023, Claimant missed December 26 and 27, 2023 as a result of his disability. However, he then missed December 28, 2023 due to his fiancée's illness after he had reported to work for modified duty. Claimant presented no evidence that he missed December 28, 2024 as a result of his disability. As such, even though Claimant missed two shifts as a result of his work injury, he failed to establish the requirement of missing three shifts under §8-42-105, C.R.S. to warrant TTD benefits. Indeed, the third shift that he did not work had no relationship to his work injury and only occurred due to his fiancée's illness after he appeared at work ready to perform modified duty.

34. Claimant then returned to work from December 29, 2023, through January 1, 2024, for modified duty in which he performed a job known as running sand. Claimant's schedule remained the same and he was not required to do any pushing, pulling, or repetitive twisting or bending. During the period he thus did not suffer any wage loss. For the period January 2-6, 2024 Claimant did not miss work as a result of his disability. Rather, Claimant only presented evidence that he was unable to work during the period as a result of a non-work-related illness that he believed he contracted from his fiancée. The record thus reveals that Claimant only missed work on December 26-27, 2023 as a result of his industrial injury. He did not suffer a disability lasting more than three work shifts as required by §8-42-105, C.R.S. to establish an entitlement to TTD benefits. Accordingly, his request for TTD benefits prior to his January 6, 2024 termination from employment is denied and dismissed. However, whether Claimant may receive TTD benefits after January 6, 2024 is contingent upon whether he was responsible for his termination of employment as addressed in the following section of this order.

35. Claimant was terminated solely for violating Employer's attendance policy. He specifically missed consecutive working days from January 4-6, 2024 without notifying his supervisors. Notably, Claimant acknowledged his agreement and understanding of the attendance policy when he was hired and received Employer's Handbook. Claimant's testimony that he did not know about the attendance policy or the requirements of Employer regarding absences from work lacks credibility. His actions and statements prior to his termination directly contradict his representations. Notably, Claimant testified that he was familiar with Employers' attendance policy and he always kept in communication if there was any reason he would miss a shift. Additionally, for each of Claimant's absences prior to the missed shifts from January 4-6, 2024 he communicated with his supervisors that he would not be at work. Finally, when Claimant last

communicated with LW[Redacted] on January 3, 2024 and LW[Redacted]informed him that he needed to see urgent care and submit a doctor's note, Claimant acknowledged his understanding of the actions he should take when he responded, "[c]opy."

36. Following January 3, 2024, Claimant provided no explanation or excuse for his lack of communication through a text message or phone call. He also did not provide a doctor's note prior to termination. Instead, Claimant only suggested he was sick and in bed. LW[Redacted] had no understanding as to why Claimant was failing to communicate and did not interpret Claimant's messages on January 2-3, 2024, to apply to January 4-6, 2024. He reasonably interpreted Claimant's text messages and expected Claimant either to report for work on January 4-6, 2024, or communicate about his condition.

37. It is important to recognize that Claimant's termination was not predicated on his inability to perform his job duties because of his work injuries. He was working modified employment without difficulties. However, when he failed to apprise his supervisors of his condition or produce a doctor's note during January 4-6, 2024, his actions clearly contravened Employer's attendance policy. The record thus reveals that Claimant was responsible for his termination. Additionally, Claimant voluntarily chose not to proceed to urgent care and obtain a doctor's note as instructed by LW[Redacted]. His termination was predicated on a failure to obtain a doctor's note rather than absences related to his admitted work injury.

38. The record reveals that Claimant agreed to Employer's attendance policy when he acknowledged receipt of the Handbook that included a provision stating "[e]mployees who are absent for two consecutive working days, without notifying their supervisor, will be terminated." Additionally, he further agreed that "[r]otational employees who miss (unexcused) two days of work, consecutive or not, during any scheduled work period, will be terminated." Claimant thus had complete control over the circumstances that led to his termination and voluntarily violated both of the preceding requirements. He specifically failed to notify his supervisors and did not provide a doctor's note for missing three consecutive work shifts on January 4-6, 2024. Claimant would thus have reasonably expected to be terminated based on a direct contradiction of Employer's policies and his own prior actions. Therefore, under the totality of the circumstances, Claimant committed a volitional act or exercised some control over his termination from employment. Because Claimant was responsible for his termination, he is not entitled to receive TTD benefits subsequent to January 6, 2024.

39. Claimant has established it is more probably true than not that he is entitled to receive TPD benefits from July 7, 2024 until terminated by operation of law. Initially, Claimant began working in his modified duty position for Employer on December 28, 2023. However, Claimant was subsequently terminated from his modified employment on January 6, 2024. Nevertheless, consistent with the Panel's prior determinations, application of §§8-42-103(1)(g) and 8-42-105(4)(a), C.R.S., does not prevent Claimant from receiving an award of TPD benefits after his termination for cause. Had Claimant not been terminated for cause on January 6, 2024, he still would have sustained a wage loss due to the industrial injury, Specifically, the wage loss still would have "resulted" regardless of Claimant's termination and remained attributable to the industrial injury.

Thus, although Claimant was terminated for cause from his modified duty job, he is entitled to TPD benefits to compensate for that portion of his wage loss that continued to result from his December 12, 2023 industrial injury.

40. The record reflects Claimant's earnings while working for BN[Redacted]. From July 7, 2024 through July 13, 2024 Claimant's gross pay was $800.00. From July 18, 2024 through July 20, 2024 Claimant earned $910.40. From July 23, 2024 through July 27, 2024 Claimant's gross pay was $944.05. Finally, from July 30, 2024 through August 3, 2024, Claimant earned $1,365.44. The parties agreed that after February 1, 2024, due to Claimant's COBRA eligibility, his AWW increased to $1,937.77. Claimant is thus entitled to receive the difference between his stipulated AWW and earnings during the continuance of the disability. Claimant shall specifically receive 66.66% of the difference between his AWW of $1,937.77 and his earnings while his partial disability continues.

41. Claimant has proven it is more probably true than not that he is entitled to recover penalties under §8-43-203(2)(a), C.R.S. and WCRP 5-2(C) for Respondents' failure to file a NOC within 20 days of the FROI. Initially, on December 13, 2023 Employer filed the FROI. Insurer received the FROI on December 13, 2023 at 11:47:47. On February 14, 2024 Respondents filed a NOC. The reason listed for the denial was "[f]urther Investigation for Medical Records." Adjuster FR[Redacted] testified that she was aware of WCRP 5-2(C) that requires either an admission or NOC to be filed within 20 days of the filing of the FROI. FR[Redacted] agreed that, even though the FROI was filed on December 13, 2023, the NOC was not filed until February 14, 2024. She explained that the NOC was filed almost three months before Claimant filed his application for hearing on May 7, 2024 asserting penalties.

42. Because the NOC was not timely filed in the present matter, Respondents violated a statute and Rule. Insurer may thus be liable to Claimant for up to one day's compensation for each failure to so notify. The record reveals that Insurer was aware there was a statutory requirement to file a NOC within 20 days as delineated in §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). Respondents did not offer a persuasive explanation justifying the late filing of the NOC. It can thus be presumed that Respondents' actions were objectively unreasonable. Although Insurer filed the NOC almost three months before Claimant filed his application for hearing, there is no cure provision delineated in §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). Moreover, the only reasonable inference from the record is that Respondents knew or should have known that their failure timely to admit or deny liability violated the statute and Rule. Accordingly, Claimant has produced clear and convincing evidence that Insurer knew or should have known of the violation.

43. Claimant is entitled to penalties for the violation of §8-43-203(2)(a), C.R.S. and WCRP 5-2(C) from January 3, 2024 (20 days after the FROI) until February 14, 2024 when the NOC was finally filed. The delayed filing totals 42 days. Although Insurer failed to timely file the NOC the record is devoid of reprehensible conduct or significant prejudice to Claimant. Moreover, Insurer's motivation for the violation is uncertain, but may have simply constituted a missed deadline. Claimant is thus awarded penalties of $20.00 per day or a total of $840.00 for failing to timely file the NOC pursuant to §8-43-203(2)(a),

C.R.S. and WCRP 5-2(C). The penalty is designed to enforce the statute and Rule as well as deter future misconduct. Pursuant to §8-43-203(2)(a), C.R.S. fifty percent of the penalty shall be paid to the subsequent injury fund, created in §8-46-101, and fifty percent to Claimant.

44. On January 26, 2024 Claimant's counsel sent a letter to Insurer explicitly requesting a copy of the claim file and asserting the authority of §8-43-203(4), C.R.S. FR[Redacted] acknowledged that Claimant's attorney's introduction letter made a request to produce the claim file on January 26, 2024. She testified that she is familiar with the requirements to produce claim files when requested in Colorado claims. On February 15, 2024 Claimant's counsel sent a second letter to GR[Redacted] adjuster LE[Redacted] reiterating that he had requested the claim file on January 26, 2024 and it was due on February 10, 2024 pursuant to §8-43-203(4), C.R.S.

45. The record reflects that Insurer was aware there was a statutory requirement to copy the claim file and transmit it within the time period included in the statute. Insurer is in the business of adjusting claims and §8-43-203(4), C.R.S. is a statute concerning the adjustment of claims. Although the claim file was due on February 10, 2024, it was not produced until February 23, 2024.The only reasonable inference from the record is that Respondents knew or should have known that their failure to timely produce the claim file would violate the statute. It can thus be presumed that Respondents' actions were objectively unreasonable.

46. Similarly, the defense Insurer pursued involving a cure of the violation pursuant to §8-43-304(4), C.R.S. has not been established. The section requires that, if the violation is cured by a respondent within 20 days of the filing of an application for hearing, then the respondent cannot be fined unless it is shown by clear and convincing evidence the respondent "knew or reasonably should have known such person was in violation." The cure provision retains a negligence standard when referring to a violator who "reasonably" should have known of its transgression. The same documentary evidence that established the violation, the letters of January 16, 2024 and February 15, 2024, constitute clear and convincing evidence that Insurer knew of its responsibility to exchange a copy of the claim file as provided by §8-43-203(4), C.R.S. Insurer's failure to produce the claim file until February 23, 2024 when it was due on February 10, 2024 thus mandates penalties.

47. Considering the extent of harm to Claimant, the duration and type of violation, Insurer's motivation for the violation, Insurer's mitigation, and whether the misconduct is part of a pattern, suggests a minimal penalty. Notably, §8-43-304(1), C.R.S. provides a violator "shall also be punished by a fine ..." It shall not be more than $1,000 per day, but it must necessarily be at least $10 each day. Accordingly, an appropriate penalty in regard to the violation is $20.00 per day for 13 days or a total of $260.00. Fifty percent of any penalty shall be paid to the Colorado uninsured employer fund created in §8-67-105, C.R.S. and fifty percent to Claimant.

CONCLUSIONS OF LAW

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

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

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

Temporary Total Disability Benefits

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

regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to receive TTD benefits for the period prior to his January 6, 2024 termination from employment. Claimant has been on restrictions from his regular duties as a result of his compensable work injury. Following his injury, Claimant was not scheduled to work for another two weeks from December 13, 2023 through December 25, 2023. During the period from December 26, 2023 through January 5, 2023, Claimant missed December 26 and 27, 2023 as a result of his disability. However, he then missed December 28, 2023 due to his fiancée's illness after he had reported to work for modified duty. Claimant presented no evidence that he missed December 28, 2024 as a result of his disability. As such, even though Claimant missed two shifts as a result of his work injury, he failed to establish the requirement of missing three shifts under §8-42-105, C.R.S. to warrant TTD benefits. Indeed, the third shift that he did not work had no relationship to his work injury and only occurred due to his fiancée's illness after he appeared at work ready to perform modified duty.

6. As found, Claimant then returned to work from December 29, 2023, through January 1, 2024, for modified duty in which he performed a job known as running sand. Claimant's schedule remained the same and he was not required to do any pushing, pulling, or repetitive twisting or bending. During the period he thus did not suffer any wage loss. For the period January 2-6, 2024 Claimant did not miss work as a result of his disability. Rather, Claimant only presented evidence that he was unable to work during the period as a result of a non-work-related illness that he believed he contracted from his fiancée. The record thus reveals that Claimant only missed work on December 26-27, 2023 as a result of his industrial injury. He did not suffer a disability lasting more than three work shifts as required by §8-42-105, C.R.S. to establish an entitlement to TTD benefits. Accordingly, his request for TTD benefits prior to his January 6, 2024 termination from employment is denied and dismissed. However, whether Claimant may receive TTD benefits after January 6, 2024 is contingent upon whether he was responsible for his termination of employment as addressed in the following section of this order.

Termination for Cause

7. Claimant seeks TTD benefits after his termination for the period January 8, 2024 through July 6, 2024, except for May 28-31, 2024, because of his earnings from a tiling project. However, Respondents have demonstrated by a preponderance of the evidence that Claimant was responsible for his January 6, 2024 termination from employment under the "termination statutes and is thus precluded from receiving TTD benefits. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the

resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that a claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

8. As found, Claimant was terminated solely for violating Employer's attendance policy. He specifically missed consecutive working days from January 4-6, 2024 without notifying his supervisors. Notably, Claimant acknowledged his agreement and understanding of the attendance policy when he was hired and received Employer's Handbook. Claimant's testimony that he did not know about the attendance policy or the requirements of Employer regarding absences from work lacks credibility. His actions and statements prior to his termination directly contradict his representations. Notably, Claimant testified that he was familiar with Employers' attendance policy and he always kept in communication if there was any reason he would miss a shift. Additionally, for each of Claimant's absences prior to the missed shifts from January 4-6, 2024 he communicated with his supervisors that he would not be at work. Finally, when Claimant last communicated with LW[Redacted] on January 3, 2024 and LW[Redacted informed him that he needed to see urgent care and submit a doctor's note, Claimant acknowledged his understanding of the actions he should take when he responded, "[c]opy."

9. As found, following January 3, 2024, Claimant provided no explanation or excuse for his lack of communication through a text message or phone call. He also did not provide a doctor's note prior to termination. Instead, Claimant only suggested he was sick and in bed. LW[Redacted had no understanding as to why Claimant was failing to communicate and did not interpret Claimant's messages on January 2-3, 2024, to apply to January 4-6, 2024. He reasonably interpreted Claimant's text messages and expected Claimant either to report for work on January 4-6, 2024, or communicate about his condition.

10. As found, it is important to recognize that Claimant's termination was not predicated on his inability to perform his job duties because of his work injuries. He was working modified employment without difficulties. However, when he failed to apprise his supervisors of his condition or produce a doctor's note during January 4-6, 2024, his actions clearly contravened Employer's attendance policy. The record thus reveals that Claimant was responsible for his termination. Additionally, Claimant voluntarily chose not to proceed to urgent care and obtain a doctor's note as instructed by LW[Redacted. His termination was predicated on a failure to obtain a doctor's note rather than absences

related to his admitted work injury. *Compare Morales v. Walmart*, W.C. No 4-770-910 (ICAO Sept. 21, 2009) (where claimant was terminated for excessive absenteeism, but missed some work due to medical appointments and pain related to her work injury, respondents did not meet burden of responsible for termination); *Pace v. Commercial Design Engineering,* W.C. No. 4-451-277 (ICAO May 15, 2001) (claimant not responsible for termination when fired for excessive absenteeism, but missed work because of symptoms caused by the work injury).

11. As found, the record reveals that Claimant agreed to Employer's attendance policy when he acknowledged receipt of the Handbook that included a provision stating "[e]mployees who are absent for two consecutive working days, without notifying their supervisor, will be terminated." Additionally, he further agreed that "[r]otational employees who miss (unexcused) two days of work, consecutive or not, during any scheduled work period, will be terminated." Claimant thus had complete control over the circumstances that led to his termination and voluntarily violated both of the preceding requirements. He specifically failed to notify his supervisors and did not provide a doctor's note for missing three consecutive work shifts on January 4-6, 2024. Claimant would thus have reasonably expected to be terminated based on a direct contradiction of Employer's policies and his own prior actions. Therefore, under the totality of the circumstances, Claimant committed a volitional act or exercised some control over his termination from employment. Because Claimant was responsible for his termination, he is not entitled to receive TTD benefits subsequent to January 6, 2024.

Temporary Partial Disability Benefits

12. 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). 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).

13. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TPD benefits from July 7, 2024 until terminated by operation of law. Initially, Claimant began working in his modified duty position for Employer on

December 28, 2023. However, Claimant was subsequently terminated from his modified employment on January 6, 2024. Nevertheless, consistent with the Panel's prior determinations, application of §§8-42-103(1)(g) and 8-42-105(4)(a), C.R.S., does not prevent Claimant from receiving an award of TPD benefits after his termination for cause. Had Claimant not been terminated for cause on January 6, 2024, he still would have sustained a wage loss due to the industrial injury, Specifically, the wage loss still would have "resulted" regardless of Claimant's termination and remained attributable to the industrial injury. Thus, although Claimant was terminated for cause from his modified duty job, he is entitled to TPD benefits to compensate for that portion of his wage loss that continued to result from his December 12, 2023 industrial injury. *See Lucero v. City of Durango,* WC 5-195-588 (ICAO Mar. 21, 2024) (concluding that, even though the claimant retired from his modified duty job, he was still entitled to TPD benefits to compensate for that portion of his wage loss that continued to result from his industrial injury).

14. As found, the record reflects Claimant's earnings while working for BN[Redacted]. From July 7, 2024 through July 13, 2024 Claimant's gross pay was $800.00. From July 18, 2024 through July 20, 2024 Claimant earned $910.40. From July 23, 2024 through July 27, 2024 Claimant's gross pay was $944.05. Finally, from July 30, 2024 through August 3, 2024, Claimant earned $1,365.44. The parties agreed that after February 1, 2024, due to Claimant's COBRA eligibility, his AWW increased to $1,937.77. Claimant is thus entitled to receive the difference between his stipulated AWW and earnings during the continuance of the disability. Claimant shall specifically receive 66.66% of the difference between his AWW of $1,937.77 and his earnings while his partial disability continues.

Penalties

15. 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).

16. 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….

17. 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).

18. 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).

Penalties Related to Filing Late Notice of Contest

19. Section 8-43-203(1)(a) C.R.S. provides that the employer or, if insured, the employer's insurance carrier shall notify the Division and the injured employee in writing within 20 days, after the first report of injury is filed with the Division, whether liability is admitted or contested. Similarly, Rule 5-2(C) provides: "[t]he insurer shall state whether liability is admitted or contested within 20 days after the date the employer's First Report of Injury is filed with the Division."

20. Section 8-43-203(2)(a), C.R.S. specifies that, if such notice is not filed, "the employer, or if insured, the employer's insurance carrier, may become liable to the claimant, if successful on the claim for compensation, for up to one day's compensation for each failure to so notify." Fifty percent of any penalty shall be paid to the subsequent injury fund, created in §8-46-101, and fifty percent to the claimant. §8-43-203(2)(a), C.R.S. The claimant bears the burden of proof to establish the circumstances justifying the imposition of the penalty. *See Pioneer Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005).

21. As found, Claimant has proven by a preponderance of the evidence that he is entitled to recover penalties under §8-43-203(2)(a), C.R.S. and WCRP 5-2(C) for Respondents' failure to file a NOC within 20 days of the FROI. Initially, on December 13, 2023 Employer filed the FROI. Insurer received the FROI on December 13, 2023 at 11:47:47. On February 14, 2024 Respondents filed a NOC. The reason listed for the denial was "[f]urther Investigation for Medical Records." Adjuster FR[Redacted] testified that she was aware of WCRP 5-2(C) that requires either an admission or NOC to be filed within 20 days of the filing of the FROI. FR[Redacted] agreed that, even though the FROI was filed on December 13, 2023, the NOC was not filed until February 14, 2024. She explained that the NOC was filed almost three months before Claimant filed his application for hearing on May 7, 2024 asserting penalties.

22. As found, because the NOC was not timely filed in the present matter, Respondents violated a statute and Rule. Insurer may thus be liable to Claimant for up to one day's compensation for each failure to so notify. The record reveals that Insurer was aware there was a statutory requirement to file a NOC within 20 days as delineated in §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). Respondents did not offer a persuasive explanation justifying the late filing of the NOC. It can thus be presumed that Respondents' actions were objectively unreasonable. Although Insurer filed the NOC almost three months before Claimant filed his application for hearing, there is no cure provision delineated in §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). Moreover, the only reasonable inference from the record is that Respondents knew or should have known that their failure timely to admit or deny liability violated the statute and Rule. Accordingly, Claimant has produced clear and convincing evidence that Insurer knew or should have known of the violation.

23. As found, Claimant is entitled to penalties for the violation of §8-43-203(2)(a), C.R.S. and WCRP 5-2(C) from January 3, 2024 (20 days after the FROI) until February 14, 2024 when the NOC was finally filed. The delayed filing totals 42 days. Although Insurer failed to timely file the NOC the record is devoid of reprehensible conduct or significant prejudice to Claimant. Moreover, Insurer's motivation for the violation is uncertain, but may have simply constituted a missed deadline. Claimant is thus awarded penalties of $20.00 per day or a total of $840.00 for failing to timely file the NOC pursuant to §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). The penalty is designed to enforce the statute and Rule as well as deter future misconduct. Pursuant to §8-43-203(2)(a), C.R.S. fifty percent of the penalty shall be paid to the subsequent injury fund, created in §8-46-101, and fifty percent to Claimant.

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

24. Section 8-43-203(4), C.R.S. provides that,

Within fifteen days after the mailing of a written request for a copy of the claim file, the employer, or if insured, the employer's insurance carrier or third-part administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the

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

25. As found, on January 26, 2024 Claimant's counsel sent a letter to Insurer explicitly requesting a copy of the claim file and asserting the authority of §8-43-203(4), C.R.S. FR[Redacted] acknowledged that Claimant's attorney's introduction letter made a request to produce the claim file on January 26, 2024. She testified that she is familiar with the requirements to produce claim files when requested in Colorado claims. On February 15, 2024 Claimant's counsel sent a second letter to GR[Redacted] adjuster LE[Redacted] reiterating that he had requested the claim file on January 26, 2024 and it was due on February 10, 2024 pursuant to §8-43-203(4), C.R.S.

26. As found, the record reflects that Insurer was aware there was a statutory requirement to copy the claim file and transmit it within the time period included in the statute. Insurer is in the business of adjusting claims and §8-43-203(4), C.R.S. is a statute concerning the adjustment of claims. Although the claim file was due on February 10, 2024, it was not produced until February 23, 2024.The only reasonable inference from the record is that Respondents knew or should have known that their failure to timely produce the claim file would violate the statute. It can thus be presumed that Respondents' actions were objectively unreasonable.

27. As found, similarly, the defense Insurer pursued involving a cure of the violation pursuant to §8-43-304(4), C.R.S. has not been established. The section requires that, if the violation is cured by a respondent within 20 days of the filing of an application for hearing, then the respondent cannot be fined unless it is shown by clear and convincing evidence the respondent "knew or reasonably should have known such person was in violation." The cure provision retains a negligence standard when referring to a violator who "reasonably" should have known of its transgression. *See Kerr v. Costco Wholesale Inc*, W.C. No. 5-076-601-002 (June 1, 2021); *Tadlock v. Gold Mine Casino*, W.C. No. 4-200-716 (May 16, 2007). The same documentary evidence that established the violation, the letters of January 16, 2024 and February 15, 2024, constitute clear and convincing evidence that Insurer knew of its responsibility to exchange a copy of the claim file as provided by §8-43-203(4), C.R.S. Insurer's failure to produce the claim file until February 23, 2024 when it was due on February 10, 2024 thus mandates penalties.

28. As found, considering the extent of harm to Claimant, the duration and type of violation, Insurer's motivation for the violation, Insurer's mitigation, and whether the misconduct is part of a pattern, suggests a minimal penalty. Notably, §8-43-304(1), C.R.S. provides a violator "shall also be punished by a fine ..." It shall not be more than $1,000 per day, but it must necessarily be at least $10 each day. Accordingly, an appropriate penalty in regard to the violation is $20.00 per day for 13 days or a total of $260.00. Fifty percent of any penalty shall be paid to the Colorado uninsured employer fund created in §8-67-105, C.R.S. and fifty percent to Claimant.

ORDER

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

1. Claimant's request for TTD benefits is denied and dismissed. He did not suffer a disability lasting more than three work shifts as a result of his admitted work injury prior to when he was responsible for his termination on January 6, 2024.

2. Claimant shall receive TPD benefits for the period July 7, 2024 based on the difference between his stipulated AWW of $1,937.77 and his earnings during the continuance of his disability.

3. Respondents are financially responsible for penalties of $20.00 per day or a total of $840.00 for failing to timely file the NOC pursuant to §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). Pursuant to §8-43-203(2)(a), C.R.S. fifty percent of the penalty shall be paid to the subsequent injury fund, created in §8-46-101, C.R.S. and fifty percent to Claimant.

4. Respondents shall pay penalties of $20.00 per day for 13 days or a total of $260.00 under §8-43-304(1), C.R.S. for failing to timely produce the claim file pursuant to §8-43-203(4), C.R.S. Pursuant to §8-43-304(1), C.R.S. fifty percent of the penalty shall be paid to the Colorado uninsured employer fund created in §8-67-105, C.R.S., and fifty percent to Claimant.

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

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

DATED: October 16, 2024.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-153-471-003

ISSUES

- Did Claimant overcome the DIME's determination of MMI by clear and convincing evidence, including the DIME's determination that the multi-level lumbar fusion recommended by Dr. Roger Sung is not causally related to the work accident?

- Did Claimant prove entitlement to medical benefits after MMI by a preponderance of the evidence?

- The parties agreed to reserve the issue of average weekly wage for future determination.

FINDINGS OF FACT

1. Claimant worked for Employer as a Tunnel Maintenance worker at the [Redacted, hereinafter ER]Tunnel on I-70, since approximately June 2015. His job duties included maintaining the tunnel facilities, cleaning, snow removal, and operating various forms of equipment. Many tasks are physically demanding and involve lifting, pushing, and pulling heavy objects.

2. Claimant suffered admitted injuries on November 1, 2020, when he fell into an eight-inch-deep hole while raising flags at the tunnel.

3. Claimant went to the St. Anthony Summit Hospital emergency department later that day. He reported aching pain in his right low back and right hip. He denied weakness or numbness in his leg. Examination showed tenderness in the right lateral paraspinous region and the right hip. He had full lumbar range of motion with minimal discomfort. Lumbar x-rays showed no acute fracture. There was grade 1 spondylolisthesis at L3-4 and L4-5, advanced degenerative changes at L4-5 and L5-S1, and lesser degeneration at L3-4. The radiologist noted the finding were "unchanged" compared to a prior CT scan performed in October 2017.

4. Claimant had previously injured his back on October 13, 2017 when he fell down a flight of stairs. The primary injuries were to his shoulders and resulted in bilateral shoulder surgeries. But he also complained of low back pain and radiating leg symptoms. A lumbar MRI in December 2017 showed mild to moderate degenerative changes and foraminal narrowing from L3-S1. He received conservative treatment including therapy and SI joint injections. On April 23, 2019, Claimant's symptoms were described as "essentially unchanged," with pain in the low back radiating to the left leg. Dr. Samuel Chan put Claimant at MMI for the 2017 injury on May 22, 2019. At the time, Claimant was still reporting low back and leg pain. However, Dr. Chan opined that he did not qualify for a spinal rating because he had only subjective pain complaints with "no objective findings that would warrant an impairment."

5. Claimant returned to work and continued working without any restrictions related to his back until the November 2020 work accident.

6. Claimant testified his low back symptoms had resolved by the time he was put at MMI for the 2017 injury. However, he told Respondent's IME he still had 3-5/10 back pain at that time.

7. After the November 2020 accident, Employer referred Claimant to Concentra where he saw Dr. J. Douglas Bradley on November 5, 2020. Claimant completed an intake form on which he reported pain in his low back, right hip, right buttock, right thigh, left shoulder and arm, neck, and left jaw. Examination of the lumbar spine showed right-sided muscle spasms and limited range of motion. Claimant ambulated with an antalgic gait, but examination showed no sensory or motor deficits. Dr. Bradley diagnosed a low back strain and contusions of the right hip and thigh. He prescribed medications and referred Claimant to physical therapy.

8. On January 11, 2021, PA-C Michael Gottus added a diagnosis of right lower extremity radiculopathy in January 2021, because of pain radiating to the right leg. However, physical examinations continued to show normal sensation and strength.

9. A lumbar MRI on January 5, 2021 showed multilevel degenerative changes, including: spondylolisthesis and a disc protrusion at L3-4 with moderate right foraminal narrowing and severe left foraminal narrowing, spondylosis and bilateral facet arthropathy at L4-5 with severe foraminal stenosis on the right worse than the left, and severe loss of disc height and a left-sided disc extrusion at L5-S1 with severe foraminal narrowing on the left.

10. Claimant saw Kelsey Chrane, PA-C at Colorado Springs Orthopaedic Group on February 18, 2021. Claimant told Ms. Chrane his back recovered after the 2017 injury and he was doing very well before the November 2020 accident. He described persistent low back pain with bilateral leg pain and weakness since the November 2020 injury. On examination, straight leg raise testing was positive, but lower extremity strength was normal. Flexion-extension x-rays taken that day showed no spinal instability. Ms. Chrane reviewed the MRI and noted "advanced degeneration occurring in the bottom 3 levels of his lumbar spine and the compression occurring on the nerves." Ms. Chrane offered no opinion that any of the pathology was caused by the November 2020 work accident. Ms. Chrane discussed the possibility of a three-level lumbar fusion, but indicated Claimant would need to lose weight before he would be considered a candidate for surgery.[1] She referred Claimant to physical therapy and to Dr. Christopher Malinky for lumbar epidural steroid injections (ESI).

11. Claimant had bilateral L4-5 and L5-S1 ESIs in June 2021, with no significant benefit.

12. Claimant saw Dr. Roger Sung at CSOG on August 11, 2021. Dr. Sung opined Claimant had exhausted conservative options and recommended an L3-S1

[1] Claimant weighed 260 pounds at that visit.

anterior-posterior fusion. However, Dr. Sung indicated Claimant needed to lose weight[2] before he could have surgery.

13. Claimant saw Dr. Scott Fisher, a general surgeon, on February 8, 2022, by which time his weight had increased to 303 pounds. Dr. Fisher opined Claimant would need to lose at least 30 pounds before any surgery.

14. A repeat MRI was performed on May 5, 2022. The findings were essentially unchanged from the January 2021 MRI.

15. On August 10, 2022, Claimant followed up with Dr. Sung, who noted Claimant's weight had decreased to 264 pounds and they were waiting for authorization to perform the multi-level fusion surgery.

16. Dr. Anant Kumar performed an IME for Respondent on November 22, 2022. Claimant reported approximately 85-90% low back pain and 10-15% left posterior thigh pain with occasional paresthesias in the left foot. He said that essentially all activities of daily living aggravated his pain. He also reported bowel and bladder dysfunction since the accident, which is not documented elsewhere in the record. Physical examination showed myofascial tenderness throughout the lumbar spine. Lateral bending was painful, but he had no pain with extension and flexion. Straight leg raise was negative bilaterally. Lower extremity strength and sensation were normal. Overall, Dr. Kumar described the clinical exam findings as "quite unremarkable," with no neurological deficits to support surgical intervention. Dr. Kumar also reviewed surveillance video that showed Claimant shopping at Walmart and loading heavy items into his vehicle without apparent difficulty.

17. Dr. Kumar opined the 3-level fusion recommended by Dr. Sung was neither reasonably needed nor causally related to the November 2020 work accident. Dr. Kumar noted there were no significant neurological deficits or spinal instability to warrant a multi-level fusion. Furthermore, the surveillance video showed Claimant is functioning quite well. Dr. Kumar opined the pathology shown on the MRIs was entirely pre-existing and unrelated to the industrial injury. The work accident caused no new structural pathology in Claimant's spine and his "strain/sprain" injury would have resolved shortly after the accident. Progression of Claimant's spinal stenosis over time is expected and reflects the natural progression of a degenerative condition, particularly given Claimant's weight issues. Therefore, any ongoing symptoms are solely related to the pre-existing condition. Dr. Kumar concluded that Claimant was at MMI with no impairment and no need for further treatment related to the work injury.

18. On March 3, 2023, Jennifer Livingston, FNP at Concentra noted that the IME "did not go in [Claimant's'] favor" and surgery would not be approved. As a result, Claimant was referred for an FCE and impairment rating "to close the case."

19. Dr. John Tyler performed a DIME on September 15, 2023. Dr. Tyler agreed with Dr. Kumar that the spinal pathology to be addressed by the L3-S1 fusion is pre-existing and not causally related to the work injury. As a result, Dr. Tyler determined

[2] Claimant weighed 283 pounds on that date.

Claimant reached MMI on November 22, 2022. However, Dr. Tyler found clinical evidence of ongoing injury-related myofascial pain and assigned a 5% specific disorder rating under Table 53 of the *AMA Guides*, for at least six months of medically documented pain and rigidity. He combined the specific disorder rating with 17% for lumbar range of motion deficits, for a total lumbar rating of 23%. Dr. Tyler opined Claimant requires no maintenance care related to the work accident.

20. Dr. Tyler and Dr. Kumar's opinions regarding causation of the proposed L3-S1 fusion are unrebutted by any persuasive medical or lay evidence.

21. Claimant failed to overcome the DIME's determination of MMI by clear and convincing evidence.

22. Claimant failed to prove entitlement to medical treatment after MMI by a preponderance of the evidence.

CONCLUSIONS OF LAW

A. Claimant failed to overcome the DIME's determination of MMI

A DIME's determination of whether a claimant has reached MMI is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(c). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the DIME is incorrect. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Proof that the DIME's conclusions are inconsistent with controlling legal standards can support a finding that the DIME has been overcome. *E.g.*, *McLane Western, Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *Lopez v. Redi Services*, W.C. No. 5-118-981 & 5-135-641 (ICAO, October 27, 2021).

