ISSUE

I. Whether Claimant established, by a preponderance of the evidence that the need for surgery recommended by Dr. Barker is due to her compensable work related injury or is it preexisting?

FINDINGS OF FACT

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

1. In a previous hearing, ALJ Spencer determined that Claimant sustained a compensable injury to her back. That order was issued on August 18, 2023. That order was not appealed. In that order, the ALJ noted that Claimant did not request approval for a lumbar fusion, and that issue was reserved.

2. Following the issuance of that order, Claimant returned to Dr. Brianna Fox on September 5, 2023. She reiterated that Claimant had lumbar radiculopathy, spondylolistesis at L5-S1 and lumbar spinal stenosis with neurogenic claudication. She also indicated that a TLIF from L3-S1 was recommended previously by two separate neuro spine surgeons, but she could not get it authorized through workers compensation. Dr. Fox recommended a referral back to Physician's Assistant (PA) Schweid at Rocky Mountain Spine Clinic to get the surgery scheduled.

3. Following the visit with Dr. Fox, Claimant was seen by Mr. Schweid on September 27, 2023. He indicated that the surgery that had been denied had now been approved.[1] However, due to the age of the prior MRI, he wanted to do an updated MRI of the low back.

4. On March 7, 2024, a request for prior authorization of the fusion surgery from Dr. Barker's office was sent to Respondents. The surgery was denied as unrelated.

5. Dr. Ogin's deposition was taken by Respondents on July 22, 2024. With respect to the causal connection of the proposed surgery to the compensable work injury, he testified "Well, [Redacted, hereinafter HN] has the record - as subsequently demonstrated, had a long history of preexisting back issues, dating back at least to 2010, if not before that. Indeed, she had already been referred for a spine surgeon, I believe, in 2016 or 2017, and was having similar complaints of debilitating back pain, numbness and tingling in her feet. It's expected that those degenerative changes, which were

[1] This statement regarding authorization of the surgery appears to be inaccurate based on correspondence from Respondents' counsel date March 18, 2024 to Dr. Barker indicating that the surgery was denied as unrelated.

pronounced on MRI in 2014 and 2015, would have progressed over time, as degenerative changes typically do. She then had a minimal exposure, which was simply bending down to pick up a vacuum tube, on the date of injury. Her subsequent MRI, which was performed in September 23rd, 2022, revealed multilevel degenerative changes, many of which were already previously present from her prior MRIs. But there is certainly some progression at the L5-S1 level, mainly having to do with posterior element arthropathy and thickening, which was producing stenosis or tightness at that level, particularly on the right side affecting, potentially, the S1 nerve root and possibly along the L5 nerve roots."

6. Dr. Rook initially performed an IME on January 23, 2023 to determine causation for the Claimant's low back pain. He performed a second IME via teleconference on June 26, 2024. After review of Dr. Ogin's report, he opined with a reasonable degree of medical certainty that Ms. Hanson is in need of surgery at this point in time because of the injury she sustained on August 16, 2022. He disagreed with Dr. Ogin that the need for surgery was preexisting. In support of his opinion, Dr. Rook noted that Claimant only had occasional flare ups prior to the work injury and was working full duty with no restrictions since February 24, 2017.

7. I find that the incident on August 16, 2022 aggravated and accelerated Claimant's low back pain and resulted in the recommendation for fusion surgery.

CONCLUSIONS OF LAW

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

Generally

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

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

P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

D. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he/she sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

E. Assuming that Dr. Ogin is correct that Claimant may have suffered from pre-existing degeneration in her low back, the presence of a pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

F. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent, as asserted by Respondents in this case, the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Based upon the evidence

presented, the ALJ is convinced that the increased symptoms and disability Claimant experienced on August 16, 2022 were a consequence of an aggravation and the industrially based acceleration of her underlying lumbar degeneration. I conclude that Dr. Rooks's analysis is credible and persuasive. The ALJ rejects Dr. Ogin's contrary opinions as unpersuasive.