MMI is defined as the point "when no further treatment is reasonably expected to improve the [injury-related] condition." Section 8-40-201(11.5). The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of the industrial injury. Section 8-42-101. The DIME's opinion regarding the cause of a claimant's condition is an "inherent" part of the diagnostic assessment that comprises the DIME process of determining MMI and rating permanent impairment. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). Therefore, the DIME's finding that a particular condition is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Id*.

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravated, accelerated, or combined with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment is proximately caused by an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965

(Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (ICAO, March 31, 2000).

As found, Claimant failed to overcome the DIME's determination of MMI by clear and convincing evidence. Although Dr. Tyler deferred to Dr. Sung about whether surgery is needed, he unequivocally opined the surgery is not causally related to the work accident. Thus, Claimant must prove a causal nexus by clear and convincing evidence. Dr. Tyler and Dr. Kumar agree the surgery is not work-related. No treating or examining physician had provided a persuasive contrary opinion. Dr. Sung has not offered any explicit opinion regarding causation, much less provided any analysis of the issue. As such, Dr. Tyler's opinion is essentially unrebutted. Although a claimant is not required to present expert opinion evidence to establish causation, the absence of such evidence is a legitimate factor to consider, particularly in the context of a clear and convincing burden.

Admittedly, there is no evidence Claimant sought treatment for his low back after May 2019, and he was working a physically demanding job immediately before the November 2020 accident. Nevertheless, Claimant told Dr. Kumar he continued to have 3-5/10 low back pain after being released from the 2017 injury, which is plausible given the extensive degenerative changes. In any event, the November 2020 accident caused no new structural pathology in his spine, and the work-related injury was limited to a soft tissue strain. The proposed 3-level lumbar fusion is solely intended to address Claimant's pre-existing degenerative condition; no one has suggested a 3-level fusion is an appropriate remedy for myofascial pain. There is no persuasive evidence that the work accident aggravated, accelerated, or combined with the pre-existing condition to necessitate the surgery.

B. 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). 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). A DIME's opinion regarding medical benefits after MMI is entitled to no special weight but is merely another opinion to consider when evaluating the preponderance of evidence. *E.g., Martinez v. K-Mart Corporation*, W.C. No. 4-164-054 (ICAO, September 19, 2003). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (ICAO 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).

As found, Claimant failed to prove he requires medical treatment after MMI. Dr. Tyler and Dr. Kumar agree no further treatment is necessary for the work injury. Dr. Sung stated Claimant had "exhausted" conservative care, and the only remaining treatment is

a lumbar fusion. Because Claimant failed to prove the surgery is causally related to the work accident, it does not provide the basis for an award of medical benefits after MMI. No provider at Concentra has opined that Claimant requires maintenance care, and Claimant has not been seen at Concentra in almost a year. The preponderance of persuasive evidence fails to show that Claimant requires medical treatment after MMI.

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME's determination of MMI is denied and dismissed.

2. Claimant's request for the lumbar fusion recommended by Dr. Roger Sung is denied and dismissed.

3. Claimant's request for medical benefits after MMI is denied and dismissed.

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

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

DATED: October 17, 2024

DIGITAL SIGNATURE
Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-262-520-001

ISSUES

I. Did Claimant suffer an injury arising out of and in the course and scope of his employment with [Redacted, hereinafter LC]?

II. What medical benefits, if any, are reasonable, necessary, and related to his work injury?

III. Whether Employer was insured for Workers' Compensation benefits at the time of the accident and injury.

FINDINGS OF FACT

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

1. The Claimant testified at the hearing, and the Court finds his testimony to be credible.
2. On May 25, 2023, the Claimant was hired by the Respondent Employer to perform demolition and construction work. He worked 40 hours per week and was compensated on an hourly basis.
3. On January 9, 2024, while performing demolition work for the Respondent, the Claimant was in the process of removing an old window. During this task, the windowpane shattered, and a shard of glass pierced the Claimant's abdomen.
4. The Claimant immediately reported the injury to his supervisor, [Redacted, hereinafter ML], owner of LC[Redacted].
5. On the day of the incident, the Claimant sought medical treatment at St. Mary Corwin Hospital. The medical history provided at the time indicated that a

> 38-year-old male (corrected from "female") was performing work when a large pane of glass shattered. A shard of glass then pierced his upper midline abdomen. The patient reported minimal stinging pain in the wound, without foreign body sensation, generalized abdominal pain, nausea, vomiting, chest pain, or shortness of breath. There were no other wounds, paresthesias, motor function loss in the lower extremities, or injuries to the head, face, or elsewhere on the body.

6. At the hospital, and as set forth in Claimant's Exhibits, Claimant was provided treatment by St. Mary Corwin Hospital, Pueblo Radiological Group, and Mountain States Pathology. The treatment included, but is not limited to, an x-ray, CT scan, and various laboratory tests. The treatment also included the cleaning and suturing of his wound. He was then instructed to return for suture removal in 12 days.

7. On January 21, 2024, the Claimant returned to St. Mary Corwin Hospital, where his sutures were removed.
8. The medical treatment provided to Claimant was reasonable and necessary to treat Claimant from the effects of his work injury.
9. The Claimant has not sought any additional medical treatment related to his injury.
10. As a result of the injury, the Claimant incurred medical expenses for the medical treatment he received from St. Mary Corwin Hospital, Pueblo Radiological Group, and Mountain States Pathology, and has been billed for that treatment.
11. The Employer did not appear for the hearing. Thus, the Employer did not submit any credible evidence to establish they were insured for workers' compensation benefits at the time of the accident and injury. As a result, the ALJ finds the Employer was uninsured for workers' compensation benefits on the date of the accident and injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the

consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Ins. 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. Did Claimant suffer an injury arising out of and in the course and scope of his employment with LC[Redacted]?

The Workers' Compensation Act (Act) defines "employee" in § 8-40-202(1)(b), C.R.S. as "[e]very person in the service of any person, association of persons, firm, or private corporation . . . under any contract of hire, express or implied . . . but not including any persons who are expressly excluded from [the Act]...." For purposes of Colorado's Workers' Compensation Act, an employer-employee relationship is established when the parties enter into a contract of hire. *Younger v. City and County of Denver*, 810 P.2d 647, 652-653 (Colo. 1991).

To establish a compensable injury, 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 alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S.

In this case, Claimant was hired by Respondent Employer on May 25, 2023, to perform demolition work. The Respondent Employer paid Claimant by the hour. On January 9, 2024, the Claimant was performing demolition work for the Respondent Employer. Thus, the Court finds and concludes that Claimant established by preponderance of the evidence that at the time of the injury he was an employee of the Respondent Employer because he was a person "in the service of" the Respondent Employer under a contract of hire to perform demolition work.

Moreover, the Court finds and concludes that the Claimant established by a preponderance of the evidence that while working for the Employer as an employee, on January 9, 2024, he was injured while performing demolition work for the Respondent Employer when a glass windowpane broke and a shard of glass stabbed Claimant in the stomach and caused the need for medical treatment.

As a result, the Court finds and concludes that Claimant established by a preponderance of the evidence that he suffered a compensable work injury.

II. What medical benefits, if any, are reasonable, necessary, and related to his work injury?

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Off.,* 53 P.3d 1192 (Colo. App. 2002).

In this case, Claimant was injured on January 9, 2024, while working for Respondent when a shard of glass stabbed him in the stomach. Due to the injury, the Claimant required medical treatment and went to St. Mary Corwin Hospital on the same day. While at the hospital, Claimant underwent various treatment which included, but is not limited to, x-rays, a CT scan, and various laboratory tests. In addition, his stomach wound was cleaned and sutured. Then, on January 21, 2024, Claimant returned to the hospital and had his sutures removed.

The medical services Claimant received were provided by St. Mary Corwin Hospital, Pueblo Radiological Group and Mountain States Pathology. The Court finds and concludes that Claimant established by a preponderance of the evidence that the medical treatment he received from these providers was reasonable and necessary to treat Claimant from the effects of his work injury.

III. Whether Employer was insured for Workers' Compensation benefits at the time of the accident and injury.

Once Claimant established a compensable injury, the burden shifted to the employer to establish a limitation of its liability by proof it had workers' compensation insurance. *McManus v. Oil Tools Limited*, W.C. No. 4-481-926 (April 29, 2002).

In this case, Claimant established a compensable injury. The Employer, however, did not appear for the hearing. Therefore, the Employer did not submit any credible evidence to establish they were insured for workers' compensation benefits at the time of Claimant's accident and injury. As a result, the ALJ finds and concludes that the Employer was uninsured for workers' compensation benefits on the date of the accident and injury.

ORDER

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

1. The Claimant suffered a compensable injury.
2. The Respondent Employer shall pay, in accordance with the Colorado Workers' Compensation Fee Schedule, for the medical treatment the Claimant received from St. Mary Corwin Hospital, Pueblo Radiological Group, and Mountain States Pathology as a result of his January 9, 2024, work injury.
3. The Employer was uninsured for Workers' Compensation benefits on the date the Claimant suffered a compensable injury.
4. 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: October 21, 2024

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-203-388-001

ISSUES

1. Whether Claimant is entitled to a change of physician.

2. Whether Claimant has presented substantial evidence to support a determination that additional medical maintenance treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition.

NOTICE OF PROCEEDINGS

1. Respondents failed to attend the September 24, 2024 in-person hearing in this matter. Therefore, prior to entering an order, the ALJ must consider whether Respondents had adequate notice of the proceedings.

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

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

3. On May 22, 2024 Claimant filed an Application for Hearing endorsing the issues of authorized provider and reasonable and necessary medical benefits. The Application for Hearing was mailed to Respondents at the following addresses: (1) [Redacted, hereinafter BM], [Redacted, hereinafter GR]; and (2) [Redacted, hereinafter OL]. Notably, Claimant's counsel also sent the Application for hearing through e-mail to [Redacted, hereinafter ME].

4. On August 27, 2024 the OAC sent a Notice of Hearing to Respondents at the following addresses: (1) OL[Redacted]; and (2) BM[Redacted], GR[Redacted], ME[Redacted]. The Notice specified that the hearing would be conducted on September 24, 2024 at 8:30 a.m. at the OAC, 1525 Sherman Street, 4th Floor, Denver, Colorado 80203.

5. On September 13, 2024 Claimant filed a Case Information Sheet (CIS), again notifying Respondents of the September 24, 2024 hearing and the issues to be heard before the ALJ, The CIS was sent to the addresses Claimant had previously verified.

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

7. Despite the preceding notice of the September 24, 2024 hearing, Respondents failed to appear. At the outset of the hearing, the ALJ reviewed the record to determine whether Respondents had received adequate and proper notice of the 8:30 a.m. hearing. Based on a review of the file, the ALJ was satisfied Respondents had proper and adequate notice of the matter. Because the case involved Claimant's Application for Hearing, the ALJ proceeded with the hearing.

8. The preceding chronology reflects that Respondents had adequate notice of the September 24, 2024 hearing in this matter. Claimant filed an Application for Hearing that was mailed to Respondents. The OAC sent a Notice of Hearing to Respondents at the addresses on file. Moreover, Claimant advised Respondents of the scheduled hearing through the filing of a CIS. The record thus demonstrates sufficient evidence to create a rebuttable presumption that Respondents received notice of the hearing. Respondents have failed to rebut the presumption. Because Respondents had adequate notice of the September 24, 2024 hearing but chose not to appear, entry of an order in this matter is appropriate.

FINDINGS OF FACT

1. Claimant worked for Employer as a surface leader. On April 7, 2022 Claimant was driving for work when a car ran a stop sign and T-boned his car. He suffered an L1 burst fracture. Claimant began receiving treatment for his injuries at Authorized Treating Provider (ATP) UC Health.

2. On May 26, 2022 Respondents filed a General Admission of Liability (GAL) acknowledging liability for Claimant's medical benefits.

3. Claimant initially received conservative treatment including physical therapy, diagnostic testing and pain management at ATP UC Health.

4. On July 7, 2023 Claimant visited Matthew David Pouliot, D.O. at UC Health for a pain management evaluation. After conducting a physical examination, Dr. Pouliot assessed Claimant with a lumbar radiculopathy, a closed compression fracture of the L1 vertebra, and lumbar pain. Dr. Pouliot noted that Claimant had a near complete resolution of his bone marrow edema at L1 with some residual compression that was unchanged from the previous year. Claimant was continuing to experience pain in the region. Dr. Pouliot recommended an epidural steroid injection to determine whether any residual spinal pain could be reduced.

5. On December 12, 2023 Claimant visited UC Health for an examination. Physician's Assistant Kai Frederic Stobbe assessed Claimant with lumbar facet joint pain and a closed compression fracture of the body of the L1 vertebra. PA-C Stobbe referred Claimant

to Dr. Pouliot to address facet diagnostic and/or therapeutic injections at the T12-L1 and L1-2 levels of the spine.

6. Claimant explained that when he visited Dr. Pouliot, he learned the injections would only mask his pain rather than provide a therapeutic effect. He thus chose not to proceed with the injections and did not undergo any additional treatment.

7. Claimant testified that he and providers determined no additional medical care was warranted, and discussed designating an authorized provider who was level II accredited to determine Maximum Medical Improvement (MMI). However, Claimant recounted there has not yet been a level II accredited physician assigned to the claim.

8. On August 19, 2024 Claimant visited Level II accredited physician David W. Yamamoto, M.D. at Peak to Peak Family Medicine, PC for an evaluation. Dr. Yamamoto reviewed Claimant's medical records and conducted a physical examination. He assessed Claimant with an L1 burst fracture with a 33% loss of disc height anteriorly as well as continuing lumbar stiffness. Dr. Yamamoto reasoned that, despite physical therapy, Claimant has lost significant function and range of motion. Based on Claimant's medical history, Dr. Yamamoto concluded that Claimant had reached MMI on the date of the visit or August 19, 2024.

9. Dr. Yamamoto assigned a 7% whole person permanent impairment rating for Claimant's vertebral fracture at L1 and a 15% whole person rating for range of motion deficits. Combining the ratings yields a 21% whole person impairment. Dr. Yamamoto did not assign any permanent restrictions, but recommended medical maintenance care for ongoing pain. He specifically noted that Claimant may be a candidate for "an epidural steroid injection, possible medial branch blocks, and rhizotomies."

10. The record demonstrates that Claimant has reached MMI. Claimant provided uncontroverted testimony that he and providers determined no additional medical care was warranted, and discussed designating an authorized provider who was level II accredited to determine MMI. However, Claimant recounted there has not yet been a level II accredited physician assigned to the claim. Claimant is stable and expects no more medical treatment to improve his condition and therefore has reached MMI. Notably, as Dr. Yamamoto recounted, on December 7, 2023 Dr. Pouliot noted that Claimant had a near complete resolution of his bone marrow edema at L1 with some residual compression that was unchanged from the previous year. Although Claimant continued to experience pain in the region, he did not wish to pursue the recommended steroid injections because they would simply mask his symptoms. As Dr. Yamamoto noted during his examination of Claimant on August 19, 2024, Claimant had reached MMI.

11. The record reflects that Claimant is entitled to a change of physician. Although Claimant has reached MMI, his current ATP has not referred him to a level II accredited physician. Claimant's ATP should have referred him to a level II accredited physician to determine an impairment rating within 20 days under WCRP 5.5(D)(1)(a). Furthermore, the record is devoid of evidence that Respondents referred Claimant to a Level II accredited physician within 40 days after the determination of MMI pursuant to WCRP 5.5(D)(1)(a). Because neither Claimant's ATP nor Insurer timely referred Claimant to a level II accredited

physician to determine an impairment rating after he reached MMI, the right of selection has passed to Claimant. Claimant has selected Level II provider Dr. Yamamoto as his ATP. Dr. Yamamoto is now the ATP for the purposes of determining impairment.

12. Claimant has presented substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. The record demonstrates that Claimant has reached MMI. Claimant's condition is stable and no additional medical treatment is necessary to improve his condition Although Level II accredited physician Dr. Yamamoto did not assign any permanent restrictions, he recommended medical maintenance care for ongoing pain. He specifically noted that Claimant may be a candidate for "an epidural steroid injection, possible medial branch blocks, and rhizotomies." Absent the preceding treatment, Claimant's condition can be reasonably expected to deteriorate. Therefore, Claimant has established the probable need for future treatment and is thus entitled to a general award of medical benefits. Respondents are thus financially responsible for Claimant's evaluation with Dr. Yamamoto on August 19, 2024 as well as all reasonable, necessary and causally related medical treatment to relieve the effects of the industrial injury or prevent further deterioration of Claimant's condition.

CONCLUSIONS OF LAW

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

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

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

Change of Physician

4. Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's

permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* WC 4-597-412 (ICAO, July 24, 2008). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, WC 4-570-904 (ICAO, June 19, 2006). Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretion to determine whether the circumstances justify a change of physician. *Gutierrez Lopez v. Scott Contractors*, WC 4-872-923-01, (ICAO, Nov. 19, 2014).

5. Section 8-43-404(5)(a)(III), C.R.S. provides a mechanism for a one-time change of physician. The statute specifies, in relevant part, that an employee may obtain a one-time change in the designated authorized treating physician by providing notice within 90 days after the date of the injury, but before the injured worker reaches MMI. Furthermore, DOWC Rule 8-5(A) reiterates that within 90 days following the date of injury, but before reaching MMI, an injured worker may request a one-time change of authorized treating physician pursuant to §8-43-404(5)(a)(III).

6. Moreover, Workers Compensation Rules of Procedure (WCRP) 5-5(D)(1)(a) also provides a method for a change of physician. Notably, WCRP 5-5 (D) sets forth the requirements for determining medical impairment when the authorized treating physician is not level II accredited. *In re Claim of Shada*, W.C. No. 4-910-076 (ICAO, Sept. 22, 2016). The Rule specifies:

> When an authorized treating physician providing primary care is not Level II accredited and has determined the claimant has reached MMI and has sustained any permanent impairment, such physician shall, within 20 days after the determination of MMI, refer the claimant to a Level II accredited physician for a medical impairment rating. If the referral is not timely made, the insurer shall refer the claimant to a Level II accredited physician for a medical impairment rating within 40 days after the determination of MMI.

W.C.R.P. 5-5(D)(I)(a) thus requires the respondents to refer a claimant to a Level II accredited physician within 40 days after the determination of MMI. While the employer or insurer has the statutory right to select a physician to treat the industrial injury, the right of selection passes to the claimant if the insurer or employer fails to provide a physician willing to treat the injury. *See* 8-43-404(5), C.R.S; WCRP 8-7; *Yeck v. Indus. Claim Appeals Off.*, 996 P.2d 228, 229 (Colo. App. 1999). Authorized treating physicians can be changed with permission from the employer, insurer, or an ALJ. *See Id.*

7. Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Off.,* 942 P.2d 1337 (Colo. App. 1997). The employer's obligation continues until the claimant reaches MMI. MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. An ATP

makes the initial MMI determination, and assigns an impairment rating. *Mandel v. Sears*, W.C. No. 4-575-413 (ICAO, Jan. 24, 2005).

8. As found, the record demonstrates that Claimant has reached MMI. Claimant provided uncontroverted testimony that he and providers determined no additional medical care was warranted, and discussed designating an authorized provider who was level II accredited to determine MMI. However, Claimant recounted there has not yet been a level II accredited physician assigned to the claim. Claimant is stable and expects no more medical treatment to improve his condition and therefore has reached MMI. Notably, as Dr. Yamamoto recounted, on December 7, 2023 Dr. Pouliot noted that Claimant had a near complete resolution of his bone marrow edema at L1 with some residual compression that was unchanged from the previous year. Although Claimant continued to experience pain in the region, he did not wish to pursue the recommended steroid injections because they would simply mask his symptoms. As Dr. Yamamoto noted during his examination of Claimant on August 19, 2024, Claimant had reached MMI.

9. As found, the record reflects that Claimant is entitled to a change of physician. Although Claimant has reached MMI, his current ATP has not referred him to a level II accredited physician. Claimant's ATP should have referred him to a level II accredited physician to determine an impairment rating within 20 days under WCRP 5.5(D)(1)(a). Furthermore, the record is devoid of evidence that Respondents referred Claimant to a Level II accredited physician within 40 days after the determination of MMI pursuant to WCRP 5.5(D)(1)(a). Because neither Claimant's ATP nor Insurer timely referred Claimant to a level II accredited physician to determine an impairment rating after he reached MMI, the right of selection has passed to Claimant. Claimant has selected Level II provider Dr. Yamamoto as his ATP. Dr. Yamamoto is now the ATP for the purposes of determining impairment.

Medical Benefits

10. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). An award for *Grover*-type medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Off.,* 992 P.2d 701, 704 (Colo. App. 1999); *Stollmeyer v. Indus. Claim Appeals Off.,* 916 P.2d 609 (Colo. App. 1995). Nonetheless, the claimant must show medical record evidence demonstrating the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan,* 860 P.2d 539, 542 (Cob. App. 1992). The care becomes reasonably necessary where the evidence establishes that, but for a particular course of medical treatment, the claimant's condition can reasonably be expected to deteriorate so that he or she will suffer a greater disability. *Id.;* see *Hanna v, Print Expediters Inc.,* 77 P.3d 863, 865 (Colo. App. 2003). Once a claimant has established the probable need for future treatment, he or she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna,* 77 P.3d at 866. Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing*

Care Center, 992 P.2d at 704.

11. As found, Claimant has presented substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. The record demonstrates that Claimant has reached MMI. Claimant's condition is stable and no additional medical treatment is necessary to improve his condition Although Level II accredited physician Dr. Yamamoto did not assign any permanent restrictions, he recommended medical maintenance care for ongoing pain. He specifically noted that Claimant may be a candidate for "an epidural steroid injection, possible medial branch blocks, and rhizotomies." Absent the preceding treatment, Claimant's condition can be reasonably expected to deteriorate. Therefore, Claimant has established the probable need for future treatment and is thus entitled to a general award of medical benefits. Respondents are thus financially responsible for Claimant's evaluation with Dr. Yamamoto on August 19, 2024 as well as all reasonable, necessary and causally related medical treatment to relieve the effects of the industrial injury or prevent further deterioration of Claimant's condition.

ORDER

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

1. Because Respondents had adequate notice of the September 24, 2024 hearing but chose not to appear, entry of an order is appropriate.

2. Dr. Yamamoto is now Claimant's ATP for purposes of determining impairment.

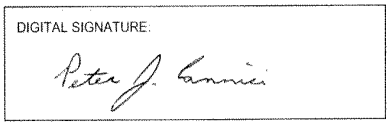
3. Respondents are financially responsible for Claimant's evaluation with Dr. Yamamoto on August 19, 2024 as well as all reasonable, necessary and causally related medical treatment to relieve the effects of the industrial injury or prevent further deterioration of Claimant's condition.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver,

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

DATED: October 21, 2024.



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

ISSUES

I. Whether Respondents have met their burden to prove that Claimant's injury resulted from the willful violation of a reasonable safety rule in contravention of C.R.S. §8-42-112(1) (b).

FINDINGS OF FACT

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

1. Employer is a timber manufacturing facility that uses heavy industrial equipment to produce lumbar products. Due to the nature of the work and the machinery used for production, Employer takes safety seriously and considers the wellbeing of their employees to be of paramount importance. (RHE A, pp. 4-6; CHE 11, pp. 95-97).

2. Employer has adopted many safety rules, but given the type of machinery used on the production line, one rule is heavily emphasized within the facility, namely that all employees be familiar with and adhere to Employer's lock-out/tag-out policies.

3. As part of the commitment to the health, safety and well-being of its employees, Employer has prepared both a written "Workplace Safety & Health Program" manual and an "Employee Handbook" containing reference to Employer's general safety rules and Employer's lock-out/tag-out policy. (CHE 11). The Workplace Safety & Health manual provides that a complete copy of the Lock-Out/Tag-Out Policy is made available to new employees during training/orientation from their supervisor. (RHE A, p. 11; CHE 11, p. 102). A copy of the Employee Handbook is also provided to new employees upon joining Employer's workforce. Employee review of the handbook is "required". (CHE 11, p. 59). New employees must acknowledge that they have thoroughly reviewed the handbook by completing an "Acknowledgement of Receipt" form maintained by Employer. *Id*. A separate form acknowledging receipt of Employer's Lock-Out/Tag-Out policies is also given to employee's for their signature during orientation. (RHE A, p. 12). The Lock-Out/Tag-Out acknowledgment form provides that employees be provided a copy of Employer's Lock-Out/Tag-Out policy for retention and future reference. *Id.*

4. Claimant acknowledged receipt of both the Employee Handbook and Employer's Lock-Out/Tag-Out policies on April 26, 2023. (RHE A, p. 12-13). A copy of Employer's Lock-Out/Tag-Out Policy, as provided to Claimant on April 26, 2023, is contained in both Claimant's and Respondents' Exhibit packets. (CHE 11, pp. 104-115; RHE A, pp. 14-25). Employer's Lock-Out/Tag-Out policy provides that it is the "responsibility of each person inspecting or working on equipment" to follow an

established lock-out/tag-out procedure when the "possibility of personal injury or damage to equipment exists. (CHE 11, p. 104). The lock-out/tag-out policy is triggered when:

- Any employee (or contractor) is required to remove or bypass a guard or other safety device.

- Any employee (or contractor) is required to place any part of his body into the mechanism of a piece of equipment or path of hazardous energy/materials while installing, construction, erecting, adjusting, inspecting, cleaning, operating or maintaining the process.

(CHE 11, p. 104).

5. Based upon review of Employer's Lock-Out/Tag-Out Policy, the ALJ finds that a machine is "locked out" when an "energy isolating device", such as a lock, hairpin, tongs or other similar device is placed on the machine to block or isolate the energy to the machine rendering it inoperable until the device is removed. (See generally, CHE 11, p. 105 §§ 3.2-3.4). A machine is "tagged out" when an employee places a tag on the energy isolating device to indicate the "device and the equipment being controlled may not be operated until the tag-out device is removed. (CHE 11, p. 106, § 3.12). The purpose of lock-out/tag-out rule is to avoid injuries by isolating the machine from all potential energy sources[1] and physically restraining it from being operated or energized through the placement of energy isolating devices. When a machine is locked-out/tagged-out, it is disconnected from all sources of power that may result in unexpected activation through the release of stored energy. Based upon the content of Employer's Lock-Out/Tag-Out Policy, the ALJ finds that when a machine is merely turned off, it still has access to power and may accidentally cycle/power up while under service resulting in serious injury. Indeed, the Lock-Out Tag-Out Policy provides: "Control circuit devices, such as push buttons, emergency stop buttons, selector switches and interlocks are not considered energy isolating devices for purposes of lockout. (CHE 11, p. 105, § 3.2).

6. Employer's Lock-Out/Tag-Out policy recognizes that there are instances where machinery that would normally be locked and tagged out must remain energized to perform troubleshooting or final adjustment. (CHE 11, p. 108, § 5.2). In these instances, Employer's Lock-Out/Tag-Out Policy provides that "special written procedures" must be written and followed to "afford a level of protection equal to primary lockout". *Id.* This policy is covered more thoroughly in Section 3.5 of Employer's Lock-Out/Tag-Out Policy under the heading "Alternative Protective Measures". (RHE A, p. 15). Alternative Protective Measures is defined as:

> Substitute measures implemented to afford employees a level of protection at least equivalent to lockout (ex. blocking, guarding).

[1] Energy includes any source of electrical, mechanical, hydraulic, pneumatic, chemical, thermal or other energy.

> Alternative protective measures must sometimes be used when lockout is not possible while preforming troubleshooting or non-maintenance and/or servicing activities that are routine, repetitive and integral to the use of the equipment for production. In such circumstances, the equipment/machine involved must be left energized to perform activities such as (but not limited to) jogging, adjusting or setting up. Where used, alternative protective measures must be specified in written procedures, employ use of physical apparatus(es) to control the energy(ies) of the machine/equipment, and be under the exclusive control of the employee utilizing these measures. Alternative protective measures must afford a level of protection *at least equivalent to primary lockout.*

(RHE A, p. 15)(Emphasis in original).

7. Claimant is a former electrician who worked for Employer from April 23, 2023 to December 15, 2023, when he suffered an admitted work-related injury to his right leg. Claimant has not returned to work for Employer since his December 15, 2023 injury.

8. On December 15, 2023, Claimant's job duties included troubleshooting/repairing electrical and mechanical problems on Employer's production equipment. Despite Claimant's job title, [Redacted, hereinafter RM], a former lead millwright for Employer testified that he relied upon Claimant to help with repairs that did not involve electricity. Claimant also acknowledged that RM[Redacted] treated him as his "right hand man" and that he did a significant amount of general repair/maintenance work.

9. As presented, the evidence persuades the ALJ that on December 15, 2023, Claimant had twice attended to repairs on Employer's bucksaw, which is equipped with a log stop conveyor before being injured during a third repair. Regarding the aforementioned repairs, [Redacted, hereinafter MM], Employer's bucksaw operator testified that he noticed a hydraulic leak on one of the bucksaws log stop pin cylinders at approximately 3:00 p.m. on December 15, 2023. MM[Redacted] testified he called for a fix and that he witnessed both Claimant and RM[Redacted] repairing the cylinder at the time. According to MM[Redacted], prior to initiating the necessary repairs, Claimant and RM[Redacted] properly locked and tagged the bucksaw.[2] MM[Redacted] testified that the bucksaw was taken offline, i.e. de-energized and he got notice on a computer monitor that the power to the machine had been cut.

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[2] Based on questioning by Claimant's counsel, there seems to be a suggestion that MM[Redacted] had some responsibility in performing the lock-out/tag-out prior to repairs being initiated on this piece of equipment. However, MM[Redacted] specifically testified that, inasmuch as Claimant and RM[Redacted] were doing the repairs, they were responsible for performing the lock-out/tag-out procedure. MM[Redacted] went on to state that it is the people that are actually doing the repairs who are responsible to initiate a lock-out/tag-out before they enter the lock-out/tag-out area.

10. MM[Redacted] testified that about two hours after Claimant and RM[Redacted] made repairs the first time, the cylinder started leaking again. Consequently, MM[Redacted] called for a second fix and Claimant and RM[Redacted] responded to the bucksaw once again to make additional repairs. MM[Redacted] testified that before Claimant and RM[Redacted] undertook extra repairs, they properly locked and tagged the bucksaw and that he once again got notice that the machine had no power.

11. [Redacted, hereinafter MB], a Production Supervisor for Employer testified that he was working on December 15, 2023, when Claimant was injured. According to MB[Redacted], one of the log stop pin cylinders on Employer's bucksaw was leaking hydraulic fluid around 3:00 p.m. and that a call for a fix was made. MB[Redacted] testified that he spoke with RM[Redacted] prior to repairs being initiated so he (MB[Redacted]) would have an idea of how long the repairs would take. MB[Redacted] testified that Claimant and RM[Redacted] completed the repairs and that a lock-out/tag-out procedure was performed before any repairs were made. MB[Redacted] added that after the first repairs were made, the cylinder began leaking again a few hours later. MB[Redacted] testified that Claimant and RM[Redacted] made repairs a second time and that prior to doing so; they properly locked and tagged the machine out a second time.

12. RM[Redacted], one of Employer's Lead Millwrights on December 15, 2023, testified that a cylinder on the bucksaw was leaking hydraulic fluid and this leak was preventing the log stop pin from retracting properly. According to RM[Redacted], the log stop cylinder had been malfunctioning for quite some time prior to Claimant's injury. His testimony was corroborated by MM[Redacted], who testified that the cylinder was leaking hydraulic fluid, regularly and MB[Redacted] who testified that the cylinder had been leaking hydraulic fluid on a frequent basis. RM[Redacted] added that it had already been figured out "more or less" what needed to be done to repair the problem.[3] RM[Redacted] confirmed that he and Claimant had fixed the problem two times prior to Claimant's injury on December 15, 2023 and that before any repairs were made on these two occasions, the machine was locked and tagged out.

13. RM[Redacted] testified that just prior to the accident; he was contacted by MB[Redacted] who notified him, for a third time, that the cylinder was once again leaking hydraulic fluid. RM[Redacted] testified that when he responded to the bucksaw, he could smell hydraulic fluid, so he was certain that the cylinder was leaking. RM[Redacted] admitted that he walked across the bucksaw's conveyor chain to inspect the cylinder to determine the exact source of the leak. The conveyor is located directly adjacent to the series of log stop pin cylinders and functions to carry logs down a track

[3] [Redacted, hereinafter DV], an Operations Supervisor and former millwright for Employer confirmed RM[Redacted]' testimony noting that the cylinder was leaking hydraulic fluid regularly for a week prior to Claimant's injury because the fitting for that particular cylinder was the wrong size. Accordingly, the fitting needed to be tightened on a regular basis.

towards the log stop pins where they are stopped before being cut by the bucksaw operator. RM[Redacted] also admitted that before crossing the conveyor track, he did not perform a proper lock-out/tag-out procedure.

14. Claimant testified that he was putting tools away when he received another, i.e. a third call that the bucksaw was not operating correctly. Claimant testified that he returned to the bucksaw and when he arrived, he noticed co-workers standing on both sides of the conveyor. RM[Redacted] was inspecting the leaking cylinder adjacent to the conveyor when Claimant arrived. According to Claimant, the saw was not moving leading him to believe it was not operational. Claimant testified that as RM[Redacted] was troubleshooting the problem, he asked for a large crescent wrench. Accordingly, Claimant crossed the safety guardrail and stepped out onto the conveyor to hand RM[Redacted] the wrench in question.