Medical Benefits

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

H. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). I conclude that the surgery recommended by Dr. Barker and P.A. Schweid is reasonable, necessary and related to the compensable work injury of August 16, 2022.

ORDER

It is therefore ordered that:

1. Respondents are liable for Claimant's surgery recommended by Dr. Barker and P.A. Schweid.

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

DATED: September 3, 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

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-248-992-001

ISSUE

I. Whether Claimant established, by a preponderance of the evidence that the need for surgeries recommended by Dr. Walden are reasonable, necessary and related to his compensable work related injury?

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury to his left knee on August 2, 2023. He was working as a prison guard at the prison at the time of the incident. As he was walking in the cafeteria, he slipped on water on the floor left from the mopping of the floor. He did not fall but his left foot slides out and heard a crack in his knee. Two short videos of the incident and of the Claimant after the incident were submitted and reviewed by the ALJ. More importantly, the videos were reviewed by the Respondent's IME doctor as noted in his report.

2. Claimant underwent conservative care with Concentra. He treated with physical therapy and receive a PRP injection. The physical therapy, according to Claimant did not help and the PRP injection made his condition worse. Claimant came under the care of David Walden, orthopedic surgeon. There were two MRIs done. The first MRI scan showed increased signal in the posterior horn of the medial meniscus which did not meet strict MR imaging criteria for meniscal tear. Additionally there was a proximal patellar tendinosis with low-grade interstitial tearing. The tearing had improved. After unsuccessful conservative care, a second MRI was ordered. The second MRI showed the area as inflamed at the proximal midportion of the patellar tendon. It also was interpreted as "questionable evidence of a possible medial meniscus tear".

3. Based on his reviews of the MRIs Dr. Walden recommended exploratory arthroscopic surgery to evaluate the meniscus and open patella tendon debridement with drilling of the inferior pole of the patella.[1]

4. The surgeries were denied.

[1] It appears that two different surgeries are recommended, namely an open patellar surgery and an arthroscopic surgery regarding the meniscus. It is unclear as to whether these surgeries are contemplated to be performed simultaneously or separately. To be clear, the reasonableness and necessity of the surgeries are considered herein, regardless of the sequence.

5. Claimant was seen by orthopedic surgeon, Scott Resig, M.D. at the request of Respondent. He performed an IME on March 15, 2024. He concluded that Claimant would not benefit from surgery and the knee arthroscopy was not indicated. After review of additional medical records and an issues letter from Respondent's attorney dated June 19, 2024, he issued an undated addendum. He concluded that Claimant appears to have continued pain at the patellar tendon and quadriceps tendon and these conditions are work related. He maintained his opinion that surgical intervention was not necessary.

6. The opinions of Dr. Resig that the meniscus surgery is not warranted based on the MRI and physical examinations is credible and persuasive. His opinion that the open patellar surgery may damage the patella and is not reasonable is also credible and persuasive. Specifically, I credit his opinion that the open surgery around the patella with drilling and creation of bleeding bone and additional scar tissue could potentially make the patient worse. At the time Dr. Walden recommended the surgery, he wrote "The patient understands that no guarantees are made that this will necessarily eliminate all of his symptoms and in some instances can make symptoms worse". This statement creates doubt as to whether Dr. Walden considers the surgeries to be reasonable.

CONCLUSIONS OF LAW

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

Generally

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

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the

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

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

D. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he/she sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

Medical Benefits

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

F. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). I conclude that the

surgeries recommended by Dr. Walden are not reasonable and necessary based upon the evidence presented. The Claimant has failed to sustain his burden of proof that the need for the surgeries are reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant's request for the surgeries recommended by Dr. Walden based on the state of the current evidence presented are denied.

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

DATED: September 5, 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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-185-760-003

ISSUE

- Did Claimant prove by a preponderance of the evidence that his right upper extremity rating should be "converted" to a whole person equivalent?