15. Various photos were admitted into evidence as part of Respondents' hearing exhibits. Exhibit F, p. 35 is a picture of the bucksaw's catwalk with barriers (guardrails) on either side. The area on the either side of the safety rail outside the catwalk is considered the lock-out/tag-out zone. This zone is clearly delineated by signage attached to the safety rail. (RHE E, p. 33). In order to hand the aforementioned wrench to RM[Redacted], Claimant had to climb over the guardrail and step out onto the conveyor. Exhibit C, p. 29 is a photograph of the cylinder on the log stop conveyor. Visible in Exhibit C is a log stop pin that extends out and over the conveyor track to stop logs on the conveyor at designated lengths, which as noted, the bucksaw operator then cuts to size before the logs are milled further. As described by RM[Redacted], the pin on the leaking hydraulic cylinder would extend but not retract. Based upon the evidence presented, the ALJ is convinced that the leaking cylinder was the cause of the log stop pin malfunction.

16. While Claimant was standing on the conveyor and preparing to hand the above-mentioned wrench to RM[Redacted], the track suddenly and unexpectedly lurched forward. The abrupt movement caused Claimant to fall and he was thrust into the hydraulic log stop pin by the moving conveyor. Claimant's right leg was pulled under the log stop pin by the moving conveyor and crushed. Claimant suffered serious injuries to the leg, for which liability has been admitted albeit with imposition of a 50% reduction in temporary total disability benefits for violation of an established safety rule, namely failing to adhere to Employer's lock-out/tag-out policy.

17. The area where Claimant was injured is under constant video recording and tape of the incident was admitted into evidence. The video tape begins at 22:06:28 (10:06:28 p.m.). No one is present at the outset of the video and it appears that both the bucksaw blade and a portion of the conveyor are moving. (See RHE H). At approximately 22:06:33, the slowly moving portion of the conveyor stops; however, the bucksaw blade continues turning.[4] At 22:07:25 of the video, Claimant appears from the left side of the camera frame. Claimant is only partially visible and his back is towards the camera. A large crescent wrench is visible in Claimant's right hand. Claimant steps

[4] The blade stops turning completely at approximately the 22:11 mark of the video.

to the left and moves slightly forward towards the area where the leaking cylinder is located. He is largely out of view of the camera when the conveyor suddenly moves to the left. Claimant is observed to fall onto the conveyor at 22:07:28 of the video. His hardhat is dislodged and he can be seen briefly lying on right side while the conveyor continues moving to the left. Claimant's legs are out of view. The conveyor stops moving at 22:07:33 and is reversed at 22:07:34, pulling Claimant backward slightly where he rolls to his back while grabbing his right lower leg. As Claimant clutches his right leg, the aforementioned wrench is clearly visible in his right hand. Claimant remains in view on the conveyor until he seemingly crawls off the bucksaw and disappears from view at 22:07:43.

18. MM[Redacted] testified that, at the time of the accident, he was looking over his right shoulder in the direction of MB[Redacted] who was attempting to unjam two logs that had crossed over and were stuck on another part of the conveyor. According to MM[Redacted], he had not been informed by either Claimant or RM[Redacted] that they were going to go into the lock-out/tag-out area of the bucksaw to work on the recurring hydraulic leak. Per MM[Redacted], both the conveyor and bucksaw were still in operation as the machine had not been lock and tagged out. MM[Redacted] clarified that when the bucksaw is in operation that means that the saw is still spinning. MM[Redacted] also testified that when the bucksaw is spinning, it makes a great deal of noise.

19. From his position in the operator's pulpit, MM[Redacted] noticed that Claimant's leg was stuck under the log stop pin. As soon as he noticed Claimant's leg was stuck, MM[Redacted] reversed the conveyor freeing Claimant's leg beneath the log stop pin. As noted, this occurs at 22:07:34 of the video admitted into evidence.

20. During cross-examination, MM[Redacted] testified that he had never heard the phrase "Alternative Protective Measures" and was never trained by Employer on any such procedures. He admitted that when some machines, like the bucksaw, needed repairs, it may require that they remain energized to diagnose the problem. He also admitted that he is not familiar with diagnosing problems on the bucksaw machine, and that he defers such diagnostic and troubleshooting work to Employer's millwrights and electricians. Importantly he testified that he defers to them when they decide whether to lock out before preforming such work.

21. MB[Redacted] testified that, at the time of the accident, neither Claimant nor RM[Redacted] performed a proper lock-out/tag-out procedure. Accordingly, MB[Redacted] testified that the bucksaw and conveyor were was energized and could be activated. MB[Redacted] testified that he was using a log pole from the catwalk of the bucksaw in an attempt to unjam a couple of logs that had crossed one another on another portion of the conveyor at the time of Claimant's injury. He admitted that he was not a skilled tradesman who was trained to troubleshoot or diagnose machines, and that he would not know whether machines should be energized for the purpose of troubleshooting and assessment. MB[Redacted], like MM[Redacted], had also not heard of or seen any special written procedures related to necessary/appropriate safety

measures when keeping machines energized to complete diagnostic work.

22. DV[Redacted] testified as a prior millwright and Employer's current Production Operations Supervisor. DV[Redacted] testified that Claimant's actions resulted in the violation of Employer's lock-out/tag-out policy and that had the policy been followed, the bucksaw and conveyor would not have been operational and Claimant never would have been injured. Nonetheless, DV[Redacted] testified that the bucksaw, like other machinery, might need to be energized to diagnose/troubleshoot mechanical problems and that there were no specific safety procedures/protocols for working on the bucksaw while it was energized. RM[Redacted] testified that he needed energy to the bucksaw to diagnose the problem with the cylinder in question. According to RM[Redacted], the only time machinery is locked and tagged out is when it is known specifically what fix is needed. As the cylinder in question had been repaired two times without success, the ALJ finds it reasonable that RM[Redacted] would need to have the machine energized to diagnose where the cylinder was leaking from in an effort to determine why the previous repairs continued to fail.

CONCLUSIONS OF LAW

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

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

B. Section 8-42-112(1) (b), C.R.S. 2014, provides for a 50 percent reduction in compensation benefits if an employee is injured due to a willful violation of a safety rule. In this case, Respondents have taken the statutory reduction and Claimant has filed an application for hearing challenging that decision. (CHE 3). The term "willful" connotes deliberate intent. See *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App 1990). Mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). Respondents bear the burden of proof to establish that a claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995); *Johnson v. Denver Tramway Corp.*, 171 P.2d 410, 414(Colo.1946).

[5] While the ALJ notes inconsistencies in Claimant's interrogatory responses and his subsequent testimony, the material aspects of the events, including his stated purpose for being on the conveyor, i.e. to hand RM[Redacted] a wrench are consistent and corroborated by the testimony of other witnesses and video tape admitted into evidence.

C. The elements of proving a violation under Section 8-42-112(1) (b) include the following: 1). there must be a safety rule adopted by the employer. 2). the safety rule must be reasonable. 3). the safety rule must be known by the employee; "brought home" to the employee, and diligently enforced. *Pacific Employers Insurance Co. v Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (Colo. 1943). 4.) the meaning and content of the safety rule must be specific, unambiguous and definite, clear and non-conflicting. *Butland v. Industrial Claim Appeal Office*, 754 P.2d 422 (Colo. App 1988). 5). the violation of the safety rule must be willful, done with deliberate intent by the employee. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App 1990). The question of whether the respondents carried their burden of proof to establish that a claimant's conduct was willful is one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). Here, there is little question that Respondents presented sufficient evidence to meet their burden of proof concerning elements 2-3. Indeed, Employer adopted a series of written safety rules, including a lock-out/tag-out policy and circulated them to their workforce in the form of written documents, i.e. an Employee Handbook, a Workplace Safety and Health Program Manual and a written Lock-Out/Tag-Out Policy. Moreover, Claimant acknowledged receipt and his responsibility to read, become familiar and comply with the policies in question. Instead, the questions presented here are whether specific "alternative protective measures" were drafted to afford Claimant and others similarly situated a level of protection that is at least equivalent to primary lockout when they are compelled to troubleshoot and/or adjust energized equipment and whether Claimant's injuries were caused by his willful failure to adhere to established safety rules.

D. Respondents argue that they have met their burden to prove willfulness based on the obviousness of the danger posed by an unlocked machine possessing a spinning blade, a moveable conveyor track and extending/retracting log stop pins in combination with the suggestion that RM[Redacted] was not troubleshooting the problem with the bucksaw at the time of Claimant's accident. Indeed, Respondent's contend that if RM[Redacted] were troubleshooting the problem with the cylinder, he would not have needed the wrench that Claimant testified he asked for. When combined, Respondent's contend the evidence supports a conclusion that Claimant acted with deliberate intent when he climbed over the guardrail into the danger zone of the machine without locking/tagging it out. Based upon the evidence presented, the ALJ is not persuaded.

E. In this case, the ALJ is persuaded that, while the employee handbook outlines lock out and tag out procedures to apply generally to employees of the lumber mill, there are acknowledged exceptions for those who need power to flow to machines to troubleshoot them for repairs/adjustments. The policy that Respondents cite to contain the safety rule Claimant violated in this case specifically carves out exceptions to the alleged violation asserted by Respondents. Indeed, all those testifying agreed that some troubleshooting and final adjustment work required certain equipment be left energized. The lock-out/tag-out policy is also exceptionally clear that in the event machinery must be energized, "alternative safety measures" must be developed and

utilized to afford a level of protection equal to primary lockout. Claimant and his co-worker RM[Redacted] testified that they were performing the type of work that required the bucksaw to be left energized. Consequently, the saw and its conveyor were not locked and tagged out when the log stop pin cylinder began leaking on a third occasion. As found, the ALJ is persuaded that the type of work Claimant and RM[Redacted] were performing on the bucksaw on December 15, 2023 would likely require the machine to remain energized to diagnose exactly where the cylinder was leaking from in an effort to determine why the previous repairs continued to fail. Contrary to Respondents' assertion, the ALJ is also convinced that RM[Redacted] would likely require a wrench when diagnosing the problem so he could make necessary adjustments to fittings or other parts he discovered to be leaking.

F. The ALJ credits the testimony of RM[Redacted] and Claimant to conclude that Employer's general lockout and tagout procedures would not apply under the circumstances presented during the third attempt to fix the bucksaw. Instead, the ALJ is persuaded that RM[Redacted] and Claimant would have been subject to the "special written alternative safety measures/procedures referenced in Employer's Workplace Safety & Health Program" manual and the Lock-Out Tag-Out Policy itself. Here, the undisputed evidence shows that Employer never developed such rules nor was the workforce trained on what measures to take to achieve safety equal to primary lockout if the bucksaw required troubleshooting/adjustment while energized, despite knowing that there was a problem with one of the log stop cylinders that required frequent adjustment. Because there were no alternative safety measures created to address the situation/circumstances with which Claimant was presented during the third attempt to repair the leaking pin cylinder, the ALJ is not convinced that Respondents established that Claimant failed to obey a reasonable rule adopted by Employer in this case.

G. Even if Respondents had established that specific safety rules had been adopted to address the situation presented, the ALJ is not convinced that Claimant willfully violated any such rule/rules. As noted, the term "willful" means "with deliberate intent". *Las Animas v. Maupin*, supra. Willfulness can be inferred from the circumstances presented, such as repeated warnings, knowledge of the risks associated with violations of a safety rule, and the degree of carelessness or indifference to obvious risks.[6] Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alvarado,* W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, in Colorado an employee's violation of a safety rule when attempting to facilitate accomplishment of his/her employer's business or his/her assigned job-related tasks does not constitute willful misconduct. *City of Las Animas v. Maupin*, supra; *Kaycene Hulbert v. Dillon Companies, Inc*., W.C. 4-330-587 (ICAO, March 20, 1998). Here, the ALJ is persuaded that Claimant reasonably understood that he and RM[Redacted] could not facilitate Employer's business of producing lumber products and complete his assigned job related task of fixing the bucksaw if it was locked and tagged out because he believed

[6] See *Industrial Commission v. Golden Cycle Corp.,* 126 Colo. 68, 246, P.2d 902 (1952); *Stockdale v. Industrial Commission,* 76 Colo. 494, 232 P. 669 (1925).

he needed electricity to be supplied to the machine to diagnose and adjust the problem. Accordingly, Claimant's actions of climbing over the guardrail to hand RM[Redacted] a wrench served a legitimate business purpose and touched upon Claimant's required duties as an electrician for Employer. Because Claimant had a "plausible purpose" to cross the guardrail and step out onto the conveyor, the ALJ concludes that Claimant did not intend to violate Employers safety rules concerning lock out/tag out procedures. Rather, the ALJ is convinced that Claimant intended to facilitate his Employer's business and complete his job related tasks as an electrician by handing RM[Redacted] a wrench in furtherance of helping diagnose and adjust a leaking hydraulic cylinder. As such, the ALJ is not persuaded, assuming that Respondents had established that Claimant violated a reasonable safety rule, that Claimant's actions in contravention of such safety polices were willful as must be established by Section 8-42-112(1) (b).

ORDER

It is therefore ordered that:

1. Respondents' have failed to demonstrate, by a preponderance of the evidence, that Claimant's injury resulted from his willful failure to obey a reasonable safety rule adopted by Employer for his safety. Accordingly, Insurer's reduction of Claimant's non-medical compensation benefits by 50% as provided for by § 8-42-112(1) (b), is reversed and the request for future reduction is denied and dismissed.

Dated: October 21, 2024

/s/ Richard M. Lamphere

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

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in

Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant has proved by a preponderance of the evidence that the arthroscopic partial lateral meniscectomy and subchondroplasty recommended by Dr. Genuario is reasonably necessary to cure and relieve Claimant of the effects of her November 27, 2020 injury.

FINDINGS OF FACT

1. On November 27, 2020, Claimant sustained an admitted right knee injury in the course and scope of her employment with Respondents while working in the freezer on a ladder. As she was descending the ladder, she missed the last two steps and fell, landing on her right side.

2. Claimant first sought treatment the following day at UC Health, where Megan Sheffield, PA-C, evaluated Claimant for right leg and low back pain. Claimant reported pain in her hamstring and mild right knee pain and leg weakness. An x-ray of her knee showed normal alignment, no soft tissue swelling, and no acute fracture or dislocation.

3. On December 8, 2020, Claimant returned to UC Health where she reported slight improvement but still experienced pain around the right SI joint, right knee in the medial aspect, and the back of the thigh near the hamstring.

4. Dr. Elizabeth Bisgard at UC Health evaluated Claimant on January 7, 2021, and noted diffuse tenderness throughout the right leg, localized tenderness in the medial joint line, and a positive Thessaly test, raising concerns for medial meniscus pathology. An MRI was ordered.

5. During a follow-up with Dr. Bisgard on February 2, 2021, Claimant reported improvement. She had minimal pain in the knee and strength was normal. Dr. Bisgard noted that an MRI would be requested if Claimant's progress plateaued or worsened.

6. On March 10, 2021, Claimant reported worsened knee pain, consisting of deep burning and numbness in her knee and in her right Achilles tendon. Dr. Bisgard suspected medial meniscus pathology due to pain during Thessaly testing and Claimant was referred for an MRI.

7. Claimant underwent the MRI on March 16, 2021, which revealed a meniscal root tear in the posterior half of the lateral meniscus.

8. On May 17, 2021, Claimant underwent a cortisone injection with Jeremy Smith, PA-C. However, Claimant reported no relief with the injection. Dr. Bisgard referred Claimant for a 3T MRI scan and an orthopedic consultation with Dr. James Genuario.

9. On August 17, 2021, Claimant underwent the 3T MRI scan of her right knee. The imaging showed a small tear in the posterior horn of the lateral meniscus and a ganglion cyst.

10. Claimant underwent a right knee arthroscopic surgery on September 16, 2021, with Dr. Genuario. The surgery included a repair of a lateral meniscus root tear with an "inside-out" repair as well as a removal of a plica. The patellofemoral and medial compartment had normal cartilage, and the lateral compartment had healthy articular cartilage

11. Claimant returned to Dr. Bisgard on November 2, 2021. Claimant reported feeling 40% improvement in her symptoms but experienced new pain in the foot and ankle. Claimant was to continue with physical therapy.

12. Claimant continued with physical therapy and returned to Dr. Bisgard on August 30, 2022, with reports that her right knee started hurting more recently with a sensation that her knee was giving out. Claimant also complained of sharp, stabbing pain in her foot. Dr. Bisgard referred Claimant for further consultation with Dr. John Spittler.

13. Claimant underwent a repeat right knee MRI on September 17, 2022. The MRI showed extensive bone marrow edema in the lateral tibial plateau and post-surgical changes.

14. Dr. Genuario presented treatment options, including an unloader brace, knee preservation surgery, or arthroplasty. Claimant returned to Dr. Bisgard on October 18, 2022. Claimant complained of worsening knee pain with a dull ache and a sharp stabbing pain. Dr. Bisgard noted that Claimant had seen Dr. Genuario the day before and that Dr. Genuario recommended additional knee surgery if Claimant had no improvement over the next six weeks with non-operative treatment. Dr. Bisgard opined that it appeared inevitable that Claimant would need an additional surgery and possible total knee replacement as a result of her work injury.

15. On December 25, 2022, Dr. Genuario requested prior authorization for a right knee arthroscopy with partial lateral meniscectomy and subchondroplasty Respondents denied the request.

16. Claimant underwent an IME with Dr. Timothy O'Brien on March 27, 2023, at Respondents' request. Dr. O'Brien took Claimant's history, performed a physical examination, and reviewed Claimant's medical records. Dr. O'Brien ultimately opined that the repeat knee surgery recommended by Dr. Genuario was not reasonably necessary or related to the November 27, 2020 work injury. In his opinion, the original injury was minor, involving a right knee sprain, strain, or contusion, a lumbosacral spine strain, and a right hamstring strain, all of which healed uneventfully. The work injury, in his opinion, lacked the severity or injury or mechanism of injury required to cause a meniscus tear. In support, Dr. O'Brien noted that Claimant did not seek urgent medical care initially and that her initial examination showed no signs of serious injury such as swelling, warmth, or bleeding.

17. Regarding the lateral meniscus tear evident on the MRI, Dr. O'Brien felt that it was pre-existing, degenerative, and unrelated to the work injury. The imaging, in his opinion, demonstrated chronic, degenerative changes rather than any acute trauma. He also found it to be significant that Claimant's complaints included medial knee pain even though the MRI showed only a lateral meniscus tear, which, in his opinion, was cause for suspicion of non-organic factors such as secondary gain. He felt that the bone marrow edema visible on the MRI was likely post-surgical rather than a direct cause of Claimant's symptoms.

18. Last, Dr. O'Brien felt that the recommended subchondroplasty and possible meniscectomy were contraindicated and experimental. Specifically, he wrote that there is no scientific evidence supporting its effectiveness for treating marrow edema or symptom relief after arthroscopic surgery. He further noted, "there is no scientific evidence that has ever been produced . . . that bone grafting cures marrow edema after an arthroscopic surgery or cures the symptomology in these cases." He cited several studies that showed that arthroscopic surgery is ineffective for treating knee pain related to degenerative changes and that the use of arthroscopic surgery in Claimant's case would be inappropriate and that the initial surgery failed, predicting that any repeat surgery would also fail.

19. On July 15, 2023, Dr. Genuario issued a report in response to Dr. O'Brien's IME report. Dr. Genuario responded to Dr. O'Brien's claim that the bone marrow edema was not the cause of Claimant's present symptoms. Dr. Genuario reasoned that bone marrow edema correlates highly with Claimant's knee pain and that "the far posterior central aspect of the knee typically has dual innervation from both medial and lateral genicular arteries and nerves and as such meniscal root pathology is often not sided (medial vs lateral) compared to typical meniscal pathology where lateral symptoms may present as medial or vice versa."

20. Dr. Bisgard also testified at hearing on Claimant's behalf. At hearing, she testified that she has treated Claimant throughout the course of her workers' compensation claim. Dr. Bisgard testified regarding Claimant's pain distribution in the knee, explaining that the menisci have cross innervation from two separate nerves such

that an injury to the lateral meniscus might result in medial joint pain and vice versa, or even pain both medially and laterally.

21. Dr. Bisgard explained that Claimant had an injury of a torn right lateral meniscus root with symptoms worsening despite conservative treatment. She explained that if a meniscus root is not anchored properly, the meniscus can shift or move. Dr. Bisgard testified that the need for a lateral meniscus root repair was the reason for the first surgery. However, because the first surgery did not hold, Dr. Bisgard and Dr. Genuario recommended a second surgery. Claimant was initially hesitant to proceed with a second surgery since it would set her back in terms of her restrictions, however, Dr. Bisgard testified that Claimant came around due to worsening symptoms. Dr. Bisgard associated the worsening symptoms to a crack in the soft tissue of the bone that resulted in bleeding inside the knee. Dr. Bisgard clarified that she felt the need for a second surgery resulted directly from the first surgery not holding.

22. Respondents called Dr. O'Brien to testify at hearing in their defense. Dr. O'Brien testified that the medical records prior to the first MRI showing the lateral meniscus tear, Claimant's pain complaints had always been medial.

23. Dr. O'Brien testified that after the injury one would expect to observe bruising and massive swelling evident on the X-ray.

24. Dr. O'Brien testified that most knees bear more weight on the medial menisci.

25. Regarding the pain fibers that innervate the menisci, Dr. O'Brien testified that those perceive an immediate onset of unmistakable pain. Dr. O'Brien testified that there are three nerves that supply the knee: one that comes off the femoral nerve and two others that come off the sciatic nerve, one of which is the genicular nerve. Dr. O'Brien disagreed that the location of the pathology would not necessarily correspond with the location of the pain. Specifically, he testified that medial meniscus pathologies result in medial pain and lateral meniscus pathologies result in lateral pain. Regarding the two articles Dr. Genuario cited concerning the situs of the pain, Dr. O'Brien testified that one is anecdotal and the other is not peer reviewed.

26. The language in the medical records of "morphologic" and "blunted" suggests that the pathology is old and that the body has attempted to remodel it in the past. He testified that there was no evidence of an acute injury. Specifically, there was no synovitis or fluid accumulation that one would expect to see, and that the knee appeared to be in homeostasis.

27. Dr. O'Brien testified that the first surgery Claimant underwent was called an "inside-out" repair, which involved drilling holes in the tibia to give a base for the posterior horn of the lateral meniscus and tying it down with sutures. The trauma introduced into the knee joint at the time of the original surgery resulted in loss of

cartilage in the lateral tibial plateau and the patellofemoral joint, a subchondral fracture, substantial marrow edema. Dr. O'Brien testified that the surgery caused a lot of trauma.

28. On cross-examination, Dr. O'Brien agreed that the surgery had failed and that Claimant's medical records documented no prior knee conditions or surgeries. Dr. O'Brien reviewed medical records from other treating physicians and stated that before the injury, Claimant did not exhibit signs of bone marrow edema or a fissure in her bone. According to Dr. O'Brien, the failure of the meniscal root repair led to further damage, including bone fissuring and marrow edema, attributed to the surgical technique, which involved drilling bone tunnels. Dr. O'Brien disagreed with Dr. Genuario's recommendation for a revision surgery, asserting that the revision would address different issues and that there is no scientific support for the proposed osteoplasty. He emphasized that the edema could resolve over time without additional surgery.

29. Dr. O'Brien expressed concern about Claimant's non-organic pain patterns, noting that her complaints were inconsistent and difficult to localize. He acknowledged that while Claimant had organic sources of pain, such as post-surgical changes, she also demonstrated non-dermatomal pain that suggested secondary gain, which could affect the outcome of treatment. He doubted that further surgery would alleviate her symptoms, as previous interventions, including physical therapy, injections, and the initial surgery, had not resolved her pain.

30. The Court finds the opinions of Drs. Genuario and Bisgard more persuasive than those of Dr. O'Brien. The September 17, 2022 MRI scan and contemporaneous physical findings consistently supported Dr. Genuario's and Dr. Bisgard's diagnosis of meniscus pathology, including the lateral meniscus tear. Both physicians provided a thorough explanation of how Claimant's symptoms, including medial pain despite a lateral meniscus tear, can be attributed to the unique innervation of the knee joint, which may result in atypical pain distribution. Dr. Genuario's explanation regarding the cross-innervation of the menisci, supported by anatomical studies, provides a logical rationale for why Claimant located her symptoms medially for a lateral pathology. Although Dr. O'Brien dismissed the hypothesis as being based on studies that were anecdotal or not peer reviewed, Dr. O'Brien did not provide a thorough explanation demonstrating that Dr. Genuario's and Dr. Bisgard hypothesis was in fact unlikely. Given that Dr. Genuario's and Dr. Bisgard's hypothesis is logical and consistent with the other evidence in this case, the Court finds it more likely.

31. Additionally, the surgery performed on Claimant's knee, including the repair of the lateral meniscus root, was consistent with the symptoms and imaging findings documented before and after the surgery. The post-surgical complications, including bone fissuring and marrow edema, were a direct consequence of the surgical intervention aimed at repairing the work-related injury, as acknowledged by both Drs. Genuario and Bisgard. Dr. O'Brien's alternative hypothesis that these

conditions were degenerative and unrelated to the work injury is less convincing because it does not adequately account for the temporal relationship between the initial injury, the surgery, and the onset of these complications.

32. Lastly, while Dr. O'Brien raised concerns about secondary gain and non-organic pain patterns, the Court finds that these concerns do not outweigh the consistent and objective medical findings from multiple treating providers. Drs. Genuario's and Bisgard's opinions are more persuasive as they are grounded in continuous treatment and clinical findings, making their recommendations for additional surgery to cure and relieve the effects of the work injury more credible.

33. The Court finds that Claimant's ongoing right knee symptoms are most likely the result of the September 16, 2021 surgery. That surgery caused bone fissuring and marrow edema attributable to the surgical technique, which involved drilling bone tunnels, and the meniscus was likely not anchored adequately, resulting in the meniscus shifting or moving.

34. The Court finds that the arthroscopic partial lateral meniscectomy and subchrondroplasty recommended by Dr. Genuario to be reasonably necessary to cure and relieve Claimant of the symptoms resulting from the September 16, 2021 surgery, which was in turn reasonably necessary to cure and relieve Claimant of her right knee injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo.App.2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the

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

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

Medical Benefits – Right Knee Revision Surgery

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

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

As found, the arthroscopic partial lateral meniscectomy and subchrondroplasty recommended by Dr. Genuario is reasonably necessary to cure and relieve Claimant of the symptoms resulting from the September 16, 2021 surgery, which was in turn reasonably necessary to cure and relieve Claimant of her right knee injury. Therefore, Claimant has met her burden.

ORDER

It is therefore ordered that:

1. The arthroscopic partial lateral meniscectomy and subchrondroplasty recommended by Dr. Genuario is reasonably necessary to cure and relieve Claimant of the effects of her November 27, 2020 right knee injury.

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

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

DATED: October 21, 2024.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-218-431-003 and 5-258-682-001

RELEVANT PROCEDURAL HISTORY

On January 5, 2024, Claimant applied for hearing on W.C. No. 5-258-682-001 (date of alleged injury of September 5, 2023) endorsing compensability and medical benefits (including a left shoulder surgery recommended by Dr. Thon). On February 2, 2024, Respondents filed a response to hearing application endorsing various defenses, including causation and relatedness. On March 5, 2024, Dr. Lesnak issued an IME report on behalf of Respondents.

On March 28, 2024, Claimant applied for hearing on his prior claim, W.C. No. 5-218-431-003, an admitted right shoulder claim with a date of injury of July 15, 2022. In that hearing application Claimant again endorsed medical benefits including the left shoulder surgery recommended by Dr. Thon.

Claimant applied for hearing on both of his claims to assert alternative causation theories—if his left shoulder issue and need for surgery are not the result of a new injury on September 5, 2023, his left shoulder issue and need for surgery are causally related to his right shoulder claim based on overuse/overcompensation.

On April 8, 2024, Claimant filed an unopposed motion to consolidate W.C. No. 5-258-682-001 with W.C. No. 5-218-431-003 for the purpose of hearing, and that motion was granted on April 11, 2024.

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable left shoulder injury from moving a roof roller rig on September 5, 2023 (W.C. No. 5-258-431-003);

II. In the alternative, whether Claimant established by a preponderance of the evidence that his left shoulder condition is the result of overuse/overcompensation related to his right shoulder injury claim (W.C. No. 5-218-431-003);

III. If Claimant proved his left shoulder condition is related to one of his two claims, did he prove by a preponderance of the evidence that left shoulder surgery recommended by Dr. Thon is reasonable and necessary medical care.

FINDINGS OF FACT

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

1. Claimant is 59-year-old male who has worked for several companies as a window washer at [Redacted, hereinafter DA] since the 1990s.

2. In the early 2000s, while working for a different employer at DA[Redacted], Claimant sustained a work-related right shoulder injury requiring surgery. (Resp. Ex. B, bn 010)

3. On August 2, 2013, again while working for a different employer at DA[Redacted], Claimant sustained a work injury resulting in injuries to his left shoulder, neck and bilateral upper extremities. (Resp. Exs. A-D)

4. On January 21, 2014, Claimant underwent arthroscopic left shoulder surgery for labral fraying, tendinopathy on the longhead of the bicep, an upper subscapularis tear, and a supraspinatus tear with delamination into the infraspinatus. (Resp. Ex. A) He remained in medical care for conditions related to his 2013 claim for almost seven years until being placed at MMI on July 9, 2020. (Resp. Exs. B-C) He subsequently underwent a Division Independent Medical Evaluation ("DIME") performed by Dr. John Hughes which resulted in a 25% whole person permanent impairment rating, including permanent impairment ratings for his left shoulder and left upper extremity (15% upper extremity or 9% whole person if converted). (Resp. Ex. C) Claimant settled his 2013 claim on July 15, 2022, the same day he claimed to have suffered a work injury with Employer (W.C. No. 5-218-431-003). (Resp. Ex. D) Claimant has been in the workers' compensation system continuously for the past eleven years.

CLAIMANT'S EMPLOYMENT WITH RESPONDENT EMPLOYER

5. Claimant was hired by Employer on August 2, 2021, shortly after Employer won a [Redacted, hereinafter CC] contract to perform window washing services at DA[Redacted]. Employer employed a crew of three window washers at all times. Employer's window washers' duties varied daily, but primarily involved interior window and glass cleaning. Additionally, one time each year Employer's window washers power washed DA[Redacted] exterior canopy, and one time each year they would clean DA[Redacted] exterior windows on the east and west side of DA[Redacted]using a roof roller rig and Bozeman chair harness system. (Resp. Ex. R)

6. Employer takes the safety of its workers extremely seriously. It holds regular morning huddles and safety meetings, and it continuously trains and retrains its window washers with respect to safety issues, including equipment use, daily safety concerns, the reporting of work-related accidents and injuries, and filling out accident forms. On May 22, 2022, Claimant was trained on reporting work related accidents, including the need to report all work accidents immediately. (Resp. Ex. X)

7. After winning the DA[Redacted] contract, Employer purchased a new roof roller rig to help perform the east and west side exterior window washing. (Hrg. Audio Day 2) In October 2021, Claimant was trained in the use of the rig and harness system. (Resp. Ex. V; Hrg. Audio Day 2) Claimant physically participated in the window cleaning using the roof roller rig and harness system in 2021. (Hrg. Audio Day 1, 1h, 9m)

8. On July 29, 2022, Claimant was the "discussion leader" for a safety training session specifically regarding the roof roller rig and harness system, a training session to prepare his fellow window washers for the use of that equipment that year. (Resp. Ex. W) He led the training discussion with Employer's other two window washers, [Redacted, hereinafter JR] and [Redacted, hereinafter MR], who then performed the window washing.

9. The roof roller rig was used only once each year, over a two or three-day period, and that the rig was in good shape without any issues or defects before September 5, 2023.

CLAIMANT'S RIGHT SHOULDER CLAIM (W.C. No. 5-218-431-003)

10. On July 15, 2022, Claimant was operating a power washer machine when he allegedly injured his right shoulder. (Resp. Exs. E–H) Although he was working with [Redacted, hereinafter DG] (Employer's owner) all day that day, and although he had recently received training on the need to report all work injuries immediately, he failed to timely report his injury. Instead, he waited until July 22, 2022, to report his right shoulder injury. As a result, on July 23, 2022, Employer retrained Claimant and Employer's other window washers on the need to report all work injuries, no matter how small, immediately. (Resp. Ex. Y; Hrg. Audio Day 1; Hrg Audio Day 2)

11. A workers' compensation claim was opened for the right shoulder injury, Claimant received several months of conservative care, but his shoulder did not improve so he underwent right shoulder surgery on November 22, 2022. (Clt's Exs. 17, 19; Resp. Ex. F) Following that surgery Claimant was off work until December 23, 2022, at which time he returned to modified duty with his right arm in a sling. (Clt. Ex. 4) His post-surgery modified duty always involved Employer's lightest window washing tasks. (Hrg. Audio Day 1, Part 2, 17m; Hrg. Audio Day 2) After the sling was removed, Claimant worked modified duty with both arms, while being restricted in terms of right arm lifting and reaching. Employer abided by Claimant's work restrictions. (Id.)

12. Claimant's right shoulder initially improved following surgery, but it subsequently worsened after he contracted COVID in early 2023. Because of the worsening, an additional right shoulder MRI was ordered, right shoulder joint and Platelet Rich Plasma ("PRP") injections were administered, and massage therapy was provided. (Resp. Exs. G-H, S; Clt. Exs. 12-13) On August 30, 2023, Claimant told his massage therapist that he had a lack of range of motion in his right arm, and pain between his scapulas. His therapist noted findings of "limited range of motion with right arm, adhesions between scapula on both sides and hypertonicity and rotator cuff muscles of right arm." (Resp. Ex. H, bn 105). No left shoulder symptoms or issues were reported. (Id.) In fact, Claimant did not report left shoulder issues to any of his medical providers until two days after his alleged work injury of September 5, 2023 (Hrg. Audio Day 1, Part 2, 22m; Hrg. Audio Day 2), nor did he report a left shoulder injury or issue to Employer before September 5, 2023. (Hrg. Audio Day 2) There are no credible medical opinions supporting Claimant's claim that his left shoulder issue is related to overcompensation or overuse due to his right shoulder injury.

13. In August 2023, JR[Redacted] and MR[Redacted] cleaned DA[Redacted] east side exterior windows using the roof roller rig and harness system. (Hrg Audio Day 1, Part 2, 33m) Claimant was not involved in that project on that date. (Hrg. Audio Day 1, Part 2, 18m) After completing the east side window washing, JR[Redacted] and MR[Redacted] moved the rig to the west side where they set it up in anticipation of completing the west side in the following days. However, the completion of the west side was delayed several weeks, until September 5, 2023, due to a work dispute

between MR[Redacted] and JR[Redacted]. (Hrg. Audio Day 1, Part 2, 34m; Hrg. Audio Day 2)

CLAIMANT'S ALLEGED LEFT SHOULDER CLAIM (W.C. No. 5-258-682-001)

14. Employer rescheduled JR[Redacted] and MR[Redacted] to complete the west side window cleaning on September 5, 2023, but that morning MR[Redacted] "no-showed" for work. [Redacted, hereinafter DR] (Employer's onsite general manager) contacted DG[Redacted] (Employer's owner), who determined it would be safest if DR[Redacted] helped Claimant perform MR[Redacted] role of moving the roof roller rig, while JR[Redacted] washed the windows from the Bozeman chair using the harness system. DR[Redacted] went through safety protocols with JR[Redacted] and Claimant that morning before they all headed to the roof to perform the work. (Hrg. Audio, Day 1, Part 2, 18m -21m)

15. The roof roller rig was still set up on the west side roof where JR[Redacted] and MR[Redacted] had moved it in August. (Id., 19m) Once on the roof, JR[Redacted] secured the ropes, he got into the harness system and Bozeman chair, and he proceeded to clean the windows, while Claimant and DR[Redacted] moved the roof roller rig as needed. Claimant and DR[Redacted] pushed the rig forward while standing on the same side of the rig, pushing in the same direction, with Claimant positioned closest to the parapet wall, and DR[Redacted] next to him on the right side of the rig. (Id., 22m; 35m-39m)

16. Claimant alleges that at some point one of the rig's wheels got tangled in a cable affixed to the parapet wall, and he had to yank the rig by himself to get it unstuck, suggesting this was when he injured his left shoulder. (Hrg. Audio Day 1, Part 2, at 2m) He claimed a lightning rod affixed to the parapet wall was broken during this process.

17. According to DR[Redacted], the rig functioned well that day, she worked next to Claimant the entire time, a wheel never got tangled in the cable, it was not even possible for the wheel to get stuck or tangled in the cable because of how the cable was affixed to the parapet wall, and Claimant never lifted, yanked, nor dragged the rig. (Id., 25m) She said the rig moved easily, as there were two people performing a one-person job. (Id.) She recalled that on two or three occasions the rig wheel closest to the parapet wall rubbed against the wall, and when this occurred, they simply rolled the rig backwards and straightened the wheels. (Id., 39m-41m) She disputed that a lightning rod was broken that day. Consistent with DR[Redacted]' recollection, JR[Redacted] indicated he did not feel any unusual tugs or movements while he was hanging from the harness and Bozeman chair that day, and he did not see a broken lightning rod when he was on the roof that day, including at the end of the day when he helped put the rig away.

18. Claimant did not report an injury to DR[Redacted] that day, nor did he appear injured to her. (Hrg. Audio, Day 1, Part 2, 26m; Hrg Audio Day 2) He also did not appear injured to JR[Redacted] that day. (Hrg Audio Day 1, Part 2, 27m-28m) DR[Redacted] asked Claimant and JR[Redacted]how the project went, and both said it went great, it was super smooth, and it was easy. (Hrg. Audio Day 1, Part 2, 26m-27m) After leaving

work Claimant did not seek medical care, nor did he electronically or telephonically report a claim to DR[Redacted] or DG[Redacted] via text, email or phone. He admitted he did not have left shoulder pain that day. (Hrg. Audio Day 1, Part 2, at 9m-10m)

19. The next day, September 6, 2023, Claimant performed his regular modified duties without incident. He did not appear injured, he did not complain of left shoulder pain, and he did not report an injury. He testified that he did not have left shoulder pain that day either. (Id.) After leaving work that day, Claimant went to his regularly scheduled massage therapy appointment at Medical Massage of the Rockies. (Resp. Ex. I). He did not report a new left shoulder injury or any left shoulder symptoms, and his therapist's findings of "multiple adhesions at scapula bilateral but especially right scapula. Hypertonic traps and levator muscle. Tightness in deltoid and bicep of right arm" were substantially similar to the same therapist's findings at Claimant's August 30, 2023, appointment, six days before the alleged work injury. (Resp. Ex. I, bn 107)

20. On September 7, 2023, Claimant noted experiencing left shoulder pain. (Hrg. Audio Day 1, Part 2 at 9m) After arriving at work he asked DR[Redacted] to talk to him in the hallway, where he told her that he wanted to report a new claim. (Hrg. Audio Day 1, Part 2, 29m) He said he was not sure if his left shoulder was just stiff, or if he pulled something, or if it was from repetitive use. (Id.; see also Resp. Hrg. Exs. K – L) DR[Redacted] had Claimant fill out paperwork, and she filled out two other reports per company protocol. (Hrg. Audio Day 1, Part 2, 30m) She wrote that Claimant reported that his left shoulder injury happened from pushing and pulling the roof roller rig. (Resp. Ex. K) She also said that "[t]here were no witnesses to this injury because nothing was report[ed] until 2 days later, and Employee stated he wasn't sure if he pulled something from moving Roof Rigg (sic) or if it was from the repetitive use of his left arm and it might just be stiff." (Resp. Ex. L) DR[Redacted] documented that she had worked with Claimant on the date of alleged injury, she did not see an injury, Claimant did not report an injury, nor did he report any near misses or safety concerns. (Id. at bn 114) Finally, she wrote: "Employee did not communicate w/ the supervisor of any stiffness, sore muscles, or the feeling he was overworking himself or working in an unsafe manner (sic). So we could have stopped the job and moved on to another task." (Id.)

21. Later that day Claimant was seen at Concentra by Marie Mueller, C-NP. (Resp. Ex. N) He reported that on September 5, 2023, he pushed a rig from above, which involved pushing 700 pounds, the rig became stuck, and they had to pull it to try to move it. (Id., bn 119) He said he developed left shoulder pain, and it felt like his right shoulder felt when he suffered his previous rotator cuff tear. (Id.)

22. On September 22, 2023, Claimant saw Dr. Hewitt, the orthopedic surgeon who repaired his right shoulder, at which time he told Dr. Hewitt that on September 5, 2023 he was cleaning windows when he developed left shoulder pain, but he could not recall a specific trauma. (Resp. Hrg. Ex. G, bn 088) Claimant did not report suffering a pushing, pulling or lifting injury, or experiencing a pop. (Id.)

23. A left shoulder MRI obtained on October 2, 2023, identified tendinosis and attenuation of the previously repaired anterior supraspinatus tendon, an absent proximal head of the bicep tendon, and mild subacromial-subdeltoid bursitis. (Resp. Ex. P)

24. After Dr. Hewitt retired, Claimant was seen by Dr. Stephen Thon for orthopedic evaluations of both shoulders. (Resp. Ex. Q) On October 19, 2023, Claimant told Dr. Thon that on September 5, 2023, he was lifting a 700-pound pallet, which was on wheels, when he "sustained a pop to the left shoulder." (Id., bn 187) In terms of a history, Claimant relayed that he had left shoulder surgery in 2013, but he had fully recovered by September 5, 2023. (Id.) Dr. Thon diagnosed left shoulder rotator cuff tendinosis, subacromial bursitis, and possible early adhesive capsulitis. He then administered a left shoulder joint corticosteroid injection. (Id., bns 189-190)

25. Claimant testified that the left shoulder corticosteroid injection did not provide short- or long-term relief. (Hrg. Audio Day 1, Part 2, 3m-4m) Subsequent medical records also document that Claimant reported receiving no short- or long-term post injection improvement (Resp. Ex. O, bns 135-145; Resp. Hrg, Ex. Q, bns 192-194; Clt. Hrg. Ex. 13, bn 93 – 95), and on December 8, 2023, Dr. Thon also noted that the corticosteroid injection had not helped Claimant's left shoulder issues. (Resp. Ex. Q, bns 192-193) Dr. Thon reviewed the left shoulder MRI, noting there was no evidence of a full thickness rupture, but the attenuation and thinning of the tendon "can" indicate a partial-thickness tear. (Id., bn 194) Dr. Thon did not offer a causation opinion. (Id.) Dr. Thon said Claimant required bilateral shoulder surgeries, noting that Claimant wanted to proceed with right shoulder surgery first. (Id.) The proposed right shoulder surgery was an arthroscopic rotator cuff repair. (Id.)

26. Jill Adams, CRC, CCM, CEAS II completed two job demand assessments (JDAs) at Respondents' request wherein she evaluated Claimant's work duties. (Resp. Hrg. Exs. R and U) Her reports identified the physical demands of Claimant's job tasks, including "window washing/surface cleaning/art display cleaning," and "use of roof rig/runner." (Id.) She documented that at the time of the JDAs Claimant was working with restrictions of no use of his arms above shoulder level. (Resp. Ex. U, bn 232) She also documented the force needed to move the rig was at most 60 pounds, and there were no repetitive use risk factors, or any primary or secondary risk factors. (Id., bns 234-237) She issued her first report on January 24, 2024. (Resp. Ex. R) Claimant disagreed with parts of Ms. Adams' original JDA, as indicated by comments he wrote on a copy of Ms. Adams' report. (Clt. Ex. 15) Ms. Adams then completed a second JDA on May 2, 2024, to address those concerns. (Resp. Ex. U)

27. On March 5, 2024, Claimant was evaluated by Dr. Lawrence Lesnak for a forensic causation evaluation at Respondents' request. (Resp. Ex. S) Dr. Lesnak obtained a history from Claimant, he reviewed available records including prior medical records, he performed psychosocial screening, and he examined Claimant's left shoulder. (Id.; Lesnak Depo., pp. 5-7) Claimant told Dr. Lesnak that he had been in his usual state of health until he developed left shoulder issues on September 5, 2023. (Resp. Ex. S, bn 221) He claimed he was moving a large roof roller machine weighing approximately 500 pounds, he pushed while his supervisor pulled, one of the wheels got stuck and he had to pull/yank the wheel towards him several times to free the wheel for further movement. (Id.)

28. Following his evaluation Dr. Lesnak's impressions were (1) subjective complaints of intermittent/frequent left anterior shoulder pains with some aching sensations involving the left anterior upper arm, (2) subjective complaints without reproducible

objective findings on exam, (3) diffuse pain behaviors, non-physiological findings and poor effort on exam, and (4) left shoulder MRI documentation of rotator cuff tendinosis with an intact anterior supraspinatus tendon repair, mild subacromial-subdeltoid bursitis, without any documented evidence of an acute or subacute injury or trauma related pathology. (Id., bns 221-222) Dr. Lesnak documented that upon psychosocial screening Claimant had a very high level of reported somatic pain complaints which strongly suggested the presence of somatic disorder/somatoform disorder. (Id.) Dr. Lesnak opined that based on his forensic causation evaluation, there was no medical evidence that Clamant sustained any type of injury or developed any type of medical diagnoses involving his left shoulder joint or left shoulder girdle structures from his work activities on September 5, 2023. (Id., bn 224) He explained that Claimant "merely has subjective complaints without any reproducible objective findings to support those complaints. The completely nondiagnostic and nontherapeutic response to the left shoulder corticosteroid injection trial performed by Dr. Thon on 10/19/2024 clearly shows the patient's symptoms are not stemming from any intra-articular left shoulder symptomatic pathology." (emphasis included) (Id.) He noted that patients with an underlying somatoform disorder frequently embellish and exaggerate their symptoms, their subjective complaints are unreliable, and their healthcare providers must rely upon reproducible objective findings to provide accurate diagnoses. (Id.) He concluded that because there was no evidence to support Claimant's allegation that he suffered a left shoulder injury on September 5, 2023, no further medical evaluation, diagnostic testing, nor treatment should be provided for the alleged incident. (Id.)

29. At the time of his IME Dr. Lesnak was not aware of Claimant's alternative "overcompensation" for right shoulder injury causation theory, but he was advised of that theory prior to his deposition testimony. (Lesnak Depo., p. 14) Dr. Lesnak said that based on a totality of the evidence, including Claimant's testimony, Claimant's left shoulder symptoms and complaints were not causally related to overuse or overcompensation for his right shoulder claim. (Id., pp. 14-15) This opinion was based in part on the history Claimant provided Dr. Lesnak during the IME, as well as his medical record review.

30. Dr. Lesnak indicated that identifying a correct diagnosis is critical to a forensic causation opinion. (Id., p. 21, lines 22-25, p. 22, line 1) With respect to Claimant's left shoulder complaints, Dr. Lesnak explained in detail the significance of the psychosocial screening results in rendering a correct diagnosis. (Id., pp. 22-24) The left shoulder MRI was also important here, and he noted that Claimant's left shoulder MRI failed to identify any acute or subacute rotator cuff issues, or any new pathology. He noted that neither the radiologist who read the MRI, nor Dr. Thon who re-read the MRI, identified anything consistent with an acute or new injury. (Id., pp. 24 - 28) Finally, he explained in detail the significance of Claimant's lack of response to Dr. Thon's left shoulder injection when rendering a correct diagnosis. (Id., pp. 29 – 32)

31. With respect to diagnosis, Dr. Lesnak opined Claimant "has subjective complaints of pain and aching sensations, but there is no medical evidence to support that he has any diagnoses responsible for those complaints pertaining to his left shoulder. So he has MRI findings of prior surgeries, some chronic tendinosis, chronic inflammation, but no – but nothing on exam or from the medical records to provide a diagnoses other

than his subjective complaints of pain and aching." (Id., p. 32, lines 20-25, p. 33, lines 1-10) Dr. Lesnak then readdressed his causation opinion with respect to Claimant's subjective complaints, opining that there is no medical evidence to support that Claimant's left shoulder symptoms are in any way related to the incident of September 5, 2023. (Id., p. 33, lines 16-25, p. 34, lines 1-4)

32. Finally, Dr. Lesnak was asked whether the left shoulder surgery recommended in Dr. Thon's December 8, 2023, report is reasonable and necessary, irrespective of causation. Dr. Lesnak opined that any left shoulder surgery is not reasonable and necessary, explaining "[m]y opinion is that based on the MRI findings that shows some chronic tendinosis, you know, previous rotator cuff repair without any full-thickness rotator cuff tears or new pathology, a completely nondiagnostic response to a steroid injection with anesthetic at the left shoulder, and based on his very high level of reported somatic pain complaints, and no reproducible objective findings on exam, then there is no medical evidence to support that regardless of causality, that he is a candidate for any type of left shoulder surgery." (Id., p. 37, lines 3-23) Dr. Lesnak's opinions were based on a comprehensive forensic causation evaluation, including a thorough review of the evidence, and are credible and persuasive.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility

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

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable left shoulder injury from moving a roof roller rig on September 5, 2023, (W.C. No. 5-258-431-003).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A 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); *Enriquez v.* Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

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); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 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. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Off.,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

In this case, Claimant failed to carry his burden of proof by a preponderance of the evidence that he suffered a left shoulder work injury from his work duties on September 5, 2023. Claimant testified consistent with only one of the three theories he reported to

Employer on September 7, 2023, alleging his left shoulder stems from moving the roof roller rig on a specific date, September 5, 2023. He did not testify that his shoulder issues were from overuse, or that his shoulder was just stiff. Regardless, the great weight of evidence fails to support his claim that a rig moving accident or incident occurred on September 5, 2023, yet alone any such accident or incident lead to a left shoulder injury and need for medical treatment.

As found, Claimant has a long history of left shoulder issues, including a 2013 work related left shoulder injury requiring surgery. That work injury eventually resulted in a 15% left upper extremity permanent impairment rating in 2020, and Claimant's left shoulder was included in the settlement he entered on July 15, 2022. Claimant had preexisting left shoulder issues.

On September 5, 2023, Claimant's job task primarily involved pushing a roof roller rig with the help of a co-worker. The roof roller rig required at most 60 pounds of force to move, a force he shared with his supervisor. Claimant now claims he injured his left shoulder yanking a wheel of the rig several times by himself after it became tangled in a cable affixed to a parapet wall. To support his claim that this event occurred he also claims he broke a lightning rod affixed to the parapet wall in the process of untangling the wheel from the cable. Claimant's claim is not credible, and numerous facts strongly weigh against Claimant's claim that he injured his left shoulder yanking the rig wheel several times to get it unstuck that day:

- Claimant's supervisor who worked next to Claimant the entire day credibly testified that the rig wheel never became tangled in the cable, nor could it become tangled in the cable due to how the cable was affixed to the wall.
- Claimant's supervisor credibly testified that Claimant never yanked the rig wheel, yet alone yanked it several times to get it unstuck.
- Claimant's co-worker who was in the Bozeman chair at the time Claimant allegedly repeatedly yanked on the wheel credibly testified that he did not experience any unusual movement while in the Bozeman chair that day.
- Claimant's supervisor credibly testified that a lightning rod was not broken by Claimant or the rig while on the roof that day. Claimant's co-worker did not notice a broken lightning rod either.
- Claimant did not appear to have a left shoulder injury that day to his supervisor, or his co-worker, both of whom he worked with all day that day.
- Claimant did not report a claim to his supervisor while he was at work that day, nor did he report a claim after leaving work, despite being repeatedly trained of the importance to report any work injury no matter how small immediately.
- At the end of his shift on the date of alleged injury Claimant told his supervisor that everything went super smooth and was easy.
- Claimant did not seek medical care for his left shoulder that day.
- Claimant testified that he did not experience left shoulder pain that day.

- Claimant did not appear to have a left shoulder injury when he worked his regular modified duty job the following day, September 6, 2023.
- Claimant did not report a new left shoulder injury to Employer on September 6, 2023.
- Claimant attended his regularly scheduled massage appointment after work on September 6, 2023, and he failed to report a new left shoulder injury.
- Claimant's therapist's exam findings were substantially similar to her findings one week before the alleged date of injury, and did not include left shoulder related findings.
- Claimant did not see medical care for his left shoulder on September 6, 2023.
- On September 7, 2023, when Claimant told his supervisor that his left shoulder was bothering him, he also told that same supervisor he was not sure whether his left shoulder was injured pushing the rig, or from repetitive motion, or if it was just stiff.
- Thereafter, Claimant repeatedly provided different stories of what happened to multiple evaluations, including Ms. Mueller, Dr. Hewitt, Dr. Thon, and Dr. Lesnak.

Claimant's inability to provide a consistent mechanism of injury, and Claimant's delayed onset of his left shoulder complaints, refute his claim that he sustained an acute left injury from yanking a rig wheel on September 5, 2023. Additionally, there is no credible objective medical evidence that Claimant sustained an acute traumatic left shoulder injury that day. Dr. Lesnak, who performed a psychosocial screen, determined Claimant has a somatoform disorder. As Dr. Lesnak explained, patients with this disorder frequently embellish and exaggerate their symptoms, their subjective complaints are unreliable, and their healthcare providers must rely upon reproducible objective findings to provide accurate diagnoses. And according to Dr. Lesnak, whose testimony and opinions the ALJ credits, there were no reproducible objective findings in this case. Claimant's left shoulder MRI obtained less than a month after the date of alleged injury failed to identify any new or acute damage. Moreover, Claimant's subsequent left shoulder corticosteroid injection was nondiagnostic.

Dr. Lesnak performed a comprehensive forensic causation evaluation. He credibly explained that Claimant has subjective complaints without reproducible objective findings on exam, with diffuse pain behaviors, non-physiological findings and poor effort on exam. He noted that Claimant's left shoulder MRI documented rotator cuff tendinosis with an intact anterior supraspinatus tendon repair, mild subacromial-subdeltoid bursitis, and no evidence of an acute or subacute injury or trauma related pathology.

Dr. Lesnak's ultimate opinion is that based on his causation evaluation, there is no credible medical evidence that Clamant sustained any type of injury or developed any type of medical diagnosis involving his left shoulder joint or left shoulder girdle structures from his work activities on September 5, 2023, and that Claimant has only subjective complaints. He concluded that because there is no evidence to support Claimant's allegation that he suffered a left shoulder injury on September 5, 2023, no further medical

evaluation, diagnostic testing, or treatment should be provided for the alleged incident. Dr. Lesnak is the only medical provider to review Claimant's complete prior medical records, Claimant's two JDAs, and Claimant's complete post-date of injury records. To the extent any other provider addressed causation, they appear to have done so based upon incomplete and/or inaccurate histories, and without reviewing and/or understanding Claimant's history. On the other hand, Dr. Lesnak's opinions are consistent with and supported by the Claimant's medical records and are credible and persuasive.

Based on the totality of the evidence, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered a compensable work injury from his work activities on September 5, 2023.

II. Whether Claimant established by a preponderance of the evidence that his left shoulder condition is the result of overuse/overcompensation related to his right shoulder injury claim (W.C. No. 5-218-431-003).

The claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). Moreover, 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); *Enriquez v.* Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

In this case, Claimant also failed to carry his burden to prove by a preponderance of the evidence that his left shoulder symptoms and any need for left shoulder medical care are related to his right shoulder claim under an overcompensation or overuse theory. Claimant did not testify consistently with this alternative theory, his medical history does not support this theory, and there are no credible and persuasive medical opinions in support of this theory.

Claimant has a history of left shoulder issues from his 2013 claim, he had left shoulder surgery in 2014, he was in care for his 2013 claim for more than seven years, he received a permanent left shoulder impairment rating in 2020, and he settled his left shoulder claim in July 2022, with specific reference in his settlement documents to his claim involving a left shoulder sprain/strain, a left rotator cuff tear, bicep tenodesis, and rotator cuff and decompression surgery.

Claimant received medical care for his right shoulder claim between July 15, 2022, and September 5, 2023, but he did not report new or worsening left shoulder issues to his providers during that period. Employer confirmed Claimant had Employer's easiest job duties after he returned to work following his right shoulder surgery in November 2022, and Claimant did not report any left shoulder issues, injuries, aggravations or symptoms to Employer prior to September 5, 2023. Logically if Claimant truly injured or aggravated his chronic left shoulder issues from overuse or overcompensation for his right shoulder,

he would have told his medical providers about his new issue, and/or reported new issues to Employer. He did neither.

Moreover, none of the medical providers who evaluated Claimant after September 5, 2023, have credibly and persuasively related his left shoulder issues to his right shoulder claim under an overcompensation or overuse theory. Claimant told Dr. Thon that he had fully recovered from his prior left shoulder surgery prior to September 5, 2023, and he told Dr. Lesnak that his left shoulder was in its usual state of health before September 5, 2023. These reported histories weigh against Claimant's overuse theory. Finally, Dr. Lesnak, who performed a forensic causation evaluation, credibly and persuasively concluded that Claimant's left shoulder condition was neither aggravated nor accelerated by overcompensating for his right shoulder injury.

In summary, Claimant failed to provide credible and persuasive medical opinions, medical evidence, or lay evidence supporting his theory that his left shoulder symptoms and medical needs are causally related to his right shoulder claim. Dr. Lesnak persuasively opined that Claimant's subjective left shoulder complaints are not related to overcompensation for Claimant's right shoulder issues. Claimant failed to meet his burden of proof, and his request for an order relating his left shoulder issues to his right shoulder is denied and dismissed.

III. If Claimant proved his left shoulder condition is related to one of his two claims, did he prove by a preponderance of the evidence that left shoulder surgery recommended by Dr. Thon is reasonable and necessary medical care.

Based on the prior findings and conclusions, this issue is moot.

ORDER

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

1. Claimant failed to prove by a preponderance of the evidence he sustained a compensable left shoulder injury on September 5, 2023. Claimant's claim for compensation under W.C. No. 5-258-682-001 is denied and dismissed.
2. Claimant failed to prove by a preponderance of the evidence that his left shoulder issues, and his alleged need for left shoulder surgery, are causally related to his right shoulder claim (W.C. No. 5-218-431-003) from overcompensation/overuse. Claimant's claim for left shoulder related medical benefits under that claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 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: October 23, 2024

s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-250-393-002

ISSUES

- Did Claimant prove he suffered a compensable injury in the course and scope of his employment?
- Did Respondents prove Claimant is an independent contractor?
- Medical benefits, including authorized provider.
- Average weekly wage.
- Temporary total disability (TTD) benefits.

FINDINGS OF FACT

1. Employer manufactures and sells residential gutter protection systems. Claimant worked for Employer as a sales representative. The job entails meeting with prospective customers at their home, inspecting their existing gutter systems and surrounding areas of the home, and convincing the customer to purchase the product.

2. On June 28, 2023, Claimant severely fractured his left ankle when he fell from a ladder while attempting to photograph a completed gutter system installation. The customer was dissatisfied with the quality of the installation performed by Employer and had contacted Claimant about a refund. The customer questioned Claimant about the installation methods and asked him to come to the property to inspect the work. The customer lived near Claimant's first sales appointment of the day, and Claimant went to the customer's home on his way to the first appointment.

3. Claimant could not get a good angle to photograph the customer's gutters from the ground using his Employer-supplied selfie-stick, so he climbed on a ladder for a better vantage point. The ladder was unstable and collapsed, causing Claimant to fall to the ground.

4. Claimant suffered a severe open fracture of his left ankle. EMTs were summoned and transported Claimant by ambulance to the Poudre Valley Hospital in Fort Collins. He underwent emergency surgery, including an open reduction and external fixation. He had another surgery approximately two weeks later to remove the external fixator and implant internal fixation hardware. Unfortunately, Claimant's post-operative recovery was compromised by a MRSA infection. He ultimately had multiple surgeries and extensive wound care related to the injury.

5. Claimant was nonweightbearing for almost six months and was off work for almost a year.

6. Claimant proved he was performing services for Employer for pay at the time of his accident. His eligibility for medical and temporary disability benefits are relatively obvious if this claim is compensable. The primary questions are whether Claimant was an independent contractor. If he was not an independent contractor, there is a secondary question of whether he was within the course and scope of his employment when the injury occurred.

7. Claimant started working for Employer in June 2021, after responding to a job listing on [Redacted, hereinafter CT]. Claimant previously worked in the oil and gas industry and had no prior experience in the gutter or roofing business.

8. Claimant was interviewed and offered the position by Employer's Loveland office operations manager, [Redacted, hereinafter MT]. Claimant was given "a stack of paperwork" to complete, including a "[Redacted, hereinafter LT] Independent Contractor Agreement Direct Seller." MT[Redacted] advised Claimant that Employer considers its sales representatives to be independent contractors, and Claimant was required to sign the form before he would be given any leads. The agreement included a provision that, "Direct Seller [i.e., Claimant] enters into this Agreement, and shall remain without interruption through the term of this Agreement, an independent contractor." The Agreement further provided that Employer would pay no taxes on Claimant's behalf, and "Direct Seller acknowledges and agrees that it must comply with all applicable workers compensation insurance laws at its sole responsibility and expense. . . . The company will not obtain workers' compensation benefits on behalf of Direct Seller." These provisions are the same font size and style as the other sections of the contract. Claimant signed the independent contractor agreement along with the other paperwork he was given.

9. Employer has very specific protocols and procedures it expects its sales representatives to follow. To that end, Employer provided extensive training and testing before Claimant could start work. Claimant was given a 23-page Basic Training manual, a 177-page Sales Training Manual, and a 77-page pitch book. MT[Redacted] advised Claimant he needed to know Employer's 12-step sales program "forwards and backwards," and follow it closely.[1] Claimant completed a three-day training program, and shadowed MT[Redacted] at a sales appointment before he was allowed work leads himself.

10. Employer provided Claimant all materials to use during sales meetings, including measuring sheets, leave-behind folders with a space for his business card, pricing pages, and brochures all bearing the Employer's logo. He was also given a "carry-on" style bag with product samples he was required to use during demonstrations at sales meetings. [Redacted, hereinafter ML] described these items as the fundamental "tools" of Claimant's job.

[1] On one occasion, MT[Redacted] told the sales representatives that, "If I call at 3am and ask what the 12 steps are, they better be rattled off immediately."

11. Employer gave Claimant shirts and an ID badge with Employer's name and logo, which he was expected to wear at sales appointments with customers. A text message from Claimant's manager instructed sales representatives to "please be sure to be dressed appropriately in LT[Redacted] attire and on time" for an upcoming meeting.

12. Employer provided Claimant with business cards bearing Employer's logo and Claimant's cell phone number. The business cards referenced no separate business operated by Claimant and gave no indication that Claimant was anything other than Employer's employee.

13. Employer gave Claimant a selfie stick for taking photographs of customers' gutters. Claimant's manager stated, "I provide all of you with a new selfie stick so we have 0 excuse of not taking pictures inside the gutters. Still not receiving those pictures. Is it we don't care, forgot, or just lazy? I need a picture of the front and back of home and a picture of inside the gutter every single time. If we are replacing gutters I need to know if there is a drip edge or flashing on the home. No excuses."

14. Claimant was required to attend meetings at Employer's office three Fridays each month. During the meetings, sales representatives received additional training including reviewing the pitch books, role playing with supervisors, practicing the 12-step program, and being tested on the sales methodology. Attendance at the meetings was mandatory. A text message from Claimant's manager states: "Meeting tomorrow morning! I expect all of you to be able to answer all of the questions on the test! Please don't embarrass yourself." Another message admonished, "Do not be late to my meetings, do not be late to my training. Do not be late to my leads that I assign you."

15. Claimant was expected to be available at all times and was instructed to "drop what you are doing and respond immediately" to any call or text from his manager. Claimant's manager told the sales reps she would only give leads to the reps "who are available always."

16. Employer controlled Claimant's daily schedule by booking all sales appointments with potential customers. Customers generally contacted Employer by phone or the internet and were offered a slate of appointment times from which to choose. Appointments were scheduled at customers' homes Monday through Friday at 9:00 AM, 11:00 AM, 1:00 PM, 3:00 PM, 5:00 PM, and 7:00 PM, and on Saturdays at 9:00 AM, 11:00 AM, 1:00 PM, and 3:00 PM. Sales representatives were typically notified of their assigned leads the evening before the appointments, except that Friday leads were generally given out after the weekly sales meeting, to enforce attendance. Claimant was also frequently assigned "same day" leads, with similar expectations regarding his availability despite short notice.

17. Employer had strict requirements about when sales representatives could arrive at each sales appointment. Arriving early or late for appointments was not allowed. ML[Redacted] underscored Employer's attitude toward sales representatives who failed to comply with its mandates in a text message that stated, "These are not your leads at all, you don't pay a dime for them. You will either follow the process or I shit you not I will

remove your name from the crm and you will never work in another LT[Redacted] location in the country. If you think I'm playing or you think you are special and have a sense of entitlement. Try me."

18. Employer terminated at least one sales representative for failing to attend an appointment with a lead. The following text exchange between Claimant and his manager confirms the nature of the relationship between Employer and the sales reps:

> Claimant: What happened to [Redacted, hereinafter AX]
> Manager: He didn't go to a lead in Fraser
> Claimant: Wow
> Manager: Yepppp
> Claimant: **Did he think he was really a 1099 employee and could go where he wanted when he wanted**
> Manager: I guess… who knows I hate peoples
> Claimant: That's what homecraft does and that's why they have no sales. (Emphasis added).

19. A handout prepared by Claimant's manager outlining her "Expectations" illustrates the high degree of control Employer exerted over its sales representatives. It states,

- Be **PROFESSIONAL** at all times. (I'm not interested in laziness or excuses)
- You will be measured to **my standard, not yours**.
- Hit 100% of the leads assigned to you at the scheduled time. (Not earlier. Not later.)
- Get to factory cost on every demo no sale in the house. **NO EXCEPTIONS!**
- Always follow the system. Inspection with the customer outside, company story, product demo, and sink demo done 100% of the time. There are no excuses not to do your job.
- All sales are sent to everyone **immediately** at the kitchen table. Not when you get home, or after your next appointment, or when you feel like it. **RIGHT NOW!**
- All sales are sent to me immediately from the driveway. Paperwork must be filled out completely with pictures.
- Minimum of 4-6 pictures on all paperwork, sale or no sale.
- Vacation or any requested time off needs to be submitted to me 2 weeks prior to the date.
- Be **prepared**. Be **enthusiastic**. **Follow the system**.
- *If you adapt to what we do, you will make a ton of money and you will love this job. If you don't you won't last long. Period. This is a Billion Dollar Sales System. Tried and True. Absolutely DO NOT reinvent the wheel. You're not as good as the system. Neither am I.*

20. Claimant was paid on commission. He had no separate business and was paid weekly by direct deposit to his personal checking account. No taxes were deducted from Claimant's pay.

21. Employer had the right to unilaterally change the terms of Claimant's commission structure "in its sole discretion."

22. Employer had the right to terminate Claimant at any time, and threats of termination or withholding leads were used to enforce compliance with Employer's methods and procedures.

23. Employer provided its sales representatives access to group health insurance through a purchasing cooperative. Although the sales representatives paid their own premiums, Employer paid for them to join the co-op.