FINDINGS OF FACT

1. Claimant sustained admitted injuries on October 15, 2021, to his right hand and fingers. As a result of the industrial injuries, the Claimant underwent treatment, including partial amputation of his right middle finger.

2. Claimant was transported to the emergency room immediately after his work injury where he was diagnosed with a right-hand crush injury that resulted in a displaced fracture of the distal phalanx of his right middle finger, a displaced fracture of the middle phalanx of his right middle finger as well as a displaced fracture of the middle phalanx of his right ring finger. An open reduction and internal fixation surgery was performed that day to salvage as much of Claimant's hand as possible. However, it was determined that Claimant's right middle finger would have to be amputated at the level of the PIP joint.

3. On October 26, 2021, Claimant underwent surgery to amputate his right middle finger at the level of the PIP joint.

4. On February 22, 2023, Claimant underwent surgery to have the hardware removed that had been installed during his initial surgery on October 15, 2021.

5. On November 23, 2022, Claimant was placed at Maximum Medical Improvement (MMI) by Dr. Gregg Martyak without medical restrictions or medical maintenance care.

6. Dr. Karl Larsen, in his June 28, 2023, MMI Report, opined that the extent of Claimant's injury symptoms were limited to the right hand at the wrist. He did not provide impairment ratings for any body parts beyond Claimant's right wrist.

7. On June 28, 2023, Dr. Larsen assigned Claimant an impairment rating, during which he affirmed the pre-existing MMI date opined by Dr. Martyak and assigned a 33% impairment rating to Claimant's hand, which converts to a 30% upper extremity impairment rating and an 18% whole person impairment rating.

8. On December 5, 2023, Claimant attended an Independent Medical Examination (IME) with Dr. F. Mark Paz. In his IME Report, Dr. Paz confirmed Dr. Martyak's MMI date and assigned a 34% impairment rating to Claimant's hand, which

converts to a 31% upper extremity impairment rating. Dr. Paz did not find a medical basis for converting the right upper extremity impairment to a whole person impairment rating.

9. Dr. Paz noted in his IME Report that Claimant continued to have difficulty gripping with his right hand. He was functional at work, within the limitations of the right-hand gripping. He was also "experiencing a stinging sensation when gripping without radiation of the symptoms proximally into the right upper extremity. He denies symptoms in the right wrist, elbow, or shoulder. He has difficulty using hand tools of smaller diameter with the right hand."

10. On direct examination, Claimant gave testimony that he had difficulty performing certain tasks with his right hand, such as brushing his teeth, buttoning his jeans, holding smaller tools, bowling, and shooting. However, he indicated that he could still perform those tasks. There are no medical restrictions regarding his active daily living routines. Additionally, all the tasks that Claimant listed he had difficulty performing post-injury are limited to a disability of the hand below the wrist.

11. On direct examination, Claimant did not provide any credible testimony that indicated his injury and symptoms extended beyond his right hand at the wrist.

12. Dr. Paz testified persuasively and credibly consistent with his IME report. On direct examination of Dr. Paz, he testified that Claimant's injury symptoms were limited to his right hand. Dr. Paz stated that during his IME with Claimant, they had discussed whether Claimant's injury symptoms radiated beyond the right hand, and Claimant had said, both verbally and in his written evaluation, that his injury related symptoms were limited to his right hand at the wrist. Specifically, Dr. Paz' report indicates that "He denies any symptoms above/proximal to the level of the right wrist".