24. Claimant worked exclusively for Employer for from the date of hire until the accident. Even though Claimant's contact did not explicitly prohibit working elsewhere, ML[Redacted] acknowledged that Employer did not want sales representatives "moonlighting" for a competitor and sharing proprietary information.

25. Employer failed to prove Claimant was an independent contractor. The persuasive evidence shows Claimant was not customarily engaged in an independent trade or business and was not free from control and direction in the performance of his work.

26. Employer argues in the alternative that Claimant's injury occurred outside the scope of his employment because he did not follow the proper procedure for dealing with customer service issues. ML[Redacted] testified that Employer wants customers to call the 1-800 number for any post-sale issues. Employer has a dedicated service department and tracks several aspects of customer service calls. He testified that if a customer contacts a sales representative, the sales representative should provide the 1-800 number. If that number is not called, there is no way to track service requests in the system. ML[Redacted] tells the operations managers to convey to their sales representatives that customers should call the 1-800 number after the sale. He understands customers have a rapport with the sales representative, but if the problem is not solved, there is no record in Employer's system. Sales representatives are never asked to make service calls or make repairs and cannot generate service tickets.

27. There is no persuasive evidence that Claimant intended to perform any repair work at the customer's property on June 28, 2023. He merely went there to look at the installation and speak with the customer. Claimant's primary motivation was to appease the customer and protect the sale.

28. Claimant had gone to a customer's home to evaluate post-installation concerns on at least one other occasion. Rather than being reprimanded, Claimant was praised in a meeting for "saving the job."

29. Claimant proved the injury occurred in the course and scope of his employment.

30. Claimant proved he suffered a compensable injury on June 28, 2023.

31. Claimant proved the right to select a treating physician passed to him. Claimant's manager went to the hospital after the accident and asked Claimant to complete an injury report. She explained to Claimant that the document was for Employer's records and did not mean that Employer would cover medical treatment. Employer never referred Claimant to a physician despite knowledge of the injury.

32. Claimant proved treatment from the Thompson Valley EMS, the University of Colorado Poudre Valley Hospital, and Orthopaedic & Spine Center of the Rockies was reasonably needed and authorized. Claimant had a severe open fracture that required immediate treatment, including surgery. He required extensive treatment thereafter including multiple surgeries and wound care.

33. Claimant's average weekly wage is $3,504.41. Claimant earned $87,110.01 between January 1, 2023 and June 23, 2023, a period of 174 days. This equates to an AWW of $3,504.41 ($87,110.01 ÷ 174 = $500.63 x 7 = $3,504.41). Two-thirds of the AWW is $2,336.27. which exceeds the maximum compensation rate of $1,228.99 in effect on the date of injury.

34. Claimant proved entitlement to TTD benefits commencing June 28, 2023. Claimant was obviously disabled by the injury, having underwent multiple surgeries and being non-weightbearing for almost six months. Although the record shows some payments from Employer after June 28, 2023, I infer that those payments reflect commissions for sales made before the injury.

35. Claimant returned to work on June 7, 2024. Therefore, his entitlement to TTD benefits ended on June 6, 2024.

CONCLUSIONS OF LAW

A. Claimant was not an independent contractor

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

Claimant proved he was performing services for Employer for pay at the time of his accident. Therefore, he is considered an employee unless Employer proves he was an independent contractor by a preponderance of the evidence. *Stampados v. Colorado D&S Enterprises*, 833 P.2d 815 (Colo. App. 1994).

The Act provides for a rebuttable presumption of independent contractor status if the parties use a contract that meets the requirements of § 8-40-202(2)(b)(IV). Specifically, the document must contain:

> a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers' compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship. All signatures on any such document must be duly notarized.

In this case, Employer cannot rely on the rebuttable presumption set forth in § 8-40-202(2)(b)(IV), because the "Independent Contractor Agreement Direct Seller" document does not contain the required advisements in large, bold-faced, or underlined type. Nor were the parties' signatures on the document notarized.

The Workers' Compensation Act prescribes a balancing test to determine whether an injured worker is an employee or independent contractor. *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998). Section 8-40-202(2)(b)(II) sets forth several factors the General Assembly considers particularly "important" making this determination. *Industrial Claim Appeals Office v. Softrock Geological Services Inc*., 325 P.3d 560, 565 (Colo. 2014).[2] In a true independent contractor relationship, the person or entity for whom services are performed should 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; 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;

[2] Although *Softrock* addressed independent contractor determinations in the context of unemployment insurance, the analysis also applies to workers' compensation claims. *Pella Windows & Doors, Inc. v. Industrial Claim Appeals Office*, 458 P.3d 128 (Colo. App. 2020).

(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.

Other factors may be relevant to the inquiry, including whether the claimant maintained an independent business card, listing, address, or telephone; had a financial investment that created a risk of suffering a loss on the project; used their own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. *Softrock, supra*. No single factor is dispositive, and the determination must be based on the totality of the circumstances. *Id*.

As found, Employer failed to prove Claimant was an independent contractor. First, Claimant was not customarily engaged in an independent trade or business. Claimant has no separate business and Employer paid him personally. Claimant previously worked in the oil and gas industry and had not worked in the gutter or roofing industry before taking the sales position with Employer. Claimant worked exclusively for Employer before his accident and had no other "contracts" with any other gutter-related or roofing-related companies.

Second, Claimant was not free from direction and control. To the contrary, Employer tightly controlled most aspects of Claimant's work. For instance, Employer required Claimant to know and follow incredibly detailed sales protocols. To that end, Employer provided extensive training, including multiple face-to-face sessions, voluminous written materials, testing, and frequent mandatory meetings. Employer provided the materials Claimant was required to use during sales meetings with potential customers, which ML[Redacted] referred to as the "tools" needed for the job. Claimant was expected to wear attire bearing Employer's name and logo. He was given business cards with Employer's name and logo, with no reference to any separate business operated by Claimant. Claimant was expected to be available to Employer "at all times" and was instructed to "drop what you are doing and respond immediately" to any call or text from his manager. Claimant's manager stated she would only give leads to the sales representatives "who are available always." Employer dictated Claimant's daily schedule, with strict requirements about when he could arrive at each property. Claimant risked losing his job if he missed scheduled sales appointments. Employer terminated at least one other sales representative for failing to attend a meeting with a lead. Claimant was required to request time off at least two weeks in advance, but had no guarantee the leave would be approved. Employer retained the right to unilaterally change Claimant's

commission structure at its discretion. Finally, Employer made group health insurance available to Claimant through a purchasing cooperative. As a practical matter, aside from the fact that he was responsible for paying his own taxes and travel expenses, Claimant was functionally indistinguishable from an employee.

B. Claimant's injury occurred in the scope of employment

To receive workers' compensation benefits, a claimant must prove they suffered an injury while "performing service arising out of and in the course of his employment." Section 8-41-301(1)(b). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). There is no presumption that an injury occurring at work during work hours necessarily arises out of employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal nexus between the injury and their employment by a preponderance of the evidence. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant proved his injury occurred in the course and scope of his employment. Claimant received a call from an upset customer who was dissatisfied with the quality of work on the gutter system Employer installed. The customer wanted to cancel the contract but asked Claimant to look at the quality of the installation first. The customer's residence was close to Claimant's first sales appointment of the day, and he agreed to stop by and look. Claimant was merely inspecting the installation to verify the customer's complaints, and there is no persuasive evidence he intended to perform any repair work at the customer's property. Claimant's primary purpose was to placate the customer and prevent losing the sale. Claimant's actions at the time of the injury are reasonably within the scope of employment for a field-based sales representative. In fact, Claimant credibly testified to previous occasions where he had returned to the property of a dissatisfied or concerned customer. Rather than being reprimanded, he was praised in a staff meeting for "saving the job."

C. Medical benefits

The respondents are liable for medical treatment from authorized providers reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The employer has the right to select a treating physician in the first instance. Section 8-43-404(5)(a)(I)(A). The employer must refer the claimant to a physician "forthwith" after receiving notice of an injury, or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

As found, Claimant proved the right to select a treating physician passed to him. Claimant's manager went to the hospital after the accident and asked Claimant to complete an injury report. She explained to Claimant that the document was for

Employer's records and did not mean that Employer would cover medical treatment. Employer never referred Claimant to a physician despite knowledge of the injury.

Claimant proved treatment from the Thompson Valley EMS, the University of Colorado Poudre Valley Hospital, and Orthopaedic & Spine Center of the Rockies was reasonably needed and authorized. Claimant had a severe open fracture that required immediate treatment, including surgery. He required extensive treatment thereafter including multiple surgeries and wound care.

D. Average weekly wage

Section 8-42-102(2) provides that compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). As found, Claimant's AWW is $3,504.41. Two-thirds of the AWW is $2,336.27, which exceeds the maximum compensation rate of $1,228.99 in effect on Claimant's date of injury.

E. Temporary total disability benefits

A claimant is entitled to TTD benefits if the injury caused a disability, the claimant missed more than three regular days from work, and the claimant suffered an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Once commenced, TTD benefits "shall continue" until one of the terminating events enumerated in § 8-42-105(3).

Claimant proved entitlement to TTD benefits commencing June 29, 2023. Claimant was obviously disabled by the injury, having underwent multiple surgeries and being non-weightbearing for almost six months. Although the record shows some payments from Employer after June 28, 2023, I infer that those payments were commissions for sales made before the injury. There is no persuasive evidence of any post-injury work activity to account for those payments. Claimant returned to work with a new employer on June 7, 2024, and was no longer eligible for TTD on that date. Section § 8-42-105(3)(b).

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury arising out of and in the course of his employment on June 28, 2023.

2. Respondents' independent contractor defense is denied and dismissed.

3. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including

Thompson Valley EMS, the University of Colorado Poudre Valley Hospital, and Orthopaedic & Spine Center of the Rockies.

4. Claimant's AWW is $3,504.41.

5. Insurer shall pay Claimant TTD benefits at the rate of $1,228.99 per week, from June 28, 2023 through June 6, 2024.

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

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

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

DATED: October 24, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-142-174-004

ISSUES

- Did Respondents overcome the Division IME determination that the Claimant is not at MMI?

- If so, did Respondents overcome the DIME determination that the Claimant has 27% whole person impairment?

FINDINGS OF FACT

1. Claimant works for Employer as a mechanic. He sustained an admitted low back injury on February 24, 2020. He injured himself using a 3' pipe lever to straighten a bent snowplow mount.

2. A hearing was previously held in the matter before the undersigned Administrative Law Judge. In an order issued on November 22, 2022, the ALJ denied medical treatment for Claimant's hip and groin as unrelated. That order was not appealed. Following that order, Claimant's ATP, Dr. Johnson placed the Claimant at MMI on December 9, 2022 and issued a 30% whole person impairment rating.

3. Respondents requested a Division sponsored IME.

4. The DIME was performed by Dr. Ogden on April 12, 2023. Since Dr. Ogden was not familiar with complications from hip replacements, he conducted medical literature research including research with "UpToDate". Dr. Ogden determined Claimant has not reached MMI and he issued an advisory 27% whole person impairment rating.

5. Specifically, Dr. Ogden determined that Claimant could benefit from chronic pain evaluation and treatment. In accordance with the Chronic Pain Disorder Medical treatment Guideline, he suggested an evaluation by a psychologist or a psychiatrist. He also determined that the pain in Claimant's left hip needs to be addressed. He recommended an evaluation to provide a diagnosis and definitive care. After review of the medical literature, Dr. Ogden determined that the Claimant's L5-S1 fusion caused changes in the hip dynamics. Due to that change, he related the hip to the work injury.

6. Dr. Ogden was unaware that the ALJ had previously determined that the hip was unrelated to the work injury after a hearing on the matter. Dr. Ogden became aware of the Order after the DIME was completed and he was asked about it in his deposition. Dr. Ogden maintained that the hip was related.

7. Respondents filed an Application for Hearing on May 12, 2023 to challenge the determinations of the DIME that the Claimant is not at MMI and the 27% impairment rating.

8. Respondents obtained an IME with Dr. Wallace Larson. In his September 28, 2022 report, Dr. Larson stated that "(a)t this time his left groin pain has not been definitely diagnosed, but is most likely iliopsoas tendinitis either as an idiopathic condition or related to his total hip arthroplasty. . . it is not likely related to his anterior lumbar fusion." Exhibit E, p. 12. Additionally, Dr. Larson opined that Claimant was at MMI for his work related injury. Exhibit E, p. 13.

9. Dr. Larson also testified at hearing. He opined that the iliopsoas tendonitis is not related to the spine surgery that Claimant underwent. He also provided a peer review article (Exhibit G) which is a comprehensive article on iliopsoas tendonitis. It demonstrates that if the acetabular component of the hip replacement extends too far out, it will rub against the iliopsoas tendon causing tendonitis. This suggests that this would be a likely cause of hip pain following a total hip replacement as opposed to back surgery.

10. Dr. Larson also authored a report dated June 29, 2023 wherein he states "Dr. Ogden's opinion regarding the relationship of the patient's hip symptoms to his occupational injury and to his spinal fusion are clearly incorrect." He further states "Lumbar fusion has not been identified as a cause for the development of hip osteoarthritis. That is especially true with a single level lumbar fusion. The reason is that the hip joint normally experiences a large range of motion. A lumbar fusion does not place additional stress on the hip joint that would be a risk factor for development or aggravation of hip osteoarthritis".

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101,*et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony.

Colorado Springs Motors, Ltd. v. Industrial Commission, 441 P.2d 21 (Colo. 1968).

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

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

E. A DIME's findings may only be overcome by clear and convincing evidence. Clear and convincing evidence has been defined as evidence which demonstrates that it is 'highly probable' the DIME's opinion is incorrect. See Qual-Med, Inc., v. ICAO, 961 P.2d 590 (Colo. App. 1998); Metro Moving & Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995).

F. The DIME doctor determined that the Claimant was **not** at MMI due to chronic pain that must be addressed and hip and groin pain. I conclude that Respondents have overcome the determination that the hip and groin pain are causally related to the occupational injury by clear and convincing evidence based on the opinions of Dr. Larson. I conclude that the opinions of Dr. Larson as to the causal relationship to the work injury to be credible and persuasive. I am also persuaded by Dr. Larson's opinion that Claimant's hip pain is likely due to iliopsoas tendonitis rather than Claimant's lumbar surgery. The DIME doctor clearly erred when he opined that Claimant's hip pain is work related. However, the DIME doctor did not clearly err when he determined that the Claimant is not at MMI due to chronic pain due primarily to his back, which is work related.

G. Respondents also challenge the impairment rating for the spine in their proposed order. In light of the determination that the Claimant is not at MMI for his chronic pain, the determination of Claimant's impairment rating is premature.

ORDER

1. The Claimant is at not at MMI due to his chronic pain related to his back.

2. The hip and groin pain are not work related and benefits related to those conditions are denied and dismissed.

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

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

DATED: October 29, 2024

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that, as a result of her March 6, 2013 injury, she is permanently and totally disabled.

STIPULATED FINDINGS OF FACT

1. Claimant is a 73-year-old female who worked for Employer as a housekeeping attendant.

2. Claimant's pre-existing conditions include endocrine disease, hypothyroidism, hyperlipidemia, GERD, musculoskeletal disorder, fibromyalgia, arthritis, high cholesterol, sinusitis, ear trouble, IBS, and headaches.

3. On June 17, 2009, Claimant reported to her primary care physician ("PCP") at Kaiser Permanente that she had an MRI of her head/ears approximately two years prior.

4. On February 9, 2010, PCP records note Claimant saw an ear, nose and throat ("ENT") specialist in 2007. Claimant reported that she wakes up every day with a headache that is gone by 10am for which she sometimes takes Advil. She reported that every day her entire body hurt, complaining that "everything hurts." Claimant reported feeling ear, mouth and nose problems. The PCP noted that Claimant was "Asking to be evaluated for disability – hurts too bad, is too fatigued to do job in housekeeping."

5. On May 19, 2010, Claimant reported complaints of arthritis to her PCP. She reported that she stopped taking arthritis medications because could not sleep and was so tired and got dizzy at work. Claimant complained of pain in her back, hips, knees, ankles, elbows, shoulders and hand. She requested a lung X-ray for tingling and numbness. She was assessed with fibromyalgia.

6. On August 30, 2010, Claimant presented to her PCP reporting "more and more problems." Claimant reported that her right eye teared for two days in the morning and that she had a bit of headache on that eye and could not see the same out of the eye. She further reported severe pain in her neck and head and requested a CT scan or MRI of her head. She was quoted in the medical note as saying, "I want to get SSI and stop working – will you do the disability forms or write a letter to support me stopping working."

7. On December 2, 2011, Claimant reported having problems with her right eye. She reported that every day her vision worsened and that her right eye was blurry. Claimant was taking medication for depression.

8. July 25, 2012, Claimant complained of a stabbing pain in her left ear and ongoing headaches.

9. On March 6, 2013, Claimant sustained an admitted industrial injury when she tripped over a power cord and fell, striking her head on the concrete floor.

10. Claimant was taken to the emergency room at St. Anthony Hospital that same day. She reported falling backwards and hitting her head on the floor. Claimant complained of a slight headache and some neck soreness, but denied loss of consciousness, blurry vision, dizziness and weakness of her extremities. PA Mary Stults noted Claimant was not displaying any signs of symptoms of a concussion at the time. On neurological examination, Claimant was alert and oriented with no focal neurological deficits and was ambulatory with no problems. A CT scan of the head revealed a small to moderate right parietal subgaleal hematoma with no evidence of acute bony or acute intracranial injury, mass lesion, extra-axial fluid collection or acute hemorrhage, or acute ischemia or infarction. Incidental benign right basal ganglia calcification was noted. A cervical spine x-ray revealed facet arthrosis with no evidence of an acute fracture or subluxation. Claimant was diagnosed with closed head injury, subgaleal hematoma, and cervical sprain. She was prescribed Tylenol, discharged from care, and ordered to follow-up with her primary care physician.

11. A Kaiser note dated March 6, 2013 indicates Claimant's daughter called Kaiser from the St. Anthony Hospital emergency room regarding the injury. It was noted Claimant was not having significant symptoms at the time other than a mild headache.

12. Claimant subsequently underwent evaluation and treatment at Concentra. On March 7, 2013, Claimant presented to Matt W Slaton, PA-C with complaints of pain in the head, upper right back, right shoulder and neck. Claimant reported falling backwards and hitting the back of her head and right side. On examination, PA Slaton noted decreased neck range of motion with pain on the posterior occipital temporal area and palpable muscular tenderness bilateral trapezius through the scapular region. Neurologic exam was normal. There was limited range of motion in the trunk. Palpation of the spine was positive for pain at C7-T9 on the right. Cervical range of motion was decreased with pain. A large "goose egg" was noted over the occipital temporal area. PA Slaton gave the following assessment: concussion with no loss of consciousness, contusion of the thorax, trapezius strain, thoracic strain, and cervical strain. He prescribed Claimant Skelaxin and tramadol and removed Claimant from work.

13. Claimant returned to PA Slaton on March 11, 2013 reporting improvement in back pain but continuing stiffness and soreness in her neck. Claimant reported feeling better and that her symptoms were improving. PA Slaton referred Claimant for physical therapy and released Claimant to modified duty with restrictions of no lifting more than 20 lbs., no walking or standing more than 45 minutes per hour, no reaching over shoulder height, and sitting 25% of the time.

14. On March 13, 2013 Employer offered Claimant modified duty within her temporary restrictions.

15. On March 25, 2013 Claimant sought treatment at the emergency department of Lutheran Medical Center with complaints of headaches and dizziness and memory loss. Memory and speech were noted as normal. Claimant was diagnosed with post-concussion syndrome and a cervical strain and referred back to her workers' compensation provider.

16. Later on March 25, 2013 Claimant saw Gary A. Landers, M.D. at Concentra reporting dizzy spells and periods of confusion. A CT scan of the brain with no contrast was obtained. The impression was: 1. No acute intracranial abnormality was detected. No evidence for skull fracture or acute intracranial hemorrhage; and 2. Suspect changes of mild chronic microangiopathic ischemic disease. X-rays of the cervical spine revealed multilevel sclerotic facet arthrosis with no fractures. Dr. Landers assessed post-concussion syndrome and increased Claimant's restrictions to no standing or walking for more than four minutes per hour.

17. A physical therapy note from Concentra dated April 10, 2013 notes Claimant had thus far attended seven sessions. Claimant was reporting throbbing and tingling on the right side of her head, neck pain, and dizziness.

18. On April 11, 2013 Claimant again presented to the emergency department at Lutheran Medical Center with complaints of dizziness. Claimant felt as though the muscle relaxants she was taking might be too strong. Examination of the neck revealed normal range of motion and her head was atraumatic. A CT scan of the head was obtained and compared to the March 25, 2013 CT scan. No significant intracranial abnormalities were noted. The emergency department physician opined Claimant was likely suffering from post-concussion syndrome but may also be feeling dizzy due to muscle relaxers. Claimant was diagnosed with dizziness and dehydration and discharged.

19. On April 12, 2013 Claimant presented to Julie Parsons, M.D. at Concentra with complaints of dizzy spells, increased forgetfulness and emotion, anxiety, depression, and continued head and neck symptoms and balance issues. On examination Dr. Parsons noted an antalgic gait and positive Romberg's test. Dr. Parsons further noted Claimant could not do finger-to-nose without overshooting dramatically, trouble with diadochokinesis, and an inability to walk heel-to-toe.

Dr. Parsons assessed Claimant with a closed head injury, concussion, and cervical strain. She restricted Claimant to working 100% seated duty and instructed Claimant to stop physical therapy. Dr. Parsons referred Claimant to John Burris, M.D., a physical management specialist. Dr. Burris is Level II accredited.

20. Claimant presented to Dr. Burris on May 14, 2013. Regarding the mechanism of injury, Claimant reported striking her back and the back of head on the floor, losing consciousness, and waking up while seated in a chair. Claimant complained of 8/10 throbbing pain and burning sensation throughout her head and neck, dizziness, and difficulty ambulating. Dr. Burris noted Claimant appeared very somatically focused and displayed moderate pain behaviors. On examination, Dr. Burris noted Claimant appeared to be somewhat unsteady on her feet. Her head was atraumatic, and neck displayed a full range of motion. The neurological exam was grossly intact. Dr. Burris diagnosed Claimant with a cervical strain and scalp contusion. He recommended Claimant undergo an ear, nose and throat ("ENT") evaluation to assess her vestibular system, as well as a neurologic evaluation. Claimant's work restrictions of 100% seated work continued.

21. On May 16, 2013, Stanley H. Ginsburg, M.D. performed a neurological Independent Medical Examination ("IME") at the request of Respondents. Dr. Ginsburg is Level II accredited. Claimant reported falling backwards and hitting her head on concrete and being rendered unconscious. Claimant complained of headache on the posterior right with pounding/tingling/burning, neck discomfort, poor balance, and difficulty ambulating. Dr. Ginsburg noted, When I asked the patient to ambulate, she staggered even with casual ambulation and staggered even more prominently when I asked her to tandem or assume a Romberg position. This occurred in a way that would cause her to fall if her balance were not good. I believed that her gait disturbance is, from my observation, not organic.

22. Dr. Ginsburg reviewed Claimant's medical records, including a CT scan of Claimant's brain and cervical spine imaging. He documented that motor examination was unremarkable except for finger-to-nose testing which demonstrated some marked abnormalities that were corrected when Claimant's eyes were open, which he felt was nonorganic. Dr. Ginsburg diagnosed Claimant with a work-related minor closed head injury and a cervical strain with minor radicular symptomatology. He noted that he was unsure if Claimant was rendered unconscious as a result of the fall, so it may be regarded as post-concussion syndrome. He further noted there were complaints of memory issues that were not expressed frequently, so he was unsure of the significance. Dr. Ginsburg concluded that there was no evidence of myelopathic process, and the restriction of Claimant's neck movement was variable and not accompanied by neurological abnormalities on examination with some degree of pain behavior. He opined, "Clearly her gait disturbance is not organically based, according to my observations, but one cannot rule out the possibility she has post-concussion

vertigo, which would probable (sic) ear related rather than brain related. Dr. Ginsburg recommended performing an MRI with careful posterior fossa views. He stated that if the MRI results were negative, he recommended obtaining an opinion from ENT consultant due to Claimant's persistent symptoms and possible consideration of some vestibular therapy. He recommended Claimant continue conservative therapy for her cervical strain.

23. On May 23, 2013, Claimant presented to Level II accredited Alan Lipkin, M.D. for an ENT evaluation. Claimant reported to Dr. Lipkin falling and hitting the right side of her head on the concrete floor and losing consciousness for an unspecified amount of time. Claimant reported that she began noticing dizziness about a week after the incident. She also complained of occasional right-sided ringing tinnitus. On examination, Dr. Lipkin noted Claimant walked using a walker with wide-based station and unsteady without lateralization. Dr. Lipkin performed a series of tests that revealed bilaterally symmetrical sensorineural hearing loss, but concluded that the test findings revealed that it was unlikely Claimant sustained a catastrophic vestibular injury. He diagnosed Claimant with vertigo, tinnitus, dizziness and giddiness, and cerumen impaction. Dr. Lipkin recommended that some additional vestibular testing be completed on a later date and that Claimant return after the testing had been completed.

24. Claimant underwent a neurological evaluation with Level II accredited Eric K. Hammerberg, M.D. on June 20, 2013. Claimant reported losing consciousness during the work incident. Her major symptoms were dizziness and light-headedness. Claimant complained of having trouble walking using a cane and that her head had a hot and burning sensation. Dr. Hammerberg's impression was: post-traumatic headache with cervical strain and post-traumatic vertigo. He recommended Claimant take analgesic medication as needed and continue physical therapy for the cervical spine. He opined that Claimant's major problem at the time appeared to be post-traumatic vertigo and stated he would defer to Dr. Lipkin for further evaluation and treatment in that regard.

25. On June 26, 2013, Claimant underwent a vestibular evaluation by Cara Fiske, Au.D. Dr. Fiske noted the following tests were performed: video onystagmogram; fistula test; brainstem evoked response; electrocochleography; spont nystag test with eccentric gaze fixation; nystag with red; positional nystag test, minimum of 4 positions; with red optokinetic nystag test; biodirectional foveal/peripheral stimulation, with red oscillating tracking test. All testing could not be completed due to Claimant's inability to stand without assistance and her keeping her eyes open. Dr. Fiske noted all gaze, positional and fistula tests were within normal limits. The right Dix-Hallpike was within normal limits, however the left could not be completed due to neck pain. Saccades and pendular tracking were abnormal. Bilateral bithermal air caloric stimulation revealed robust and symmetric labyrinthine function. Claimant was to follow-up with Dr. Lipkin regarding the test results.

26. On July 2, 2013, Claimant saw her PCP Heather Shull, M.D., at Kaiser for an annual exam. Claimant presented without acute complaints. It was noted Claimant stopped taking citalopram and her pain and depression were feeling better.

27. On July 23, 2013, Claimant returned to Dr. Lipkin, who reviewed the recent balance tests. He noted the Brainstem Auditory Evoked Response test and electrocochleography were normal. The electronystagmography was limited testing due to mobility and neck issues. Dr. Lipkin noted that symmetrical calorics and tracking problems could suggest central issues. Audiometrics showed symmetrical sensorineural loss. Dr. Lipkin's assessment continued to be vertigo, tinnitus, dizziness and giddiness, and sensorineural hearing loss. He again opined that it was unlikely Claimant sustained a catastrophic vestibular injury. He noted that if Claimant's problems persisted, the next step would be vestibular rehabilitation/physical therapy.

28. From August 20, 2013, through March 25, 2014, Claimant attended multiple sessions of vestibular rehabilitation/physical therapy at Select Physical therapy. From August 20, 2013, through March 25, 2014, Claimant presented for vestibular rehabilitation/physical therapy for a total of eighteen visits. Rehab/therapy consisted of: Gait Training, Active Assistance Range of Motion Activities, Active Range of Motion Activities, Adaptive Equipment Education, Client Education, Home Exercise Program, Manual Range of Motion Activities, Manual Therapy Techniques, Neuromuscular Re-Education, Passive Range of Motion Activities, Proprioceptive/Closed Kinetic Chain Activities, Soft Tissue Mobilization Techniques, stretching/Flexibility Activities, Therapeutic Activities, and Therapeutic Exercise. The physical therapist noted, "Pt seems to ambulate with less unsteadiness and less need for support when unaware that she is being observed versus requiring contact guard when observed." As of March 25, 2014, Claimant was demonstrating slight improvement with decreased dizziness and improved balance and was discharged from care.

29. Dr. Burris reexamined Claimant on August 27, 2013. He noted that an August 12, 2013 brain MRI was essentially normal, but did identify some nonspecific white matter changes with no evidence of acute abnormalities. MRI of the cervical spine obtained on August 12, 2013, showed some degenerative changes with a small shallow disk protrusion at C6-7, but no clear evidence of foraminal stenosis. Dr. Burris noted that the most recent diagnostic testing was somewhat indeterminate as to why Claimant continued to have the severity of her reported symptoms. He opined that it may be possible Claimant has whiplash syndrome from the work injury, which could attribute much of her complaints, including dizziness. Dr. Burris recommended Claimant undergo an evaluation with an interventional spine specialist and noted she may be a candidate for facet injections or medical branch blocks. He referred Claimant to John T. Sacha, M.D. Dr. Sacha is Level II accredited.

30. Claimant first presented to Dr. Sacha on September 16, 2013. Dr. Sacha noted complaints of right neck pain, right-sided headaches, and mild dizziness. He noted there were no problems with concentration, memory or following directions. On examination, Dr. Sacha documented moderate to severe pain behaviors and a non-physiologic antalgic gait. Dr. Sacha's impression was: cervical facet syndrome with headaches and reactive depression that is multifactorial. He opined there was no evidence of a closed head injury at this point. He agreed with Dr. Burris that Claimant has cervical facet syndrome and dizziness secondary to that, which he noted happens frequently with whiplash syndrome. Dr. Sacha recommended Claimant take antidepressants and undergo a trial of cervical facet injections.

31. At a follow-up evaluation on October 7, 2013, Dr. Sacha noted Claimant decided not to proceed with the facet injections and thus was likely at MMI. He noted moderate pain behaviors and that Claimant's gait was normal when using her cane. Dr. Sacha remarked that Claimant was now seven months into her injury and had less than 10% improvement in her overall symptoms by her own report. Dr. Sacha's final impression was cervical facet syndrome with headaches and dizziness secondary to that. He discharged Claimant from his care and noted facet injections could be performed as maintenance treatment in the event Claimant chose to proceed with the injections at some future point.

32. On October 8, 2013, Claimant saw Dr. Burris and reported improvement with therapy. Dr. Burris noted that Claimant appeared to be responding to change of medicines and conservative measures directed at her neck. Work restrictions were changed to sitting 90% of the time.

33. Dr. Burris placed Claimant at MMI at a follow-up evaluation on November 19,2013. Claimant reported improvement in her symptoms with no new complaints. She continued to note some dizziness when looking up and 3/10 neck pain and mild headaches. Dr. Burris noted, "Dr. Sacha describes (sic) all of her symptoms to cervical facet syndrome and therefore to avoid duplication of impairment, only a cervical spine impairment will be performed." Using the *AMA Guides*, Dr. Burris assigned a total 10% whole person impairment, comprised of 4% impairment under Table 53(II)(B) and 6% for range of motion deficits. He opined Claimant reached MMI as of November 19, 2013 for her work-related neck injury. Permanent work restrictions were assigned to limit overhead activities that cause an extension of the neck and exacerbation of symptoms. Claimant was to sit 25% of the time. As maintenance care, Dr. Burris recommended finalizing her remaining physical therapy sessions, medication management for three to six months, and injections within the next six months if Claimant changed her mind and wished to proceed with the injections. He noted no other maintenance care was otherwise required.
34. On January 9, 2014, Employer provided Claimant with modified duty within her temporary restrictions.

35. On June 5, 2014, Claimant underwent a DIME with Ronald J. Swarsen, M.D. Dr. Swarsen gave the following assessment: trip and fall; closed head injury with concussion without loss of consciousness; dizziness, likely vestibular in origin-partially treated; neck sprain with persistent pain; persistent head pain and point of impact; and symptoms magnification, depression with anxiety. He opined that Claimant was not at MMI with respect to her head and neck injuries. He provided a provisional impairment rating of 24% whole person of the cervical spine (consisting of 21% for range of motion deficits and 4% for cervical specific disorder). He noted he did not provide a provisional mental impairment rating as Claimant was not at MMI and he did not have the applicable records for review. Dr. Swarsen recommended Claimant complete vestibular therapy and undergo a follow-up ENT evaluation. He noted Claimant's symptoms likely included a psychological component that had not yet been addressed comprehensively, and recommended Claimant undergo evaluation with a Spanish-speaking psychologist and at least six to eight sessions of counseling. He further recommended a one-time consultation with an ophthalmologist. Dr. Swarsen noted future medical needs of physical therapy twice a week for two months, medication for the next three to six months, and facet injections in the next six months.

36. On July 21, 2014, Claimant had declined to return to modified duty but was still considered an employee of Employer.

37. On September 16, 2014, Claimant sought treatment at Swedish Medical Center with complaints of dizziness, headaches, unsteady gait and memory loss. CT scans of the head and neck revealed of the head revealed coarse calcification within the inferior aspect of the right basal ganglia with differential diagnosis and atherosclerotic disease without hemodynamically significant stenosis. There was atherosclerotic disease without hemodynamically significant stenosis.

38. On September 29, 2014, Stephen A. Moe, M.D. performed a psychiatric IME at the request of Respondents. Dr. Moe is board certified and Level II accredited. Based on his interview of Claimant and review of Claimant's records, Dr. Moe concluded that Claimant's current complaints suggesting multiple disabling neurological problems could not be explained by the physical injuries from the March 6, 2013 work injury. Dr. Moe explained that the available data was insufficient to either definitively determine or rule out a concussion, but that if Claimant did suffer a concussion, it was at the mildest end of the spectrum of severity, given that the impact did not result in loss of consciousness, and it resulted in no more than a very brief period of a change in her cognitive functioning. Dr. Moe opined that Claimant's injury could not account for the problems to which Claimant attributes her disability. He opined that any probable neck injury was mild and not likely to cause significant pain or a sense of dizziness that persists for 18 months post-injury. He noted that, while vestibulopathy has not been definitively ruled out, if present, it was likely mild.

39. Dr. Moe noted Claimant reported multiple symptoms in the absence of any particular illness or injury, that her subjective experience of symptoms at times involved unusual characteristics, that a number of her pre-injury complaints were similar to those that have been her focus since the work injury, and that Claimant has previously expressed the desire to be declared disabled. He opined that Claimant suffered a mild work-related injury that subsequently grew into widespread symptoms and severe disability, which represented an idiosyncratic, rather than normative, outcome. He opined that a reaction to a return to work and anxiety about her symptoms resulted in the transformation from symptoms that were limited in scope and expected to be time limited to a presentation suggestive of profound disability.

40. Dr. Moe further opined that Claimant does not suffer from a psychiatric disorder manifested in overt depressive or anxiety symptoms. He noted that the contribution of non-injury factors to Claimant's current symptoms and impairment is great. He concluded that Claimant's current complaints are not caused by the work injury and strongly doubted that any interventions are likely to be of benefit so long as Claimant's claim remains unresolved. He disagreed with Dr. Swarsen that Claimant's condition is related to the work injury, opining that her symptoms were largely the product of reversible psychological factors.

41. On November 12, 2014, Douglas C. Scott, M.D. performed an IME at the request of Respondents. He assessed Claimant with a closed heard injury with possible post concussive syndrome; subgaleal hematoma without skull fracture, intracranial hemorrhage, or intracranial space occupying lesion with residual skin sensitivity; cervicothoracic muscle strain; and possible post traumatic vertigo with balance issues. He opined that Dr. Swarsen did not err in finding Claimant was not MMI or in his provisional impairment rating.

42. On November 21-22, 2014 surveillance video was obtained of Claimant.

43. Dr. Sacha reviewed the video surveillance of Claimant as well as Dr. Swarsen's DIME report and issued a report dated April 29, 2015. He noted that on the surveillance video, Claimant had "quite good gait pattern was able to bend and twist without difficulty and hold balance." Dr. Swarsen remarked that Claimant's presentation in the surveillance video was clearly different than when he saw Claimant on April 22, 2015. He concluded, "This patient clearly has a significant nonphysiologic presentation in the office compared to what is viewed on the surveillance video. The patient clearly has no evidence whatsoever of any problems with balance or difficulty standing or walking, and it calls into question many of this patient's complaints." (Id.) He opined that "there is unlikely any organic or objective issues at this point related to this Worker's Compensation claim."

44. On June 11 and June 30, 2015, Claimant presented to Lupe Ledezma, Ph.D. for a Spanish-speaking psychological evaluation, per the referral of Dr. Sacha. Dr.

Ledezma wrote a report dated June 30, 2015. Claimant's chief complaints included depression, anxiety, cognitive issues, and physical symptoms. Dr. Ledezma noted that Claimant was very unsteady and swayed while standing or walking and held onto furniture or walls when walking. She was able to recall 3/3 words on immediate recall. After 30 minutes, she remembered 1/3 of the words with two intrusions. She was unable to perform simple or complex mental calculations. Her judgment abilities and abstraction abilities were poor. Her short-term memory skills were fair, but her mental control skills were poor. She was able to follow simple and multiple-step commands well. Dr. Ledezma further noted that on the physical symptoms scale Claimant scored in the 94th, 97th and 90th percentile indicating that she focuses mainly on her subjective pain complaints and deems them the most limiting factor in her life. Depressive and anxiety scales were also high, showing lack of motivation and fear of further pain. Her dependency score was in the high range. She noted Claimant is pessimistic about her future and feels she is incapable of managing her problems and looks to others for help. She is passive and unassertive. Dr. Ledezma wrote that, of greater concern, is that Claimant may be passive in her approach to her recovery and functioning, leaving it to others to "cure" her. She lacks trust in her providers and does not feel they are acting in her best interest. She noted significant psychological overlay to Claimant's physical issues. Dr. Ledezma diagnosed Claimant with major depression, moderate; generalized anxiety disorder; and psychological factors affecting other medical conditions. She recommended Claimant undergo psychotherapy, continue antidepressant medication, and undergo neuropsychological testing in Spanish to determine the presence of a neurocognitive disorder and provide treatment recommendations.

45. On June 25, 2015, Dr. Sacha issued an addendum after reviewing Claimant's medical records, Dr. Swarsen's DIME report, and video surveillance of Claimant. He opined, "there is unlikely any organic or objective issues at this point related to this Worker's Compensation claim." He agreed that Dr. Burris provided appropriate care at all points. Regarding whether he agreed or disagreed with Dr. Swarsen's DIME conclusion, Dr. Sacha stated "I wholly disagree with Dr. Swarsen, and my guess is that Dr. Swarsen did not have all the medical records or did not pick up that the patient has such a non-physiologic presentation, and he may not have seen the surveillance video on this patient." Dr. Sacha concluded Claimant was at MMI and did not require further medical care, including any further vestibular physical therapy and rehabilitation.

46. Claimant continued to see Dr. Ledezma on July 23, September 1, September 17, and October 8, 2015. She continued to report headaches, dizziness and cognitive issues, with intermittent improvement. Dr. Ledezma continued with her same recommendations.

47. On November 3, 2015, Dr. Hughes performed a follow-up DIME, as Dr. Swarsen had retired in the interim. A Spanish interpreter was present at the evaluation. As part of his evaluation, Dr. Hughes reviewed Claimant's medical records,

including, inter alia, the March 6, 2013 emergency room report, Concentra records, Dr. Lipkin's May 23, 2013 report, the neurological reports of Drs. Ginsburg and Hammerberg, Dr. Burris' reports, Dr. Swarsen's DIME report, Dr. Moe's report, Dr. Scott's report, Dr. Sacha's reports and Dr. Ledezma's June 30 and July 23, 2015 reports. Regarding the mechanism of injury, Claimant reported tripping and falling over computer cables and having progressive symptoms of hearing voices but not being able to see. Claimant continued to report right-sided 4/10 head pain, balance issues, depression and anxiety. Dr. Hughes noted Claimant reported to him having no past history of traumatic injuries, headaches, neurological conditions or depression. He remarked Claimant's history understated the severity of her preexisting conditions, which included active problems of depression, fibromyalgia, and headache disorder.

48. On physical examination, Dr. Hughes noted Claimant had a flat affect and neutral mood but did not exhibit word-finding difficulties, bizarre thought process or flights of ideas. Claimant reported tenderness to palpation over her right temporal head. Regarding the cervical spine, Dr. Hughes noted, There is a rather remarkable amount of discrepancy between informally observed and formally measured cervical spine ranges of motion, with formal measurements being fairly consistent with those obtained by Dr. Swarsen, using dual inclinometers, with cervical spine flexion and extension maximally 32 and 28 degrees, right and left lateral flexion 26 and 25 degrees, right and left rotation of the head and neck 37 and 34 degrees. Informally, I observed full right and left rotation of the head and neck as well as full flexion chin to chest.

49. He further noted bilateral finger-nose testing was intact, and Romberg testing was grossly abnormal with Claimant demonstrably unable to stand without her cane. Under general appearance, Dr. Hughes noted, "She ambulates with a cane in her right hand, lurching back and forth and nearly falling in the clinic. This is quite variable from observed ambulation out to her car, although she had the assistance of a young female who walked with her."

50. Dr. Hughes reviewed surveillance video of Claimant from November 21 and November 22, 2014, noting the video showed ambulation without difficulties and without a cane to mailbox, and ambulation using a cane and then in the store walking briskly without cane while holding onto her cart. He remarked that he did not observe Claimant demonstrating any problems with balance while getting items off shelves and putting them into the cart without use of her cane.

51. Dr. Hughes gave the following assessment: (1) Past medical history of a depressive disorder, on citalopram, as documented in Kaiser notes. (2) Past medical history of headaches. (3) Work-related fall with multiple injuries sustained on March 6, 2013. (4) Closed head injury, secondary to #3, with documented symptoms consistent with a post-concussive syndrome, but without objective evidence of residuals of traumatic brain injury. (5) Cervical spine sprain/strain, resolved. (6) Progressive balance problems of unclear etiology with

psychiatric features that suggested to Dr. Moe that she had aconversion disorder. (7) Hypothyroidism.

52. Noting "[Claimant] presents with a perplexing medical history that contains inconsistencies and non-documentation of persistent organic pathology," Dr. Hughes agreed with Dr. Sacha that residuals of all of Claimant's injuries reached MMI by April 29, 2015. He opined that Claimant's previous cervical spine impairment had resolved, as there was no mention of cervical spine pain in recent medical records, during his interview of Claimant or on Claimant's pain diagram completed for his evaluation. He added, "This is further clouded by rather extreme inconsistencies between informally observed and formally measured cervical spine ranges of motion."

53. Dr. Hughes stated he could not provide a medical explanation for Claimant's progressive balance problems. He wrote, "I agree with Dr. Moe that findings are "bizarre" and perhaps consistent with a conversion disorder. I am not sure if a permanent impairment rating can be assigned for a conversion disorder, as it is virtually indifferentiable in many cases from exaggeration of signs and symptoms for the purpose of secondary gain. I would leave this up to a board-certified psychiatrist to sort out. It does not appear that Dr. Moe felt that [Claimant] had sustained a permanent psychiatric impairment as a result of her injuries of March 6, 2013.

54. Dr. Hughes concluded that Claimant sustained no permanent impairment as a result of the March 6, 2013 work injury. He reiterated that Claimant's headaches and depression were well-documented pre-existing problems, and "I really cannot objectify any changes in her condition that [Claimant] has sustained as a result of her injuries of March 6, 2013." Dr. Hughes stated he agreed with Dr. Ledezma's recommendations for further counseling but explained that the need for such psychological treatment was not attributed to the March 6, 2013 work injury. He noted that although much of Claimant's treatment appeared to be reasonable, it did not appear to be related to Claimant's March 6, 2013 work injury.

55. On November 12, 2015, Respondents filed a Final Admission of Liability (FAL) admitting for $25,186.20 in temporary benefits ending April 28, 2015, but zero percent rating for permanent impairment benefits. Claimant objected to the FAL and applied for a hearing to challenge the DIME.

56. Claimant returned to Dr. Ledezma on December 14, 2015, Ledezma reporting decreased neck pain and stiffness but poor mood and increased depressive symptoms. Claimant feared she would worsen in the near future. Dr. Ledezma continued to recommend neuropsychological and follow-up, pending authorization of continued treatment.

57. Claimant continued vestibular rehabilitation through her personal health insurance with Heather Campbell, P.T. and other therapists. Claimant began treating with PT Campbell on May 5, 2016. Ms. Campbell's impressions included impairment in deceleration of head, adversely affecting gait stability; suggestion of otolithic impairment and central organization impairment; persistent recurrent right head scalp dysesthesia and headache with balance challenges due to co-contraction of neck musculature. Claimant presented for physical therapy on May 12, May 26, June 2, June 6, and June 16, 2016.

58. On September 16, 2016, PT Campbell issued a written report at the request of Claimant's daughter. PT Campbell reviewed records provided to her by Claimant's daughter, as well as Dr. Benson's reports, an IME report of Dr. Moses, and surveillance video of Claimant. She noted that Claimant's findings are consistent with reported head impact injury resulting in balance, oculomotor and processing disorders. She opined that Claimant's significant emotional overlay does not negate the underlying physical and functional impairments. PT Campbell concluded that the four months of physical therapy with her had resulted in improvements in various areas. She opined that Claimant remains impaired in deceleration of head, adversely affecting gait stability, suggesting otolithic impairment and central organization impairment; scalp dysesthesia and headache with balance challenges. PT Campbell recommended continued vestibular rehabilitation therapy. She noted that she observed the surveillance video of Claimant and Claimant's gait pattern and reliance on touch or support from a cane or grocery cart was the same gait pattern she observed in her clinic.

59. On June 9, 2016, Randall Benson, M.D. performed a neurological IME at the request of Claimant. He later issued a report. Dr. Benson reviewed Claimant's medical records and conducted an advanced MRI including Susceptibility Weighted Imaging (SWI), Gradient Echo (GE), Quantitative Diffusion Tensor Imaging (DTI), and Fractional Anisotrophy (FA). Claimant reported issues with memory, depression, increased anxiety, balance issues, light aversion, occasional tinnitus, and sleeping issues. Dr. Benson concluded that Claimant sustained traumatic brain injuries and continues to experience symptoms as a direct result of the work injury. He outlined five specific areas in support of his conclusion:

1) Biomechanical information along with the immediate alteration in sensorium. Dr. Benson summarized initial medical reports which noted complaints of blurry vision, dizziness, cervical spine pain, and memory loss, which he stated were characteristic of TBI.
2) Post-traumatic symptoms, including those that are now permanent. Dr. Benson noted that Claimant endorsed various cognitive, psychological and physical symptoms including, inter alia, lower thought processes, issues with memory and multitasking and focus, fatigue, increased irritation, depression, balance issues, ringing in her ears, changes in vision, and gait disturbances.
3) Neurobehavioral findings on examination. Dr. Benson noted exam findings of decreased cognitive efficiency, mild PTSD, poor balance with retropulsion, and

tremor, along with evidence of right hemisphere damage such as decreased empathy, social interaction and general change in personality. 4) Dr. Perrillo's August 26, 2016 neuropsychological assessment. 5) Neuroimaging. Dr. Benson opined that the combined findings of the imaging showed an acceleration/deceleration-induced closed head injury resulting in diffuse vascular and diffuse axonal injury to the bilateral cerebral hemispheres.

60. On June 23, 2016, Richard J. Perrillo, Ph.D. performed a neuropsychological IME at the request of Claimant. Dr. Perrillo issued a report dated September 19, 2016. Part of the assessment was conducted with an interpreter. Claimant's results were compared with updated "NeuroNorma" norms for Spanish-speaking individuals. Dr. Perrillo diagnosed Claimant with: mild/moderate brain dysfunction and damage with significant changes in white matter affecting efficient brain connectivity and some aspects of prefrontal and frontal functioning consistent with the effects of brain damage and inconsistent with baseline compared to normal brain at Claimant's age. He noted that Claimant gave optimal or adequate effort on neuropsychological measures. Dr. Perrillo opined that Claimant is 100% disabled on both a neuropsychological and psychological level. He explained that loss of consciousness is not a clinical requirement to establish a concussion. Dr. Perrillo opined that the radiological scans as performed by Dr. Benson as well as the previous MRI are positive and consistent with Claimant's functional brain impairment results as revealed by her current neuropsychological test data. He concluded that, by all neuropsychological and neurological standards of definition, Claimant continues to suffer from mild brain damage, which does not appear to be resolving with persisting mild/moderate organic brain dysfunction and changes as evidenced by the objective neuropsychological test results. Dr. Perrillo noted that Claimant's scores showed Claimant has "accelerated aging" with a significant risk for early dementia. He opined that Claimant's brain functioning is worse than the average 70 year-old with normal brain functioning.

61. Dr. Perrillo noted that there was nothing in Claimant's background that would have predicted such cognitive changes other than her brain injuries and the overlapping effects of aging. He further noted that the accident parameters, as well as the current comprehensive examinations and the results from the various scans including DTI as performed by Dr. Benson were consistent with the effects of axonal shearing, axonal bundling and cellular disturbances leading to 'slowness' of response times and information processing speed. Dr. Perrillo opined that Claimant should start with neuroexercise as soon as it is reasonable, as well as psychological intervention for moderate anxiety and depression including PTSD.

62. On August 24, 2016, X.J. Ethan Moses, M.D. performed an IME at the request of Claimant. Claimant reported to Dr. Moses that she fell and struck the right side of head on ground and lost consciousness for maybe 10-15 minutes. She reported that she could hear people around her at the time but could not see

them, and that she could not remember much regarding what happened for the next three hours or so. Claimant complained of 4/10 head pain with burning and tingling sensations, memory loss, blurry vision in the right eye, and a balance disorder. Dr. Moses reviewed medical records, physically examined Claimant and gave Claimant a psychological assessment and functional assessment. His assessment was: head contusion resulting in occipital neuralgia; mild traumatic brain injury resulting in diffuse axonal injury noted on MRI with DTI causing memory loss, vertigo and emotional disturbances; cervical sprain aggravating pre-existing facet arthrosis; and symptom magnification, likely a combination of culturally normative expressions of loss and function, psychological factors adversely affecting recovery, and a pre-existing desire to discontinue working. 64. Dr. Moses opined that, while it was clear some symptom magnification was present, Claimant was inadvertently magnifying her symptoms in order to receive the care she believes she needs. He noted that surveillance video provided clear evidence of Claimant's need for assistance with ambulation at all times and showed Claimant stumbling several times in precisely the same way she stumbled during his evaluation. Dr. Moses agreed with Dr. Ledezma that Claimant is experiencing psychological distress due to physical limitations and pain, which he noted presents a psychological barrier to recovery and is likely heightened by her emotional disturbance due to her traumatic brain injury and possibly compounded by her desire to discontinue working.

63. Regarding the reliance on MRIs with DTI, Dr. Moses noted that the current MTG for traumatic brain injuries do not currently recommend MRIs with DTI to diagnose mild traumatic brain injuries because there were no studies validating their clinical use to differentiate with mild traumatic brain injury patients with cognitive deficits from those without. Dr. Moses noted, however, that the MTG were last revised November 2012, and since that time there have been multiple studies demonstrating the usefulness and effectiveness of MRIs with DTIs in diagnosing and stratifying the severity of mild TBI. He opined that the MRI with DTI performed by Dr. Benson provides significant evidence of the physiological basis for Claimant's reported symptoms. He remarked that the opinions of Dr. Moe and Dr. Hughes may have been different if they had access to these results, and if a neuropsychological evaluation had been accomplished.

64. Dr. Moses concluded that Claimant's current functional deficits are proximately related to the March 6, 2013 work injury. He opined that Claimant likely reached MMI for her aggravated cervical facet arthrosis, unless Claimant desired to undergo the injections previously recommended. He further opined that Claimant was not at MMI for her other conditions and recommended additional evaluation and treatment in form of a consultations with a neuro-ophthalmologist, a physical medicine and rehabilitation specialist with traumatic brain injuries, neuropsychological testing, and a functional capacity evaluation. He assigned a 24% whole person provisional impairment rating consisting of 15% for the cervical spine and 10% for loss of function due to the brain injury.

65. On September 15, 2016, Dr. Benson performed a neurobehavioral evaluation. Claimant reported hitting her head and her first memory being waking up in a chair with people around her. Claimant reported she could not see for the first 4-5 minutes and when her sight returned it was blurry. Dr. Benson noted that his examination revealed decreased cognitive efficiency; mild PTSD; evidence of hemorrhage in an area of brainstem (lack of balance/retropulsion); evidence of R-hemisphere (frontal/parietal) damage (decreased empathy, decreased social interaction/communication, general change in personality); and binocular visual dysfunction caused by the head trauma. He recommended that Claimant undergo a neuro-optometric evaluation and prescription for prism lenses, as well as a trauma protocol MRI.

66. On October 27, 2016, Dr. Benson issued a comprehensive medical report after reviewing Claimant's medical records. Dr. Benson opined that Claimant sustained a traumatic brain injury and continues to experience symptoms as a result of that injury, as evidenced by biomechanical information, post-traumatic symptoms, neurobehavioral findings, neuropsychological findings, and neuroimaging. Regarding biomechanical information, Dr. Benson explained that the medical records documented evidence of symptoms characteristic of a traumatic brain injury including, but not limited to, headache, blurred vision, dizziness, extremity weakness, cervical spine pain and reduced cervical range of motion, a 2 centimeter "goose egg" over the occipital area, and memory loss. He noted Claimant endorsed most cognitive, psychological and physical symptoms consistent with a traumatic brain injury. With respect to neurobehavioral findings. Dr. Benson noted examination findings included decreased cognitive efficiency, mild post-traumatic stress disorder, poor balance with retropulsion, tremor and evidence of right hemisphere(oval/parietal) damage manifested by increased empathy, social interaction/communication in general change in personality. Dr. Benson summarized and relied on Dr. Perrillo's neuropsychological assessment and his own neuroimaging findings.

67. On January 18 and 20, 2017, board certified Jose M. Lafosse, Ph.D. performed a neuropsychological IME at the request of Respondents. Dr. Lafosse issued a report dated February 7, 2017. Dr. Lafosse, a native Spanish-speaker, conducted the IME of Claimant entirely in Spanish. Claimant reported to Dr. Lafosse being rendered unconscious after falling backwards and hitting her head. Claimant complained of memory issues, depression, lack of motivation and socialization, and difficulty sleeping. She reported not having much difficulty with concentration or slower thinking speeds. Physical complaints included headache, dizziness, disequilibrium, neck pain and blurry vision. Claimant advised Dr. Lafosse that she had no difficulties with activities of daily living. Dr. Lafosse reviewed Claimant's records and identified several perceived issues with Dr. Perrillo's June 23, 2016 report. He noted Dr. Perrillo is not board certified in clinical neuropsychology, only used an interpreter for portions of the evaluation, and did not adequately consider Claimant's status as an older Spanish-speaking Latina female from Mexico with only six years of formal education in a very small

farming community school in Mexico. He further noted that Dr. Perrillo provided tests to Claimant in English and had them interpreted by a person rather than using the available testing documents in her native language of Spanish. Further inadequacies noted by Dr. Lafosse included comparing Claimant's test results to individuals with more and better-quality education than Claimant to determine she had lower ability. Dr. Perrillo gave Claimant multiple computer-based tests, requiring the Claimant to respond quickly when she had no previous experience with such technology via computer, gaming system, TV interface or joystick usage.

68. Dr. Lafosse conducted twenty-six tests, all in Spanish. He performed seven performance validity tests, of which Claimant failed all seven. Dr. Lafosse explained that failure of two or three performance validity tests could indicate malingering and lack of effort. Dr. Lafosse noted that 93% of patients with dementia scored higher than Claimant did, which he opined supports the likelihood of malingering. He opined that Claimant's behavior during testing was disingenuous, with a lot of exaggerated shrugging, opening of her hands, facial gestures and confused looks. He noted that Claimant's speech was normal and fluid on the first day of testing but markedly slower and more confused on the second day of testing. Dr. Lafosse concluded that Claimant was clearly not performing to her true capability.

69. Dr. Lafosse noted that on language tests conducted in her native language, Claimant was very slow to respond; however, in her normal daily conversation she did not show any signs of word-finding difficulty, nor did she report any word-finding difficulty in her everyday life, which would be expected with the severely impaired score she received on the examination. Claimant failed to even complete the NeSBHIS Block Design test that required her to manually manipulate blocks to create a particular spatial pattern, however she scored in the average range when performing the test for Dr. Perrillo. Dr. Lafosse noted that, when Claimant was aware he was observing her walking, she leaned on the wall with her hand and walked in a cautious manner. When Claimant was unaware, he was behind her, she appeared to walk normally with a good and rhythmic pace, then when she became aware he was observing her, she began walking more slowly and her movements became more irregular.

70. Dr. Lafosse concluded that Claimant's premorbid level of intellectual ability is estimated to be in the low average range. Within this context, her current level of cognitive functioning is at least within normal limits as compared to Spanish-speaking Latina women of similar age and education. In light of the empirical evidence of underperformance the Claimant normal range performance may well be an underestimate of her actual ability level. The findings from this evaluation are inconsistent with Claimant's numerous cognitive complaints, and in fact, contradict them. Dr. Lafosse concluded that Claimant may have suffered a concussion, but at almost four years since the date of injury, would no longer be suffering symptoms. He stated several factors that could account for Claimant's

prolonged complaints, including depression, somatic symptom disorder, "cognitive and emotional vulnerabilities" mentioned by Dr. Perrillo, pre-existing history of fibromyalgia, iatrogenic effects creating an expectation for prolonged symptomology and litigation. He opined that Claimant demonstrates cognitive functioning within normal limits and at least in the same range as her premorbid cognitive abilities.

71. On July 27, 2017, Dr. Hammerberg issued an addendum report after reviewing additional medical records. Dr. Hammerberg disagreed with the determinations of Drs. Perrillo and Benson. He explained, …Dr. Perrillo attributed all of Claimant's neurological symptoms to a traumatic brain injury, apparently believing that the increased T2 signal in the MRI scans represented axonal sheering rather than chronic microvascular ischemia secondary to the patient's hyperlipidemia; he apparently also believed that Dr. Benson had conclusively documented brain injury on the basis of diffusion tensor imaging (DTI). However, diffusion tensor imaging has not gained wide acceptance in the neurological community because, when it comes to evaluation individual patients in whom mild traumatic brain injury is suspected, it cannot distinguish adequately normal from abnormal. It fact, this case is an excellent example of why DTI studies are not helpful – Dr. Benson has apparently convinced himself that the patient has a traumatic brain injury, when in fact she's merely psychiatrically ill.

72. Dr. Hammerberg noted that DTI can have both false positives and false negative results and that the medical community has not embraced the medical studies outside of a research setting. He opined that none of the requests for additional treatment, including traumatic brain injury therapy, vestibular therapy, imaging, and lifetime maintenance and meds, are reasonable or necessary. Dr. Hammerberg opined Claimant did not suffer a traumatic brain injury, she has returned to her pre-injury condition, and her current complaints are not causally related to the March 6, 2013, work injury. He noted that individuals with traumatic brain injuries have cognitive symptoms immediately and then usually slowly improve, especially when the initial imaging studies are entirely normal. He explained that Claimant, to the contrary, has exhibited progressive worsening of her condition with bizarre highly variable symptoms and findings. Dr. Hammerberg stated that Claimant is at MMI without impairment consistent with the opinion of Dr. Hughes.

73. On October 16, 2017, Dr. Moe issued a supplemental report after reviewing additional records, including Claimant's IME reports and Dr. LaFosse's report, and surveillance video. He opined that the breadth, severity, duration and/or treatment resistance of Claimant's complaints are grossly in excess of what is reasonably ascribed to the injury in question. Dr. Moe explained that such extensive symptomatology argues strongly against a medical explanation and instead to the influence of noninjury factors. He opined that Dr. Benson, Dr. Perrillo and PT Campbell ignore Claimant's transition from one with mid, episodic postural dizziness and a subjective sense of cognitive impairment in the weeks

following the injury to someone who has subsequently reported significant balance problems, a dramatically abnormal gait, and severe cognitive deficits. Dr. Moe pointed out Claimant's inconsistent reporting of information i.e. loss of consciousness and loss of vision. He further noted that Claimant's gait was independently judged to be non-physiological by Drs. Sacha, Ginsburg, himself, Dr. Hughes and Dr. Moses. He also noted that physical therapists commented on various inconsistent behaviors.

74. Dr. Moe explained that DTI research remains at a preliminary research level of understanding, and the papers referenced by Dr. Moses in support of using DTI implicitly or explicitly acknowledge that DTI as applied to concussions remains investigational rather than clinically applicable. Dr. Moe referred to two recent papers that he noted substantiate the reason that DTI is not an accepted diagnostic measure in assessing injured workers in Colorado. Dr. Moe opined that the DTI technique cannot be used diagnostically as of yet, and currently is only an investigational tool with no clinical utility at this time. He stated, In brief, whereas DTI is a sensitive measure for detecting changes in the structure of white matter tracts, the findings are highly nonspecific, insofar as all manner of causes can result in such changes, including non-medical conditions such as depression, PTSD, and low socioeconomic status. Hence the interpretation of positive DTI findings following a possible or confirmed concussion remains to be determined. Dr. Benson has sought to use DTI to detect at-most subtle microscopic structural changes to the axons in the brain ostensibly due to a concussion in the presence of grossly apparent, pre-existing macroscopic axonal damage. Such a mission is impossible.

75. Dr. Moe noted that Claimant's August 12, 2013, September 17, 2014, and June 9, 2016 MRIs were consistent in revealing the presence of white matter hyperintensities and opined that it was probable the brain MRI findings are due to microvascular disease that resulted in grossly-apparent damage of the white matter. He opined that there is no evidence to support Dr. Benson's claim of evidence of hemorrhage in the brain stem. He disagreed with PT Campbell's assessment that Claimant lacked ability to perceive acceleration when she walked, noting that Claimant invariably is able to sense her movement in space and take appropriate corrective actions when she is about to fall. Dr. Moe again opined that Claimant's current complaints were not caused by the work injury. He concluded that Claimant has no incentive to recover as she would then be expected to return to work, and that her symptoms are largely the product of reversible psychological factors.

76. On November 28, 2017, board certified neuroradiologist Eric Nyberg, M.D. performed an independent medical record review at the request of Respondents. Dr. Nyberg concluded that there was no evidence of TBI on the initial CT scan of March 6, 2013, nor on the several subsequent CT scans and conventional MR examinations. He opined that there was no evidence of TBI or diffuse axonal injury (DAI) on subsequent conventional MR imaging performed by Dr. Benson

on June 9, 2016, and that the MR diffusion tensor imaging (DTI) study by Dr. Benson does not demonstrate evidence of TBI or DAI. Dr. Nyberg stated that the points elucidated by Dr. Benson failed to demonstrate evidence of a TBI in general, DAI in particular, and that his conclusion that perceived findings on the DTI to Claimant's fall is misguided. He opined that the methods used by Dr. Benson are seriously misguided, have no support in the scientific literature, and have no basis in clinical practice. He noted that the neuroradiology community has explicitly warned against the misuse and misinterpretation of the DTI data as committed in Dr. Benson's analysis.

77. On July 6, 2018, Dr. Hammerberg issued an addendum report after reviewing Dr. Nyberg's November 28, 2017 report and Dr. Moe's October 16, 2017 report. He agreed with the conclusions of both Dr. Nyberg and Dr. Moe, noting Claimant's presentation is indistinguishable from someone who is malingering. 80. On August 18, 2018, Dr. Nyberg issued a response to Dr. Benson's response regarding his initial opinion. Dr. Nyberg opined that there is no evidence of TBI on either the clinical MRI performed in 2013, or on the MRI performed by Dr. Benson in 2016. He noted that subcortical changes are highly characteristic for changes related to high blood pressure and high cholesterol, both of which Claimant has had for years. Dr. Nyberg explained that DTI will always pick up abnormalities found in a FLAIR image, as DTI magnifies at a greater scale than FLAIR – meaning if it is on the FLAIR it will show in a DTI – but not necessarily the other way around. Dr. Nyberg noted that calcification was evident, but not edema; without both, there is no evidence of a hemorrhage.

78. Surveillance video of Claimant's was taken September 1 to 3, 2019 and was viewed and discussed at hearing. Claimant is observed by the ALJ no longer exhibiting retropulsion in her walk. She exhibits a wide stance when standing or walking. Claimant is observed walking without assistance, shopping by herself for groceries, bending over, looking up, reaching up, and picking up objects. Claimant is observed walking stairs and babysitting. Claimant is observed occasionally using a shopping cart for assistance and on one occasion is accompanied by her cane.

79. PT Campbell testified at hearing on behalf of Claimant as an expert in physical therapy with a specialization in vestibular rehabilitation. She testified that she saw Claimant on 23 occasions, and Claimant saw someone else at the same clinic on 11 more occasions. A Spanish interpreter was present. PT Campbell testified that she did not see evidence that Claimant's vision and motor skills to control eyeballs was evaluated. She acknowledged that Dr. Lipkin performed two tests for the eyes (saccades and smooth pursuit), which were abnormal, but there was no follow-up on Dr. Lipkin's tests. She testified that Dr. Lipkin did not perform a vestibular evoked myogenic potential test – which is a test different from those others administered by Lipkin to test particular function vestibular systems.

80. PT Campbell further testified that Dr. Hughes did not have access to a clinical vestibular testing, gait testing, ocular motor testing and intervention at the time he issued his DIME opinion. She opined that Dr. Hughes erred in failing to have Claimant undergo a neuropsychological evaluation before placing Claimant at MMI. She stated that Claimant's presentation in the November 2014 surveillance video was the same as it was in her clinic. She stated that Claimant's gait presentation is one of the many types of abnormal presentations TBI patients may demonstrate, including retropulsion. She testified that she performed eight tests on Claimant, all industry standard, at which Claimant provided valid effort and provided objective evidence explaining Claimant's gait disorder. She testified that none of the other providers administered the complete battery of tests that she did. PT Campbell opined that her findings are consistent with the reported head impact resulting in balance, oculomotor and processing disorders. 84. PT Campbell stated that Claimant did experience improvement from vestibular rehabilitation, including increased neck range of motion, better response to balance changes, improved gait and walking pattern. She reviewed the September 2019 surveillance and observed Claimant consistently demonstrating a wide base of support, abnormally short stride, swaying. She testified that the video showed Claimant walking unsupported for no longer than about four or five feet and need about 10 meters for comprehensive and useful actual gait analysis. She opined that Claimant did not have proper physical therapy before she began treating Claimant, as Claimant's gait had not changed in three years. She opined that Claimant did not have adequate and consistent physical therapy before being placed at MMI. On cross-examination, PT Campbell acknowledged that Claimant did not have catastrophic loss of vestibular function although she was displaying catastrophic symptoms.