CONCLUSIONS OF LAW

A. Claimant failed to prove whole person impairment due to his injured right hand.

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The term "injury" has been defined to refer to the manifestation in a part or parts of the body which have been functionally impaired or disabled as a result of the industrial accident. . *Strauch v. PSL Swedish Healthcare System*, *supra.* Where the claiant suffers an injury not enumerated in C.R.S. §8-42-107(2), the claimant is entitled to whole person impairment benefits under §8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the

body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc.*, W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000). In this case the Claimant has failed to sustain his burden of proof that his injury results in a loss that falls outside the list of scheduled injuries under C.R.S. §8-42-107(8). Although the consideration of whether the impairment requires consideration of the Claimant's physical limitations in addition to medical impairment, in this case I am persuaded more by Dr. Paz' opinions as to Claimant's medical/physical limitations than by the Claimant's testimony.

ORDER

It is therefore ordered that:

1. Claimant's request to convert the impairment rating from a scheduled rating to a whole person rating is denied and dismissed.

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

DATED: September 10, 2024

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

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

statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-265-304-001

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable injury to her left foot.

II. If Claimant established that she suffered a compensable left foot injury, whether she also established, by a preponderance of the evidence, an entitlement to reasonable and necessary medical benefits to cure or relieve the effects of this industrial injury.

III. If Claimant established that she is entitled to reasonably necessary and related medical benefits, whether she also established the right of selection passed to her and whether Dr. Douglas McFarland and any referrals stemming therefrom are authorized providers.

IV. Claimant's Average Weekly Wage ("AWW")

VI. If Claimant established that she suffered a compensable left foot injury, whether she also established, by a preponderance of the evidence, that she was entitled to temporary disability benefits from and including June 27, 2023 through and including August 17, 2023.

FACTS

Based on the evidence presented at hearing, the ALJ finds the following:

1. Claimant was employed as a bartender by the employer [Redacted, hereinafter MY] on June 26, 2023,. During the course of her employment, Claimant was carrying a box of fruit down a flight of stairs at the worksite when she tripped and fell. As

a result, Claimant suffered a fractured foot. Claimant was engaged in an activity directly related to her job duties. The fall occurred on the employer's premises and within her normal working hours. *See* CHE 8, p. 84.

2. Immediately after the fall, Claimant sought treatment at a local emergency room, where she was diagnosed with a fractured foot. This was paid for by Medicaid. She was instructed to receive follow-up care, including evaluations, x-rays, and treatment. She sought this treatment from Dr. Douglas McFarland. Dr. McFarland treated Claimant until October 26, 2023, at which point she was released from further care. Claimant testified that her employer did not provide her with access to an authorized treating physician (ATP) or a designated provider list. As a result, Claimant sought medical care on her own. The treatment the Claimant received resulted in a Medicaid lien, which remains unpaid. (CHE 6).

3. Claimant was unable to return to work immediately following the injury. Her treating physician, Dr. McFarland, placed her on temporary restrictions and instructed her not to bear weight on her injured foot. (CHE 8, p. 85). Dr. McFarland cleared the Claimant to return to full duty on August 18, 2023. However, until that time, the Claimant was unable to perform her regular work duties as a bartender for the period from June 27, 2023, through August 17, 2023, during which she was medically unable to perform the full duties of her employment.

4. Claimant testified that she worked an average of 28 hours per week at a rate of $13.65 per hour, which was the applicable minimum wage at the time. In addition to her hourly wage, Claimant earned tips as a bartender, which made up a significant portion of her income. Employer did not provide any wage records, or any information

whatsoever to be precise, despite repeated requests by Claimant's counsel. As a result, Claimant's testimony regarding her hours worked and earnings is the primary source of information for calculating her AWW. Based on Claimant's testimony, her AWW is calculated as follows: 28 hours per week x $13.65 per hour = $382.20 (weekly base wage). Additionally, the Claimant estimates an average of $100 per week in tips. However, Claimant did not provide evidence that the tips were reported to the federal internal revenue service (IRS) as provided in C.R.S. §8-40-201(19)(b).

5. The Employer did not attend the hearing and did not present any defense or witnesses. Claimant's attorney attested on the record to multiple attempts to contact the employer to no avail. The employer was uninsured at the time of the accident, in violation of C.R.S. § 8-43-409, which mandates workers' compensation insurance coverage for all employers in Colorado.