81. Dr. Moses testified at hearing on behalf of Claimant as an expert in occupational medicine. Dr. Moses is Level II accredited, including teaching courses on how to rate neurologic impairment ratings. Dr. Moses disagreed with Dr. Hughes that there is no objective evidence of residuals of a TBI. He testified that the medical records revealed multiple specialists have found organic findings and the DTI MRI showed diffuse axonal injury which provides clear organic physiological evidence for Claimant's symptoms. Dr. Moses explained that, while the current MTG do not recommend DTI MRI for diagnostic purposes, he believes they will in the future based on his review of the medical literature.

82. Dr. Moses opined that Claimant suffered an acceleration/deceleration-induced closed head injury. He testified that Dr. Hughes erred by not having Claimant undergo neuropsychological testing, explaining that the MTG states that a neuropsychological evaluation should occur in such circumstances. Dr. Moses testified that, even if Dr. Hughes was relying on Dr. Moe's statement regarding a conversion disorder, he would still be required to perform neuropsychological testing for a differential diagnosis. Dr. Moses explained that conversion disorder can be assigned an impairment rating, and opined that if the conversion disorder was proximately related to Claimant's work injury it therefore could be rated

under the AMA Guides using the DOWC worksheet that allows physicians to classify what level of impairment a person suffers as a result of a psychiatric disorder. He clarified that he does not believe Claimant has conversion disorder and further treatment would not be helpful for Claimant. Dr. Moses disagreed that the November 2014 surveillance footage showed Claimant walking normally. On cross- examination Dr. Moses testified that Claimant case is atypical in that the normal progression of TBI is "worst first", with the vast majority of symptoms resolving within three days to six weeks, and that very few individuals have residual symptoms beyond that time.

83. Dr. Perrillo testified at hearing on behalf of Claimant as an expert in clinical and neuropsychology. Dr. Perrillo disagreed with Dr. Hughes' determination that there is no objective evidence of residuals of TBI, noting that Dr. Hughes' ultimate determination was inconsistent with Dr. Hughes' prior statement that there are documented symptoms consistent with post-concussion syndrome. Dr. Perrillo testified that the MTG provide that you need to collect neuropsychological data if there is a differential diagnosis and to determine if the work event has affected the individual's memory, spatial relations, processing speed or reaction time. He disagreed with Dr. Hughes' statement that Claimant's balance problems are of unclear etiology. Dr. Perrillo testified that the etiology was clear based on the radiological findings of Dr. Benson and the neuropsychological data. He further disagreed that Claimant has conversion disorder.

84. Dr. Perrillo explained that because there is no normative data from Mexico, used neurotrauma norms from Spain. He testified that he was satisfied that the language difference was not a barrier to proper administration of his tests. Dr. Perrillo testified that he administered multiple validity tests and that there was no evidence of suboptimal effort, malingering, negative or positive impression management or bias. He stated that his testing revealed issues with Claimant's working memory, processing speed and cognitive proficiency, selective attention deficits, simple focus and immediate recall and auditory recall. There were no impairments in fine and gross motor ability or verbal fluency. Dr. Perrillo testified that his neuropsychological test data demonstrates Claimant's brain experienced axonal shearing along with metabolic and cellular imbalances. He remarked that the age of someone who sustains a TBI is important to the outcome, noting that older individuals have less time and capacity to heal. Dr. Perrillo opined that Dr. Benson's DTI results corroborate his neuropsychological findings. He testified that the November 2014 surveillance video shows imbalance, and retropulsion.

85. Dr. Perrillo opined that Dr. Hughes erred because he did not refer Claimant for a neuropsychological evaluation before placing Claimant at MMI. He explained that the MTG state that individuals with a TBI warrant neuropsychological evaluation, and that it is necessary when there is a differential diagnosis, for proper cognitive rehabilitation and to rule out exaggerating or malingering.

86. Dr. Perrillo disagreed with Dr. LaFosse that a Spanish speaker is required to administer the tests. He stated that Dr. LaFosse was incorrect in his assessment that he only used an English language test developed in the United States for English-speakers with at least 12 years of education. He explained that he used tests that assumed an education level of 8 years or less. Dr. Perrillo testified that because Claimant has lived in United States for at least 25 it was more appropriate to use neuronorma norms that he used in his testing. Dr. Perrillo testified that, for at least one test, Dr. Lafosse used an African American norm instead of Caucasian norm, which was inappropriate. He testified that Claimant actually passed two of the seven validity tests given by Dr. Lafosse, and at least three were not internally reliable. Dr. Perrillo explained that there are numerous articles that dispute the theory of "worst first." He opined that both his and Dr. LaFosse neuropsychological evaluation demonstrated cognitive impairment and brain damage. On cross-examination Dr. LaFosse stated that he did not take into consideration that before the work injury Claimant had twice requested that her personal doctors determine her disabled because she did not want to work anymore. He testified that such behavior could fit the definition of malingering.

87. Dr. Benson testified at hearing as expert in functional MRI and DTI MRI and susceptibility weight imaging. Dr. Benson testified that he was able to diagnose Claimant with a TBI based on neurological evaluation alone. Dr. Benson explained that the video he took of Claimant in his office shows Claimant lurch backwards when she stops and when she turns. Claimant was videotaped with her knowledge. He stated Claimant's gait was plodding, which is a typical response to the type of neurological problem in Claimant's case. Dr. Benson testified that his observations of Claimant on surveillance footage were virtually identical to her gait at his examination.

88. Dr. Benson explained that DTI-MRI is an imaging test used to identify alteration in axonal structure and is able to detect microscopic changes in white matter constitution. He testified that standard, conventional MRIs do not identify microscopic changes, but rather visible, macroscopic changes in the structure of the brain. DTI scans look at water diffusion at the microscopic level, which is associated with axonal change, an indicator of brain damage. Dr. Benson opined that the findings on various scans revealed: an acceleration/deceleration-induced closed head injury resulting in diffuse vascular and diffuse axonal injury to the bilateral cerebral hemispheres; diffuse axonal injury; evidence of a deep hemorrhage in the brain in an area called the basal ganglia, which is an area of the brain that is critical for motor function; and significant damage to the right hemisphere of Claimant's brain. He opined that there is objective evidence of permanent residuals due to the TBI suffered by Claimant.

89. Dr. Benson testified that CT scans obtained after the industrial injury will not reveal the same findings of the DTI images because CT scans are not sensitive enough to identify the deep hemorrhage or to alteration in the white matter. Dr. Benson testified that there are clinical manifestations of the injury including loss

of cognitive efficiency, alteration in Claimant's emotional processing, and motor dysfunction. He stated that the objective data obtained from radiological scans demonstrated "three different hits to the center of the brain", a bleed in the basal ganglia, an area of DTI abnormality of the cerebellum right side, and an abnormality in the visual fibers the occipital lobe close to where the Claimant fell. He opined that these three issues resulted in the movement disorder or motor problem that Claimant has. Dr. Benson testified that Clamiant's movement pattern, including retropulsion, was bizarre, but organically based. He testified that he conducted a thorough examination of Claimant in which he found similar findings that were organic, including the cerebellar tremor that she had, one of the right side left side, which is consistent with the ipsilateral (on the same side) lesion that she had in the cerebellum; her gait exam was very internally consistent with no deviation, embellishment, emotion or histrionics; and her eye movements were consistently abnormal, meaning that her right gaze was very abnormal. Dr. Benson opined that Claimant's condition is not consistent with a congenital disorder, early dementia or something other than TBI because clearly Claimant's symptoms began after the work injury, and she was able to work before the injury. He testified that a congenital problem would have manifested earlier in life, and that Claimant does not have a degenerative problem because she is not necessarily getting worse.

90. Dr. Benson testified that his findings correlate with those of Dr. Perrillo. He opined that Dr. Hughes erred by concluding that Claimant's balance problems were of unclear etiology because we know the etiology. He believes that the battery of tests he administered for identification of motor dysfunction were helpful for his diagnosis, and he determined that Claimant had cerebellar problems and that she most likely had a basal ganglia lesion to explain the retropulsion that she had. He stated he did not witness any symptom magnification. Dr. Benson testified that, while the actual course of recovery after a TBI is improved, in the short term many patient's concussions get worse over the ensuing days to even a few weeks. He explained that a pituitary injury and symptoms secondary to a pituitary injury can manifest in the delayed fashion and can be progressive; people with brain injuries often develop maladaptive strategies that can cause problems down the road; and TBIs are associated with ongoing inflammation that accelerates the aging process. Dr. Benson opined that Dr. Hughes erred in is conclusion that there are documented symptoms consistent with a post-concussive syndrome without objective evidence of residuals of TBI, as he and PT Campbell found objective signs and symptoms consistent with an organically based injury. On cross26 examination Dr. Benson acknowledged that Claimant's case is not the norm in terms of expected recovery time, and that if Claimant did not have gait disturbance right after the fall, would not expect her to suddenly develop gait disturbance three years later.

91. Dr. Hammerberg testified at the hearing on behalf of Respondents as a Level II accredited expert in neurology and electromyography. Dr. Hammerberg testified that medical literature establishes DTI should not be used by neurologists to

determine whether someone has suffered from TBI. He explained that Dr. Benson's MRI revealed tiny spots at three different levels of the scan, which are not seen in TBI and are common spots resulting from microvascular ischemia caused by high blood pressure and/or high cholesterol, of which Claimant has a history. Dr. Hammerberg further explained that the calcification evidenced on Claimant's CT scan was pre-existing and chronic and had no bearing on whether there was a TBI. Dr. Hammerberg opined that Claimant did not sustain any brain injury. He testified that Claimant could have a problem with her balance mechanism of the ear, but that Claimant does not truly have a neurological problem causing imbalance. He agreed Claimant's abnormal gait presentation was not organic, which he stated suggests a psychological problem. Dr. Hammerberg offered two possible explanations for Claimant's condition: psychosomatic or malingering, stating that he believes both are occurring. He testified that Claimant's ongoing fear regarding imbalance is not malingering, but that her exaggerated lurching appears to be.

92. Dr. Hammerberg testified that the Select Physical Therapy records indicating Claimant ambulated with less unsteadiness and less need for support when unaware she is being observed was consistent with his opinion in regard to his observations of Claimant's behavior in the September 2019 surveillance video. Dr. Hammerberg also discussed the difference in Claimant's presentation in the surveillance video taken at the store versus taken in Dr. Benson's office, noting the former showed much better ability. Dr. Hammerberg testified that neuropsychological testing would assess the cognitive and emotional problems at the time of testing and that, in the total context of the case where there is no TBI, it would not likely have changed Dr. Hughes' opinion. He opined that Dr. Hughes was not in error for failing to refer Claimant for a neuropsychological evaluation under the MTG because the MTG are merely guidelines. He explained that, while a neuropsychological evaluation may have been helpful prior to the follow-up DIME, it would not be related to the work injury because there was no TBI. 97. Dr. Hammerberg greed with Dr. Hughes that Claimant is at MMI with zero impairment and no need for further treatment as related to the work injury. He testified that Claimant's current conditions are not causally related and that her ongoing issues are the result of a psychiatric illness that is not related to her work injury. He explained that Dr. Hughes only should have deferred for a psychiatric evaluation if the thought the psychiatric problem was caused by the closed head injury, which both Dr. Hughes and Dr. Hammerberg concluded was not related. He testified that Dr. Hughes did defer to a psychiatric evaluation when he incorporated into his own opinion that of Dr. Moe. Dr. Hughes had it as a separate category from the workers' compensation injury indicating it was not related.

93. Dr. Moe testified at hearing on behalf of Respondents as an expert in psychiatry. Dr. Moe explained the concept of "worst first," stating that the clinical course of mild TBI is that symptoms are worse closest to the injury. He testified that this was not the case for Claimant. Dr. Moe testified that, if Claimant does have

conversion disorder, it is not related to the work injury. He explained that preexisting factors and "very idiosyncratic" features of Claimant's presentation are the two overriding reasons why the conversion disorder is not work-related. He opined that Claimant did not sustain a TBI and that Claimant's continuing symptoms are not the result of TBI. Dr. Moe reiterated his opinion that Claimant is at MMI with no impairment. He testified that the collective information at the time of the follow-up DIME indicated more information is not needed to arrive at a conclusion about the reason for Claimant's gait problems. He explained that Dr. Hughes had determined the symptoms were not work related. Dr. Moe testified that it was very clear to him that Dr. Hughes did not believe any additional psychiatric or neurological evaluations were needed as a result of the work injury.

94. On cross-examination, Dr. Moe testified that the most likely cause of Claimant's symptoms is functional neurological symptom disorder, formerly called conversion disorder. He testified that Dr. Hughes could have recommended a neuropsychological evaluation and referred Claimant to a vestibular expert if he so chose. He explained that the mental evaluation worksheet would not be used in this case to rate conversion disorder as it is not work related. He testified that if Dr. Hughes was unable to rate the conversion disorder, could have referred the task out to someone board certified in psychiatry and Level II accredited.

95. Dr. Nyberg testified at the hearing on behalf of Respondents as an expert in neuroradiology. Dr. Nyberg testified that there was no evidence of TBI on the initial CT scan of March 13, 2013, or the several subsequent CT scans and conventional MRIs. He explained that the first CT scan showed abnormalities in the white matter which were chronic and commonly from vascular risk factors. He explained that the abnormalities shown on the DTI were the same abnormalities resulting from the preexisting chronic vascular risk factors, not TBI. Dr. Nyberg testified that calcification was already present as of the first CT scan. He explained that calcification occurs as a result of hemorrhage and takes months to develop, indicating that the calcification was not the result of the work fall. Dr. Nyberg testified that diffused axonal injury (DAI) is an imaging pattern that can be seen in the setting of moderate to severe brain injury and sometimes be seen in the setting of mild TBI as well. He concluded that there was no evidence of brain injury on the imaging studies. He acknowledged on cross-examination that the absence of objective evidence on radiological imaging does not preclude the possibility of a concussion.

96. Dr. LaFosse testified at hearing on behalf of Respondents as an expert in neuropsychology. Regarding Dr. Perrillo's testing, he testified that Dr. Perrillo would have difficulty applying the appropriate tests for the applicable population group because Dr. Perrillo does not read or speak Spanish or know how to conduct the tests that were in Spanish. He opined that Dr. Perrillo should have referred Claimant to a Spanish-speaking neuropsychologist. Dr. LaFosse testified that the tests used by Dr. Perrillo were inappropriate for Claimant

because they were English language tests developed in the United States for evaluating English speakers. Dr. Perrillo stated that, in contrast, the norms he used took into account Claimant's age, gender, level of education and were developed in the border region between Mexico and the United States. He testified that neuropsychology professional standards require that, when evaluating Spanish speaking individuals, that the evaluator be Spanish-speaking and appropriate Spanish norms be used when testing, including testing conducted in Spanish and the test be created for Spanish speakers. He opines that Dr. Perrillo used a completely inappropriate" battery of tests to evaluate Claimant, noting Claimant is from Mexico and had six years of education, whereas Dr. Perrillo's tests were more appropriate for someone from Spain with 13 years of education.

97. Dr. LaFosse testified that Claimant failed all seven of his tests of performance validity, explaining that Claimant did worse on the validity tests than people with dementia and severe brain injuries, which is unexpected for the nature of Claimant's injuries. He testified that Claimant failing all seven validity tests indicate that the likelihood of Claimant's tests being accurate indicators of her level of cognitive functioning is not trustworthy. He opined there was a high probability Claimant was not putting her best efforts forward on the tests. He explained that, generally, two failures indicate that the likelihood of an individual not putting in good effort is higher than 90%, and that three failures indicates about 99%. Dr. LaFosse testified that the kind of responses Claimant provided are scientifically extremely improbable. Dr. LaFosse testified that Dr. Perrillo applied standards from cognitive testing to validity testing.

98. Dr. LaFosse further testified that in one observation, Claimant on the first day of testing had normal cadence and speed of speech fluency, but on the second day she was – speaking much more slowly, much more deliberately, much more cautiously that represented a pretty significant departure from the way she communicated with him on the first day. In another observation of behavior Dr. Lafosse recounted that he and Claimant were walking from the parking lot to his office building – he approached her from behind and saw her walking normally. But then as he caught up to her and said hello, she suddenly started walking in a very awkward manner - suddenly appearing unstable in her gait.

99. Dr. LaFosse opined that Claimant not have a TBI or any cognitive impairment. He stated that there is a possibility Claimant may have had a concussion, but that there is not a significant amount of support for that in the records. On cross examination, Dr. LaFosse testified that neuropsychological evaluation should come as early as possible in cases when there is a differential diagnosis. He agreed with Dr. Hammerberg that it is a good idea as a part of treatment to make referrals for neuropsychological evaluation when there's a question about diagnosis. Dr. LaFosse testified that he does not think there is a diagnosis of

conversion disorder in this case and there is strong empirical basis for the possibility of malingering.

100. Claimant testified at hearing that her neck pain has resolved, but she continues to experience issues with balance. She testified that she uses a cane daily, except when at the grocery store, at which time she utilizes a shopping cart for balance. Claimant stated that she is able to walk straight but feels as though she is being pulled back when she stops. She testified that her balance problem is better now than it was before. Claimant demonstrated walking to the Court – she was observed taking a few steps forward then lurching backwards. She walked with a cane. Claimant testified that her ongoing symptoms include aversion to light, blurry vision, burning pain on the right side of her head, and issues sleeping. Claimant testified that after the work injury she returned to work for two to three weeks but experienced pain in her head which made it difficult to perform her job duties. The claimant stated that she did not intend to stop working before the accident and that she wanted to work until age 65 or 66. She testified that prior to the work injury, was tired at the end of the day due to a lot of work at her job. The claimant testified she babysits her six-year-old grandchild on a daily basis.

101. Claimant's daughter testified at hearing that, prior to the work injury, her mother was more energetic, independent, and capable of doing things she is currently incapable of doing. She testified that her mother has exhibited physical and mental changes, noting that Claimant no empathy regarding her husband's death in January 2015. She testified that, prior to the injury, Claimant did not complain consistently about any physical problems and was not seeking medical care for the year prior for any serious mental or physical condition. She stated that, within a few weeks after the work injury, Claimant to walk with an altered gait, which has continued for several years but improved with PT Campbell's therapy. Her understanding is that her mother signed the resignation letter to receive accrued vacation time as a lump sum payment. She testified that her mother now has to be supervised and cannot be responsible for anything. She believes the Claimant's condition was caused by the work injury.

102. [Redacted, hereinafter HL] was the Human Resources Manager for Employer. HL[Redacted] testified that Claimant was offered modified duty after her work injury. She testified that on July 21, 2014, Claimant declined to return to modified duty, but was still considered an employee of Employer. HL[Redacted] testified that, at that point, Claimant still had the option to return to work performing modified duty, or that Claimant could resign and receive a lump sum payment. She testified that on September 5, 2014, Claimant again declined to return to modified duty and voluntarily resigned from Employer.

103. [Redacted, hereinafter DN] has worked as an investigator for over twenty-one years and is licensed in California and Colorado. He authenticated that he took the surveillance video of Claimant on September 1 to 3, 2019. He testified that he personally observed Claimant taking care of a child; only once having her

cane with her that she did not actually use; and not using a cane to walk in and out of the grocery store.

NON-STIPULATED FINDINGS OF FACT

104. On August 27, 2023, Claimant obtained a report by Douglas Prutting, a vocational rehabilitation expert. In his assessment, Mr. Prutting reviewed Claimant's previous employment as a hospital housekeeper, which required medium physical exertion (as defined by the Dictionary of Occupational Titles). Her job involved frequent physical tasks, including lifting, cleaning, and handling various materials and equipment. Claimant's work history is limited to this role, which she held for over twenty years at Respondent-Employer without any other significant employment experience or formal training. Based on these factors, Mr. Prutting opined that Claimant lacked the skillset for alternative employment, especially given her physical and cognitive impairments.

105. Mr. Prutting relied on the neurobehavioral evaluation by Dr. Randall Benson, which identified Claimant's cognitive and emotional impairments as stemming directly from her TBI. In particular, Mr. Prutting referred to Dr. Benson's opinion that Claimant exhibited significant disability, including cognitive deficits, personality changes, social interaction limitations, and lack of empathy, all of which compound her functional limitations. He also cited Dr. Bensons assessment of Claimant with a 100% disability, citing her reduced balance, gait issues, poor recovery potential without ongoing treatment, and severely limited social abilities due to her mental health status.

106. Ultimately, Mr. Prutting relied on Claimant's age, physical restrictions, language barriers, language limitations, and lack of recent work experience in reaching his conclusions.

107. [Redacted, hereinafter BO] testified at hearing on January 19, 2024. BO[Redacted] testified that she had lived near Claimant most of her life, with the two sharing a home intermittently over the past years. Recently, they lived together from 2020 to 2023, after which BO[Redacted] maintained contact with her mother via telephone.

108. BO[Redacted] testified that Claimant's pre-injury activity level was that of a very busy person and that Claimant was very independent, healthy, and reliable at work. BO[Redacted] testified that Claimant's memory prior to the injury was very good, as Claimant was able to keep track of everything the children needed in addition to what she had at work.

109. BO[Redacted] testified that she would attend the vast majority of medical appointments that Claimant had, providing interpretation. However, BO[Redacted] testified, Claimant's memory and ability to multitask deteriorated after the injury. BO[Redacted] also added that Claimant has difficulty

concentrating, reading, or focusing, impacting her ability to progress in her English language acquisition.

110. In her testimony, BO[Redacted] also described Claimant having to use her cane to walk, though she would use a grocery cart when shopping. She also testified that Claimant began to have a sensitivity to bright lights as well as a decrease in empathy.

111. When asked about Claimant's pre-injury requests for disability determinations, BO[Redacted] testified that the issue of Claimant's desire to pursue Social Security Disability benefits prior to the date of injury never came up in conversation with Claimant.

112. The Court finds BO[Redacted] testimony not credible. BO[Redacted] has a close familial relationship with Claimant, which the Court finds to affect her objectivity. Additionally, her role as the primary interpreter during Claimant's medical appointments raises concerns about impartiality, as she likely influenced the portrayal of her mother's symptoms and limitations. Overall, the Court finds that BO[Redacted] exaggerated Claimant's level of function prior to the date of injury as well as Claimant's level of dysfunction currently, and that BO[Redacted] testimony is generally unreliable.

113. Claimant also Called Douglas Prutting, vocational rehabilitation counselor, to testify at the January 19, 2024 hearing. Mr. Prutting testified that in preparing his report, he did not speak with Claimant personally, but instead spoke with BO[Redacted] .

114. Mr. Prutting testified that it would not be likely that Claimant could obtain or maintain sedentary employment, as those jobs would typically require verbal and written skills or technical skills that Claimant does not have. He cited Claimant's sixth grade education, age, and lack of employment over the past ten years as the reason for Claimant's lack of competitiveness in the job market. He also opined that Claimant's lack of empathy precludes her from being able to babysit.

115. In light of Mr. Prutting's reliance on medical opinions that are, in turn, reliant on bad information provided by Claimant, Mr. Prutting's opinions, as expressed in his report and testimony, are found to be not persuasive or credible.

116. On the second day of hearing in this matter, on February 29, 2024, Claimant testified on her own behalf.

117. Regarding the injury, Claimant testified that she fell, hit her head, and lost consciousness, later waking up with blood on the back of her head. Claimant complained of photophobia, and that she now keeps the lights low around the house and always wears a hat outside to protect her from the sun.

118. Claimant testified that she now lives with her son, that her son takes her to run errands and see her mother, and that her son would sweep and clean around the house. However, Claimant testified that she is able to bathe herself and wash her own laundry, including going up and down the stairs to use the laundry machine. She also testified that she makes her own bed, cooks whatever she eats for breakfast or lunch, and even cooks for her son sometimes too. Claimant denied that she has any problems with household chores or personal hygiene.

119. Claimant testified that she had a up to a sixth-grade education in Mexico and that she understands very little English, and cannot read or write in English. Claimant also testified that she does not have a driver's license and does not use computers.

120. The Court finds that the surveillance footage is consistent with Dr. Sacha's observation in his April 29, 2015 report that Claimant had a "quite good gait pattern was able to bend and twist without difficulty and hold balance." The Court finds Dr. Sacha's observation that Claimant's presentation in the surveillance video was clearly different than when he saw Claimant on April 22, 2015, to be credible.

121. The Court also finds the surveillance to be consistent with Dr. Hughes' observation that the surveillance did not show Claimant "demonstrating any problems with balance while getting items off shelves and putting them into the cart without use of her cane."

122. The Court finds no persuasive evidence of brain imaging supporting a finding of traumatic brain injury in this case.

123. Several medical experts concluded that the imaging studies do not substantiate a TBI diagnosis. Dr. Moe, Dr. Nyberg, and Dr. Hammerberg provided detailed critiques of Dr. Benson's DTI results, which were cited as key evidence supporting TBI by Dr. Benson and Dr. Perrillo. Dr. Moe, Dr. Nyberg, and Dr. Hammerberg emphasized the limitations and lack of clinical acceptance of DTI for diagnosing TBI in individual cases. Dr. Moe argued that DTI, while sensitive to structural changes in white matter, is nonspecific and cannot conclusively distinguish changes caused by TBI from those resulting from other conditions, including microvascular disease, PTSD, or socioeconomic factors. He noted that findings on DTI are highly variable and cannot reliably indicate TBI as they lack diagnostic utility beyond research contexts.

124. Dr. Nyberg, a neuroradiologist, opined that none of Claimant's imaging studies—whether CT scans, standard MRI, or DTI—provided evidence of diffuse axonal injury, a typical TBI marker. He stated that the patterns in Claimant's DTI results were more characteristic of vascular risk factors, such as high blood pressure and hyperlipidemia, rather than traumatic injury.

Additionally, Dr. Nyberg observed calcifications in Claimant's white matter, which were chronic in nature and unrelated to the workplace fall, as they likely developed over time. He emphasized that calcifications would take months to develop, making it improbable they were connected to an acute trauma like Claimant's injury. Dr. Nyberg further noted that the initial March 6, 2013 CT scan did not show evidence of brain hemorrhage, intracranial space-occupying lesions, or other trauma signs, which he argued indicated that the imaging findings were likely incidental and not trauma-related.

125. Dr. Hammerberg supported these conclusions, explaining that while Dr. Benson's DTI scans revealed small white matter abnormalities, they are common findings in patients with microvascular ischemia, often related to age and vascular health. He reasoned that the changes observed in the imaging results were not unique to TBI and are frequently seen in patients with hypertension or high cholesterol, both of which Claimant had. Additionally, Dr. Hammerberg critiqued Dr. Benson's interpretation of the findings as diffuse axonal injury, arguing that such conclusions were speculative given the lack of clear clinical validation for DTI as a diagnostic tool in TBI assessment.

126. The Court finds the opinions of Dr. Moe, Dr. Nyberg, and Dr. Hammerberg, that the imaging did not demonstrate evidence of a traumatic brain injury persuasive.

127. The Court also finds the opinions of Dr. Moe and Dr. Lafosse more credible than those of Dr. Perillo.

128. Drs. Moe and Lafosse provided a more credible analysis by considering Claimant's pre-existing health conditions and background factors, which Dr. Perillo did not fully address. Both doctors gave appropriate weight to Claimant's pre-existing depression, fibromyalgia, and chronic headaches—conditions that existed well before her work injury. Dr. Moe explained that these pre-existing conditions likely contributed to her symptom presentation and were not causally linked to the work injury. He pointed out that longstanding health issues, particularly those related to pain and mental health, support a non-traumatic origin for many of her complaints. In addition, Dr. Lafosse accounted for Claimant's cultural and educational background, emphasizing that her limited education and background as a Spanish speaker could influence both her cognitive performance and comprehension of test instructions. By using norms for Spanish-speaking individuals with lower educational levels, he presented a culturally sensitive evaluation that more accurately reflected her baseline functioning. In contrast, Dr. Perillo relied on neuropsychological norms that did not align with Claimant's educational or cultural background, likely leading to test results that underestimated her abilities.

129. Additionally, Drs. Moe and Lafosse considered Claimant's symptoms across multiple settings and observations. They noted significant inconsistencies in her symptoms that Dr. Perillo did not address. Both Drs. Moe and Lafosse

referenced surveillance footage and observed variability in Claimant's symptoms depending on her awareness of observation. Dr. Moe noted that while she often demonstrated an unsteady gait and apparent balance issues in clinical settings, she was observed walking normally when unaware of being watched, suggesting that her reported symptoms were not consistently organic. In his clinical evaluation, Dr. Lafosse observed similar variability; for instance, he noted that her ambulation improved significantly when she believed she was not being observed. These inconsistent findings were more aligned with symptom exaggeration, supporting the credibility of Drs. Moe's and Lafosse's conclusions.

130. The Court does not find Claimant credible, as her conduct during the course of the claim demonstrated evidence of either exaggerated or fabricated levels of disability.

131. For example, Dr. Lafosse observed a marked difference in Claimant's gait and speech when she knew she was being watched. During one observation, he saw Claimant walking normally from the parking lot until he greeted her; upon realizing his presence, she abruptly began walking awkwardly, showing unsteadiness. Additionally, on the second day of testing, Claimant's speech became slower, more cautious, and notably different from her fluent and faster speech on the first day.

132. Claimant's physical therapist in March 2014 recorded that Claimant ambulated with greater steadiness and less need for support when she was unaware of being observed. Conversely, when she realized she was being observed, she required contact guard assistance, indicating potential exaggeration of her symptoms when aware of observation.

133. Dr. Ginsburg also observed inconsistent behavior on Claimant's part. During Dr. Ginsburg's neurological examination, Claimant exhibited exaggerated gait disturbances, particularly when asked to perform specific tasks like tandem walking or the Romberg position. Dr. Ginsburg noted that these disturbances would have likely caused a fall if her balance were genuinely poor. He concluded that her gait disturbance appeared non-organic and seemed exaggerated during formal testing.

134. The surveillance footage of Claimant was also inconsistent with Claimant's presentation at examinations. In reviewing surveillance video, Drs. Sacha and Hughes observed Claimant displaying a normal gait, bending and twisting without issue, shopping, and walking without using her cane. This presentation contrasted sharply with her in-clinic behaviors, where she reportedly demonstrated significant unsteadiness and balance issues. Dr. Hughes noted that these discrepancies between formal and informal observations questioned the validity of her reported balance difficulties.

135. Given Claimant's well-documented inconsistencies in her presentation depending on whether she believes she is being observed or not casts significant doubt on all medical opinions in the record that rely on Claimant's presentation or subjective reports of her own limitations. The absence of ojective testing establishing the ongoing presence of a traumatic brain injury further cast doubt on Claimant's alleged ongoing disability. Furthermore, given the pre-injury desire to be determined disabled in order to obtain Social Security Disability benefits, there is adequate reason for the Court to find, and the Court does in fact find, that that motive underlies Claimant's exaggeration or fabrication of her level of disability. As such, the Court does not rely on any medical opinions in the record that credit Claimant's self-serving presentation or subjective reports in reaching their conclusions, nor does it find Claimant's testimony credible. In general, the Court credits those opinions of Drs. Ginsburg, Lipkin, Sacha, Moe, Hughes, and Lafosse over those of Drs. Benson, Perillo, and Moses, as well as those of Mr. Prutting and PT Campbell.

136. The Court finds that Claimant has failed to prove by a preponderance of the evidence that she, as a result of her work injury, is unable to earn any wages in the same or other employment. To the contrary, the Court finds that Claimant's inability to earn any wages in the same or other employment, if such inability exists, is solely the result of factors extraneous to Claimant's March 6, 2013 work injury. Therefore, the Court finds that Claimant is not entitled to permanent total disability benefits.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo.App.2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the

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

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

Permanent Total Disability

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

Moreover, "[i]n order to establish that the industrial injury was a significant causative factor, a claimant is required to prove that there was a direct causal relationship between the industrial injury and the [permanent total disability]." *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.*, 21 P.3d 866, 869 (Colo.App.2001); *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo.App.1986).

The Court concludes, as found above, that Claimant has not proved by a preponderance of the evidence that she, as a result of her work injury, is unable to earn any wages in the same or other employment. To the contrary, the Court finds and concludes that Claimant's inability to earn any wages in the same or other employment, if such inability exists, is solely the result of factors extraneous to Claimant's March 6, 2013 work injury, and that Claimant's March 6, 2013 injury did not contribute to Claimant's permanent disability, if any. Therefore, the Court finds and concludes that Claimant is not entitled to permanent total disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by a preponderance of the evidence that, as a result of her work injury, she is permanently and totally disabled.

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: October 29, 2024.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-880-583

ISSUES

I. Whether Claimant proved by a preponderance of the evidence her settlement should be reopened on the grounds of fraud.

II. Whether Claimant proved by a preponderance of the evidence penalties should be imposed against Respondent.

III. Whether Respondent proved by a preponderance of the evidence Claimant's request to reopen her settlement is barred by the equitable doctrine of laches.

PROCEDURAL HISTORY

On October 2, 2023, Claimant filed an Application for Hearing in W.C. No. 4-880-583, listing the date of injury as January 12, 2012, on the issues of petition to reopen and penalties alleging that the offset for benefits was obtained through fraud, citing the reopening statute §8-43-303, C.R.S. and the overpayment statute §8-42-113.5, C.R.S. On January 14, 2024, Respondent filed a Motion to Strike Application for Hearing With Prejudice and Vacate Hearing seeking dismissal with prejudice. Claimant filed Objections on January 16 and 17, 2024. On January 17, 2024, ALJ Cannici issued an Order Striking Claimant's Application for Hearing with Prejudice and Vacating Hearing for Claimant's failure to state her fraud claim with the requisite particularity required by Colorado Rule of Civil Procedure 9(b). On January 24, 2024, Claimant filed a Petition to Review ALJ Cannici's January 17, 2024 Order. On June 25, 2024, the Industrial Claim Appeals Office (ICAO) entered an order reversing ALJ Cannici's January 17, 2024 order and remanding the matter to the Office of Administrative Courts (OAC) for further proceedings, including a setting a hearing on Claimant's petition to reopen her claim. [1]

FINDINGS OF FACT

W.C. No. 4-874-358

1. Claimant alleged she sustained a work injury or occupational disease with an injury date of July 28, 2011. A claim was filed for this alleged injury on December 26, 2011, W.C. No. 4-874-358. Ex. 2. The DOWC claim file for W.C. No. 4-874-358 documents under "Accident description/cause" "EE states excessive driving causing

[1] ICAO's June 25, 2024 order also affirmed an order of ALJ Cannici granting summary judgment in W.C. No. 5-231-380, which is not before the ALJ. On February 21, 2023, Claimant filed a Workers' Claim for Compensation for injuries related to workplace mold exposure that allegedly occurred on February 9, 2012, W.C. No. 5-231-380. On January 9, 2024, ALJ Cannici issued an order granting Respondent's motion for summary judgment dismissing W.C. No. 5-231-380 with prejudice.

pain." Ex. 2, p. 4. [2] The part of body is listed as "Mul neck Inj – Any combo." Ex. 2, p. 2. As reflected in the DOWC claim file, [Redacted, hereinafter BE] was the initial third party adjuster (TPA) on the claim. Respondent denied the claim on December 29, 2011. On July 6, 2021, [Redacted, hereinafter CL] became the TPA on the claim.[3]

2. Claimant testified that a transfer from Employer's Cripple Creek office to the Golden office resulted in her driving 125 miles one-way from her home to work. Claimant testified she began experiencing issues with her neck and shoulders locking up, which she attributed to the long drive. Claimant testified that workers' compensation paperwork was filled out for the alleged injury. Hrg. Tr. 44:21-23.

W.C. No. 4-880-583

3. On January 11, 2012, Claimant sustained the admitted work injury that is the subject of the this hearing, W.C. No. 4-880-583. Claimant slipped and fell on ice, falling backwards onto her back and striking her head. Ex. 1.

4. Claimant underwent evaluation and treatment for the January 11, 2012 work injury including, among other things, CT scans of the brain, cervical and thoracic spine MRIs, EMGs, neuropsychological testing, and neurological evaluations. Ex. 1.

5. Dale P. Mann, Ph.D. performed a Neuropsychological Evaluation of Claimant and issued a report dated December 12, 2012. Ex. 3. Dr. Mann noted he originally saw Claimant for a psychological evaluation on May 10, 2012. Dr. Mann documented the following diagnostic impression in the December 12, 2012 report:

Axis I: Adjustment disorder with depressed mood
Pain disorder with psychological factors and general medical condition
Cognitive disorder not otherwise specified, mild
Axis II: No current diagnosis
Axis III: Chronic neck, back and head pain with a history of sleep apnea and acid reflux disease
Axis IV: Psychosocial stressors involving significant, ongoing work distress
Axis V: Global assessment of functioning of 60

Ex. 3, p. 3.

6. Dr. Mann concluded in the December 12, 2012 report, in relevant part, "The overall results of this comprehensive neuropsychological evaluation and neuropsychological testing revealed an individual who is experiencing increased psychological and somatic distress which is primarily related to her continuing stress in

[2] As Claimant did not number the pages of her exhibits, page numbers cited for Claimant's exhibits refer to the sequence of pages in hard copy exhibit packet provided to the Court and Respondent at hearing.

[3] The DOWC claim file for W.C. 4-880-583 in exhibit 1 also documents a change in TPA from BE[Redacted] to CL[Redacted] on July 6, 2021.

her work place and losing her driver's license." Id. He recommended Claimant follow up with a neurologist for dizziness and participate in an employee assistance program to address her ongoing and significant workplace distress.

7. Daniel A. Olson, M.D. placed Claimant at maximum medical improvement (MMI) on April 1, 2013 for the January 11, 2012 work injury. Dr. Olson's April 3, 2013 MMI report notes Claimant complained of back pain in the upper thoracic area, neck pain, headaches and dizziness.

8. Dr. Olson noted in his report, in relevant part, "Dr. Dale Mann did some neuropsychological testing. He felt that she was experiencing psychological and somatic distress which he attributed to her driver's license being removed. He also noted some mild difficulties with memory, attention and concentration." Ex. 1, p. 22.

9. Dr. Olson's assessment/diagnosis included, in relevant part: head contusion; continued intermittent headaches; thoracic contusion with MRI showing moderate disc protrusion at T6-T7; and preexisting cervical myofascial pain with stable appearance on MRI scan of her cervical spondylosis. He noted that, according to neuropsychological testing, Claimant also had some mild cognitive problems. Dr. Olson assigned a 12% whole person impairment rating, consisting of 7% impairment for the thoracic spine and 5% impairment for episodic headaches. Ex. 1.

10. On April 12, 2013, Respondent filed a Final Admission of Liability (FAL) in W.C. No. 4-880-583. Ex. 1. Respondent admitted for 12% whole person impairment rating and reasonable, necessary and related medical treatment with an authorized treating physician per Dr. Olson's April 3, 2013 report, which was attached to the FAL. The FAL noted the following remarks and basis for the permanent disability award: "Per the attached rpt from Dr. Olson dated 4/13/13 the IW is at MMI with a 12% WP rating. 1.14 x 400 x 588.46 x 12% = 32,200.53. There is an over payment of TTD benefits of $168.13 that will be deducted from impairment rating." Ex. 1, p. 20.

11. The certificate of mailing on the FAL certifies that copies of the FAL were mailed to Claimant as well as her attorney at the time. Ex. 1.

Settlement Agreement

12. On August 6, 2013, Claimant signed and executed a Workers' Compensation Settlement Agreement: Represented Claimant for W.C. No. 4-880-583 and W.C. No. 4-874-358 (Settlement Agreement). Ex. 1.

13. The Settlement Agreement provided, in relevant part:

> 1. Claimant sustained or alleges injuries or occupational diseases arising out of and in the course of employment with the employer on or about January 11, 2012 and July 28, 2011 including, but not limited to her back, hip, head, and neck, as well as all consequences and effects of these injuries/conditions. Other disabilities, impairments and conditions that may be the result of these injuries or diseases but that are not

listed here are, nevertheless, intended by all parties to be included in and resolved FOREVER by this settlement.

2. In **full and final** settlement of all benefits, compensation, penalties and interest to which Claimant is or might be entitled to as a result of these alleged injuries or occupational diseases, Respondents agree to pay and Claimant agrees to accept the following **Nineteen Thousand Five Hundred Dollars** and no cents (**$19,500.00**), in addition to all the benefits that have been previously paid to or on behalf of the Claimant…

3. As consideration for the amount paid under the terms of this settlement, Claimant rejects, waives, and forever gives up the right to claim all compensation and benefits to which Claimant might be entitled for each injury or occupational disease claimed here, including but not limited to the following, unless specifically provided otherwise in paragraph 9A of this agreement:

. . .

   g. All penalties, interest, costs, and attorneys' fees up to the date of this settlement is approved by the Division. The parties do not waive the right to seek post-approval penalties should either side fail to comply with the terms of the approved settlement agreement.

. . .

7. Claimant understands that this is a final settlement and that approval of this settlement by the Division of Workers' Compensation or by an administrative law judge from the Office of Administrative Courts dismisses this matter with prejudice and FOREVER closes all issues relating to this matter. Claimant is agreeing to this settlement of Claimant's own free will, without force, pressure, or coercion from anyone. Claimant is not relying upon any promises, guarantees, or predictions made by anyone as to Claimant's physical or mental condition; the nature, extent and duration of the injuries or occupational diseases as to any other aspect of this matter.

. . .

11. The Claimant has reviewed and discussed the terms of this settlement with Claimant's attorney, has been fully advised, and understands the rights that are being given up in this settlement. The parties agree to the terms of the settlement as contained in this agreement and waive a personal appearance of Claimant before the Director of the Division of Workers' Compensation or an Administrative Law Judge. Claimant

> authorizes Respondents to send the settlement check directly to Claimant's attorney.

Ex. 1, pp. 6-8.

14. Claimant, as well as Claimant's attorney at the time, signed the Settlement Agreement. Ex. 1.

15. The Director of the DOWC issued a Settlement Order approving the Settlement Agreement on August 6, 2013. Ex. 1.

16. Claimant testified she had the advice of counsel when entering into the Settlement Agreement and that she relied on her former attorney's advice when deciding to enter into the Settlement Agreement. She testified she believed that the attorney had her best interests in mind at the time, but that she later came to believe the attorney did not actually represent her interests and "was in cahoots with the insurance company and the doctors and whoever else was involved in this case, and I had no idea." Hrg. Tr. 41:10-12.

Fraud Allegations

17. Claimant testified to her belief that the settlement is "void" due to fraud committed by various actors involved in her claim. She testified, "The settlement is void, that contract has no standing, based on fraud. The fraud of my attorney, the fraud of the doctors, the fraud of my employer. They were all conspiring against me and committed fraud." Hrg. Tr. 79:10-13.

18. Claimant testified that, after entering into the Settlement Agreement, she became aware of an alleged diagnosis of Post-traumatic Stress Disorder (PTSD) by Dr. Mann related to her January 11, 2012 work injury. Claimant alleges she was diagnosed with PTSD prior to entering into the Settlement Agreement, and that her former attorney, doctors and Respondent committed fraud by concealing such diagnosis. Claimant testified,

> So then, in -- I -- after I signed all these [settlement] documents and I was no longer working, and it was about two years later; it wasn't until November of 2014, that I figured out -- I had taken a neurological examination by Dr. Mann and never received any results. And I am, like, why was I never given this. And this is all part of neurological problems that I have where I don't remember things and then things come back to me.
>
> I found out that they never gave me anything about these exams that they were doing, and that I was diagnosed. I finally got the results of that testing on February 2nd, 2015, and that document that I received via fax to my personal physician, Dr. Jeffery Snyder, was a document saying I had PTSD with pain, is what I was diagnosed with caused by my employer.

Hrg. Tr. 49:9-21.

19. Claimant testified she no longer has Dr. Mann's alleged report that documents the alleged PTSD diagnosis because that report was somehow "replaced" on her computer by a series of emails from her former attorney. Claimant testified,

> You don't have that document. It was replaced on my computer in a series of emails from [former attorney], my attorney; after I had received that document, I scanned it into my computer and sent it to him. And it took him a month to get back with me. And during this time he keeps sending me emails – oh, and finally, he told me, send this to me again.
>
> Well, what I have figured out is that they put links into their emails with me, and in the process of using Dropbox, they replaced the documents saying I had PTSD with pain, with a document saying what was on the workers' comp documents that are a part of the evidence, which is some other kind of diagnosis that I've never heard of, at which time I contacted [former attorney] and told him what I had figured out. And he denied everything, of course, and told me I couldn't reopen because of I had signed this contract.

Hrg. Tr. 49:22-25, 50:1-11.

20. Claimant alleges Dr. Mann's December 12, 2012 Neuropsychological Evaluation report, contained in Claimant's exhibit 3, is not his original report. Claimant testified that the two fax headers at the top of Exhibit 3 demonstrate the report was replaced and is fake. She testified,

> Exhibit 3 is a neuropsychological evaluation that is part of -- is from my workers' comp. If you look at that exhibit, you'll notice there is two dates at the top of this fax. One date shows page 2 of 21. That would be the original report that -- that they replaced. I no longer have a copy of that report.
>
> This one is the -- at the top you'll also see another column and they were sent, like, one -- within a few minutes of each other.
>
> So there was two reports sent to my doctor's office. The one for PTSD with pain caused by my employer, and this one which was a neuro psych -- neuro psych evaluation that diagnosed me with -- let's see here, adjustment disorder with depressed mood, pain disorder with psychological factors and a general medical condition, cognitive disorder not otherwise specified, mild. Which I did have mild cognitive issues at that point.

Hrg. Tr. 51:7-22.

21. There are two fax headers at the top of Exhibit 3, one showing a transmission date and time of 02/02/2015 12:29 p.003/007, and the other showing 02/02/2015 12:33 P.002/021.

22. Claimant alleges all of her records have been replaced with forged records. She testified,

> So all my -- all my medical records I have figured out have been replaced with forgeries.
>
> And I -- that has happened since living in the apartment that I live in who is -- which is owned by an insurance -- insurance recovery company. And they have been stalking me and harassing me for four years since I moved in there. They -- they put people in the apartment above me who get up at 3:00 in the morning and stomp above my head. They do things to harass me, to get me to explode because I do have PTSD and things do bother me, I guess, that I do explode when they harass me.
>
> So all of my records that I have and that I'm assuming [former attorney] has, that they got from doctors are fraud. They are forged documents; they have changed the timelines of everything that happened. So those records are not accurate.

Hrg. Tr. 66:3-17.

23. Claimant testified she first discovered the alleged fraud on February 2, 2015, when she purportedly received copy of Dr. Mann's alleged report diagnosing her with PTSD. Hrg Tr. 73:20-25.

24. Claimant also accuses her primary care provider, Jeffrey Snyder, M.D. at Mountain View Medical Group, of withholding treatment for her alleged diagnosis of PTSD. In an email to Dr. Snyder in June 2015 Claimant wrote, "I have finally figured it out. PTSD and why are you withholding treatment for it? After telling you I have been told by 2 physicians that I needed counseling you failed to provide a referral for it…" Ex. 11, p. 1. Dr. Snyder replied,

> if you just now have figured it out, how can I be withholding treatment for it?
>
> But I am very sorry if this has come up in the past and I haven't addressed it, though I do not remember any specific conversations in this regard. I have put in a referral to a very good psychiatrist, who also handles occupational injury cases, in Colorado Springs, who I think would be a very good resource for you, Dr. Mann…

Id.

25. Exhibit 9 is a list entitled "Problems- Mountain View Medical Group" Claimant obtained from Dr. Snyder's office. The document lists Claimant's several conditions and

their “effective date.” PTSD is included on the list with an effective date of 06/29/2015. Dr. Snyder included PTSD on the list per Claimant’s request. Claimant testified, “It was after I got the – after I confronted my doctor, he put it on my list as having PTSD…Exhibit 9, yes; it lists PTSD, effective date 6/29/2015, but that’s – Dr. Snyder was obviously involved in the fraud.” Hrg. Tr. 72:3-5, 9-11.

26. Claimant testified she also gave what she alleges was Dr. Mann’s original report with the alleged PTSD diagnosis to another unnamed personal physician she saw after Dr. Snyder. She testified that she then never saw the report again as that doctor “mysteriously left the state” and relocated to North Carolina. Hrg. Tr. 62:3-4.

27. Claimant began seeing a personal concierge doctor, Dr. Amber, after ceasing treatment with Dr. Snyder. Claimant presented email correspondence between herself and Dr. Amber as purported evidence of alleged fraud. On April 22, 2021, Claimant asked Dr. Amber to look at the documents Claimant provided to her and claiming her lawyer “hacked my computer and replaced the report in my computer the day after I sent it to him. I have found several documents that have changed.” Ex. 4. Dr. Amber responded, “It looks like I have the first pages of that evaluation. This fax looks like the original fax was 21 pages but this version was only 7 from the heading.” Id. On May 18, 2021, Claimant emailed Dr. Amber stating, “Just to let you know the report you have is fake. The report that I received was diagnosing me with PTSD and said it was caused by my employer. My crooked attorney apparently had something to do with the replacement of the original report.” Id.

28. Claimant called [Redacted, hereinafter SO] as a witness at hearing. SO[Redacted] is a senior paralegal with [Redacted, hereinafter CA]. Claimant questioned whether SO[Redacted] once worked for [Redacted, hereinafter RA], the same law firm that represented Respondent in this claim in 2012-2013. SO[Redacted] credibly testified he worked for RA[Redacted] from January through August 2013 but did not work on Claimant’s case at that time.

29. Claimant testified that fraud was also committed because she did not undergo evaluation of her low back for the January 11, 2012 work injury. She further testified to her belief that the various accused actors were able to commit fraud because of her cognitive issues, which she alleges were, in part, purposely caused by the medications prescribed to her by her providers. She testified,

> And then I -- so I've never had that -- that would be another area of fraud where they never even -- you know, if somebody slipped and fell flat on their back I would think you would want to X-ray the entire back and not just the upper back, which I had all that upper back pain prior to the slip and fall. I never had any lower back pain at that time, until the end of June of 2013, when I no longer could work because I was in so much pain, and they put me on oxycodone methocarbamol, tramadol. I was taking all three of those at once, and I believe they were doing that because it added to my cognitive issues.

Hrg. Tr. 54:9-18.

30. The only two reports by workers' compensation providers presented as evidence, Dr. Olson's April 3, 2013 MMI report, and Dr. Mann's December 12, 2012 Neuropsychological Evaluation report, do not document any low back complaints or findings. The records from Claimant's personal providers note Claimant's reported low back pain. On November 27, 2012, Claimant underwent a rheumatology consultation upon the referral of Dr. Snyder. Claimant complained of diffuse musculoskeletal pain, including pain in the neck shoulder girdles and low back. She was assessed with backache and fibromyalgia. Ex. 16. On July 30, 2015, Claimant saw Adam Smith, M.D. at South Denver Neurosurgery on the referral of Dr. Snyder. Claimant complained of lumbar pain and chronic pain she related to her January 2012 work injury. Dr. Smith assessed Claimant with lumbosacral spondylosis without myelopathy and congenital spondylolysis lumbosacral. Ex. 17. Neither report includes a medical opinion relating Claimant's reported low back pain to her work injury.

31. Claimant further alleges CL[Redacted] filed a workers' compensation claim for PTSD under her name without her knowledge. Claimant attempted to offer into evidence a one-page Worker's Claim for Compensation, contained in Exhibit 8, that the ALJ did not enter into evidence due to lack of authentication and foundation. Claimant testified she found the one-page form in a tub full of documents she had at home. She testified,

> And so there – that's fraud. I mean they covered up that they gave me PTSD. And they even filed a claim for it, which was filed, apparently by CL[Redacted] – or with CL[Redacted], which I had never heard of that company prior to reopen – trying to reopen my claims a filing a mold case.
>
> And since then, I found out my ex-husband's wife is – was the vice president of CL[Redacted]. And I – I don't have proof, but I'm thinking she embezzled a bunch of money and filed a false claim for PTSD with CL[Redacted]. I never got any money from CL[Redacted] that I'm aware of. The only people I had interactions with was BE[Redacted]. So I don't know how CL[Redacted] got in the mix…

Hrg. Tr. 57:2-12.

32. Claimant testified that, on June 30, 2012, she reached into a cabinet for coffee and her back locked up. She testified she sought treatment at the emergency room. Claimant testified this was the same date CL[Redacted] allegedly filed a claim for PTSD in her name without her knowledge:

> The other areas, on 6/30/12, that was the day I couldn't get to the doctor. That's the date the PTSD claim was filed, 6/30/12. That's the date I went into -- I locked up in pain reaching for the coffee, and I went to the emergency room because I couldn't get to Colorado Springs to a workers' comp doctor.

> And that's the -- matches the date that they filed the PTSD claim. I did not file that. So they filed a claim that I have no knowledge of, and I don't know the details of it because it's not in my contract. It's not in my settlement, even though there was a claim filed by CL[Redacted] for PTSD.
>
> . . .
>
> I think I've already exhibited that, that they covered up that they gave me PTSD, because I knew nothing about it until I -- you know, almost two years after I closed that workers' comp claim. I knew nothing about this, even though there's a claim for it. It's under my name. I know nothing of this claim. And they combined it with the other claim; the 488-0583, the settlement includes for 487-358; it's at the top of that settlement; it lists that claim number.

Hrg. Tr. 57:16-25; 58:1, 7-15.

33. The Request for Services forms dated July 14, 2023, attached to the claim files in Claimant's exhibits 1 and 2, notes a request for copies of the complete files for any and all claim files by Claimant. Claimant presented as evidence the claim files for WC Nos. 4-880-583 and 4-874-358. Claimant did not present as evidence a DOWC claim file for an alleged prior claim for PTSD filed by CL[Redacted].

34. Claimant testified she relied entirely on her doctors and her former attorney, who she believes were all aware of the alleged fraud regarding the purported PTSD diagnosis. Claimant testified she has suffered financially, medically and mentally as a result of the alleged fraud. She testified she suffers from unmanageable stress and anxiety and no longer trusts doctors, lawyers or employers.

35. Claimant acknowledges there is no documentation of her having PTSD prior to entering into the Settlement Agreement. She testified that this is because of the alleged fraud.

36. Claimant testified Respondent also committed fraud by allegedly withholding money for owed child support obligations, based on a citation to C.R.S. 8-42-124 in a General Admission of Liability (GAL) entered April 2, 2012. She further testified Respondent also "stole wages" from her. Claimant testified,

> It states that date of first payment of temporary total disability, and it says 8-42-124. And if you look that up, it -- it says that if they owe child support. I had no child support orders. I was a single parent. And so where did this money go, because I never received it. That's another fraud.
>
> And I also had wages -- they put me on bi-monthly payroll. And during that time I was shorted $3,000-something dollars. I had a spreadsheet at home that I calculated how much I didn't receive during that time, and they had shorted me $3,000-something dollars. And I was going around -- and they

were harassing me and they were -- what do you call it? There's a name -- gaslighting -- I think they were gaslighting me.

Hrg. Tr. 60:9-21.

37. Respondent filed a General Admission of Liability (GAL) dated March 28, 2012, stamped by the DOWC as "Entered" April 2, 2012. Ex. 1, p. 30. Under the section "Date of first payment paid TTD" it states "8-42-124" and under "Remarks" it states, "Benefits paid to employer per CO 8-42-124. Admit to back, hip and head." Id. The standard language of the GAL states, in relevant part, "YOU ARE ALSO NOTIFIED that if a child-support obligation is owed, compensation benefits may be attached and payment of the child-support obligation may be withheld and forwarded to the obligee pursuant to sections 8-24-124 and 26-13-122(4), C.R.S." Id.

38. The remarks section of a GAL dated November 9, 2012 and entered November 15, 2012 state "Benefits paid to employer per 8-42-124. As of 10/19/12 the IW will be receiving TTD benefits directly." Ex. 1, p. 32. A letter from Respondent to BE[Redacted] dated November 1, 2012 notes Claimant exhausted injury leave as of October 18, 2012, Claimant had not returned to work, and requested TTD benefits be processed for the period of 10/22/12-11/1/12. Ex. 1, p. 34. The March 28, 2012 GAL nor any of the GALs or FAL in evidence indicate any of Claimant's compensation benefits were attached to or payment withheld due to any child support obligations, nor were other offsets incorrectly or fraudulently applied.

Ultimate Findings of Fact

39. The ALJ finds Claimant failed to prove her claim should be reopened on the grounds of fraud or that penalties should be imposed on Respondent.

40. The ALJ finds Respondent failed to prove Claimant's request to reopen should be barred by the equitable doctrine of laches.

41. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be

interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. §8-43-201, C.R.S.

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

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

Reopening

Section 8-43-303(1), C.R.S. provides that a settlement may be reopened at any time on the grounds of fraud or mutual mistake of material fact. The party attempting to reopen the issue or claim bears the burden of proof. §8-43-303(4), C.R.S. To reopen a claim on the ground of fraud, a claimant must prove the following:

To prove fraud, it must be shown that (1) the party misrepresented or concealed a material existing fact that in equity and good conscience should be disclosed; (2) the party knew they were making a false representation or concealing a material fact; (3) the other party was ignorant of the existence of the true facts; (4) the party making the representation or concealing a fact did so with the intent to induce action on the part of the other party; and (5) the misrepresentation or concealment caused damage to the other party. *See Valdez v. Alstom Inc.*, WC 4-784-196-002 (ICAO), Dec. 30, 2021), citing *Morrison v. Goodspeed*, 60 P.2d 458 (Colo. 1937); *Ingels v. Ingels*, 487 P.2d 812, 815 (Colo. App. 1971); *Beeson v. Albertson's, Inc*., W.C. No. 3-968-056 (April 30, 1996); *see also Tygrett v. Denver Water*, WC 4-979-139-002 (ICAO, Dec. 7, 2021). To succeed on a claim for fraudulent concealment or nondisclosure, a party must show the other party had a duty to disclose material information. *Poly Trucking, Inc. v. Concentra Health Servs., Inc*., 93 P.3d 561, 563–64 (Colo. App. 2004).

Claimant alleges Respondent, her former attorney, and multiple physicians, both in the workers' compensation system, and her own personal physicians, committed fraud with respect to her claim. Claimant's allegations of fraud against her doctors and former attorney are not relevant with respect to reopening her workers' compensation settlement with Respondent. Claimant's dissatisfaction with her medical treatment and her former attorney do not provide a basis to reopen her settlement on the ground of fraud, nor do her other grievances. To the extent Claimant contends her former attorney and physicians effectively conspired with Respondent to commit fraud, the ALJ is not persuaded.

The crux of Claimant's argument is that, prior to settlement of this claim in August 2013, Respondent purposely concealed a diagnosis of PTSD related to her January 11, 2012 work injury. In support of her argument, Claimant relies on a purported report of Dr. Mann she claims to have received in February 2015 that allegedly documents a diagnosis of PTSD. Claimant did not present the alleged report as evidence, nor any other evidence credibly documenting a PTSD diagnosis prior to the settlement. Claimant contends she does not have the relevant documentary evidence because her computer was somehow hacked by her former attorney, resulting in her documents being replaced with "forgeries." There is no credible or persuasive evidence this occurred or was even plausible in Claimant's case. The different fax headers on Dr. Mann's December 12, 2012 report contained in Exhibit 3 are insufficient to support Claimant's account of any alleged forgeries of documents. No credible or persuasive evidence was presented demonstrating Claimant's former attorney used some method to access her computer files and replace original documents with forged documents, let alone any evidence Respondent did so.

Any references to PTSD in Claimant's admitted exhibits are based on Claimant's reports to her personal physicians. Per Claimant's own testimony, Dr. Snyder added PTSD to her list of diagnoses at Claimant's request, and he did so noting a start date of June 2015. The ALJ notes Dr. Olson's April 3, 2013 MMI report does document that Dr. Mann performed neuropsychological testing and felt Claimant was experiencing some psychological and somatic distress. This report was attached to the April 12, 2013 FAL which, per the certificate of service on the FAL, was sent to both Claimant and her attorney prior to settlement. Even if Claimant did not receive the FAL and report, the evidence does not demonstrate Respondent purposefully concealed any psychological diagnosis. Even assuming, *arguendo*, there was a PTSD diagnosis prior to settlement, Claimant failed to present any credible or persuasive evidence establishing Respondent was aware of the diagnosis and intentionally concealed or misrepresented such information.

In her position statement, Claimant notes the DOWC claim file documents a claim filed for excessive driving causing pain, but alleges that "there was no claim pursued for that claim as BE[Redacted] denied the claim. I sent the denial to my attorney and he was supposed to be pursuing the denial." That Respondent initially denied the claim does not mean the claim was never filed. The DOWC records clearly show a claim was filed for the alleged July 28, 2011 work injury involving excessive

driving, assigned claim number 4-874-358, and that the claim was subsequently included as a part of the Settlement Agreement. Claimant further argues in her position statement that the records demonstrate a lump sum payout to her by CL[Redacted] in W.C. No. 4-874-358, but the Settlement Agreement does not mention CL[Redacted]. As found, the DOWC records demonstrate CL[Redacted] replaced BE[Redacted] as the TPA on these claims in July 2021. At the time of the Settlement Agreement, BE[Redacted] was the TPA.

Claimant's contention that CL[Redacted] somehow filed a worker's compensation claim for PTSD in her name without her knowledge, resulting in someone other than Claimant receiving payment under such claim, is unsupported by any credible or persuasive evidence. The one-page document Claimant offered that was not admitted into evidence lacked foundation and authentication. No DOWC claim file or other credible or persuasive evidence was presented demonstrating a claim was filed for PTSD in Claimant's name as she alleges. Claimant's allegations of some conspiracy involving CL[Redacted] and its involvement with alleged fraud is wholly unsupported by any credible or persuasive evidence.

Claimant also contends Respondent failed to evaluate her low back and ignored recommendations for further evaluation and treatment. Claimant presented no credible evidence that this involved any false representation of a material existing fact, a representation as to material fact with reckless disregard of its truth, or concealment of a material existing fact by Respondent. Furthermore, the Settlement Agreement specifically provided that the settlement forever resolved the January 11, 2012 and July 28, 2011 work injuries and/or occupational diseases, its consequences and effects, and any other disabilities, impairments and conditions that may be the result of the injuries or diseases. Claimant acknowledges she was represented by counsel at the time she entered into the Settlement Agreement. The ALJ is not persuaded Claimant did not understand the Settlement Agreement at the time.

Claimant testified to alleged stolen wages and wrongly withheld benefit payments with no corroborating evidence. Claimant presumes the citation to C.R.S. 8-42-124 in the March 28, 2012 GAL signifies that her compensation benefits were attached to, and payment thus withheld, for some child support obligation. There is no credible or persuasive evidence this was the case. Section 8-42-124, C.R.S. applies to various matters involving the assignability and exemption of claims with respect to payment to employers including, for example, wage continuation plans and payment of temporary indemnity benefits when an employer has charged an employee with injury leave or sick leave. Claimant testified she was not subject to any child support obligations. The citation to Section 8-42-124, C.R.S. in the GALs and FAL does not support Claimant's allegations. No credible or persuasive evidence was presented demonstrating Respondent withheld payment for child support obligations, or otherwise fraudulently withheld any payments or deducted any offsets.

Based on the totality of the evidence, Claimant failed to meet her burden to prove her settlement should be reopened on the grounds of fraud. The credible and persuasive evidence does not establish Respondent knowingly falsely represented a

material existing fact, represented a material fact with reckless disregard of its truth, or concealed a material existing fact with the intent that Claimant act upon such representation or concealment.

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Section 8-43-304(1), C.R.S. authorizes the imposition of penalties of not more than $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. See §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Industrial Claim Appeals Office*, 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo*, 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001).

Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015).

The issue of any penalties that occurred prior to entering into the settlement are covered by paragraph 3(g) of the Settlement Agreement and are thus closed, as the ALJ determined there is no basis to reopen Claimant's settlement on the grounds of fraud. Even assuming, *arguendo*, there was a basis to address such prior penalties, Claimant offered no evidence penalties should be imposed. Claimant contends Respondent fraudulently applied an offset of benefits, which is not supported by any credible or persuasive evidence, as discussed above. Claimant failed to identify any statute, rule or order that was otherwise allegedly violated. Claimant did not allege Respondent failed to comply with the terms of the approved Settlement Agreement. Claimant failed to present any evidence that Respondent violated any statute, rule or order. Accordingly, Claimant failed to prove penalties should be imposed against Respondent.

Laches

The doctrine of laches is an equitable defense that may be used to deny relief to a party whose unconscionable delay in enforcing his or her legal rights is prejudicial to the party against whom enforcement is sought. *Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103 (Colo. App. 2008); *Burke v. Industrial Claim Appeals Office*, 905 P. 2d 1 (Colo. App. 1994); *Bacon v. Industrial Claim Appeals Office*, 746 P.2d 74, 75-76 (Colo. App. 1987).The elements of laches are: (1) full knowledge of the facts; (2) unreasonable delay in the assertion of an available remedy; and (3) intervening reliance by and prejudice to another. *Cullen v. Phillips*, 30 P.3d 828 (Colo. App. 2001), citing *Manor Vail Condominium Ass'n v. Town of Vail*, 199 Colo. 62, 604 P.2d 1168 (1980). The prejudice may include a detrimental change of position by the defendant, loss of evidence, death of witnesses, or other circumstances arising during the period of delay that affect the defendant's ability to defend. *Id*., citing *Board of County Commissioners v. Blanning*, 29 Colo. App. 61, 479 P.2d 404 (1970). The Respondents have the burden of proof to establish laches. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988).

Claimant acknowledges she became aware of the alleged fraud in February 2015. Claimant did not file an Application for Hearing on the issue until October 2023. Claimant offered no explanation regarding the eight-year delay in asserting her legal rights. Accordingly, the ALJ concludes Claimant had full knowledge of the facts and the eight-year delay in asserting her legal rights is unconscionable. Nonetheless, Respondent failed to prove they were prejudiced by Claimant's delay.

Respondent argues in its position statement that Claimant's delay inhibited Respondent's ability to fully investigate the fraud allegation, as material witnesses of employees of Respondent have retired or otherwise left employment and retention

policies complicate the task of procuring relevant documents several years later. Respondent offered no evidence in support of its argument. Thus, while the ALJ can imagine the potential difficulties that may result from an eight-year delay in a claimant failing to assert his or her legal rights, the ALJ cannot conclude Respondent was prejudiced solely based on argument and assumption without evidence. Respondent did not present any witnesses nor offer any exhibits. The evidence offered by Claimant and admitted to the record does not demonstrate any prejudice suffered by Respondent. Accordingly, Respondent failed to establish Claimant's request to reopen her settlement on the grounds of fraud should be barred by the doctrine of laches.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen her settlement is denied and dismissed.

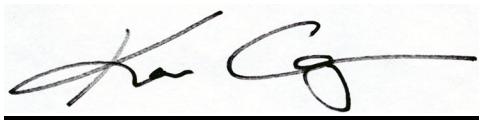
2. Claimant's request for penalties is denied and dismissed.

3. Respondent's laches defense is denied and dismissed.

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

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

DATED: October 30, 2024



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