CONCLUSIONS OF LAW

General Legal Principles

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S. 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).

Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002).

Compensability

A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident

unless the accident results in a compensable “injury.” *Romero, supra*; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an “injury” arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff’d Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); Section 8-41-301(I)(b), C.R.S.

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*, 810P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals*, 759P.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*, 811P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope 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). Conversely, 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). Here, there is little question that Claimant’s alleged injury occurred within the time and place limits of her employment and during an activity related to Claimant’s job duties. Moreover, the mechanism of injury (MOI) does not appear to be in question in this case.

The determination of whether there is a sufficient "nexus" or causal relationship between the Claimant's employment related duties and the alleged injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). In this case, the totality of the evidence presented supports a conclusion that Claimant's left foot injury arose out of her work related duties during her usual working hours. The evidence and testimony presented during the hearing make it clear that Claimant sustained a compensable injury while performing work-related duties at her job on June 26, 2023. She was carrying a box of fruit down a flight of stairs for her employer when she tripped over improperly placed boxes and fell, resulting in a fractured foot. This accident occurred during her normal working hours and on the employer's premises, thus meeting the requirements for an injury that "arose out of and in the course of employment" under Colorado law.

Claimant's Entitlement to Medical Benefits and Right of Selection

Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball*, 172Colo. 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).

Authorization to provide medical care refers to a medical provider's legal authority to provide treatment to the claimant with the expectation that the provider will be compensated by the insurer for said services. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical personnel to whom the claimant is directly referred by the employer, as well as providers to whom an authorized provider refers the claimant in the normal progression of care. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

In this case, the employer failed to provide any list, as confirmed by Claimant's testimony and lack of contradictory evidence. As a result, the right of selection passed to Claimant to select her own authorized provider. She selected Dr. Douglas McFarland as her ATP. Claimant underwent a reasonable course of care with Dr. McFarland after the initial emergency room visit, which is also considered reasonably necessary care. All treatment provided to Claimant through the initial emergency room, Dr. McFarland, and any referrals stemming therefrom are the financial responsibility of the Employer.

Claimant's Average Weekly Wage

The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993); *National Fruit Prod. v. Crespin*, 952P.2d1207 (Colo. App. 1997). Sections 8-42-102(3) and (5)(b), C.R.S. (2013), give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008).

As found *supra*, Claimant testified she worked an average of 28 hours per week at a rate of $13.65 per hour and earned tips as a bartender. The Employer did not provide wage records or otherwise participate in the proceedings in any fashion, thus leaving the AWW to be determined based on Claimant's testimony. Based on her testimony, her AWW is calculated as follows: 28 hours per week x $13.65 per hour = $382.20. Claimant's tips are not included since no evidence was provided that the tips were reported to the IRS.

Claimant's Entitlement to Temporary Disability Benefits

To receive temporary disability benefits, Claimant must prove that her injuries caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1), C.R.S. 2001; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). As stated in PDM, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v.*

Bronco Billy's, 903 P.2d 1239 (Colo. App. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability to effectively and properly perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co*., 964 P.2d 595 (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).

Claimant testified that following her injury, she was unable to work from June 27, 2023, through August 17, 2023, as her doctor placed her on temporary restrictions. The records and testimony reflect that she was unable to perform her duties as a bartender, including carrying items and serving customers, due to the use of crutches a medical boot, and other limitations. The Employer failed to provide alternative work or accommodate her restrictions, justifying her claim for TTD benefits during this period to be paid based on an AWW of $382.20.

Mileage

The Colorado Workers' Compensation Act provides that mileage reimbursement is covered when travel is reasonably necessary and related to obtaining compensable treatment, supplies, or services. Specifically, section 8-42-101(7)(a) of the Act states that Claimant must submit a request for mileage expense reimbursement to the employer or the employer's insurer no later than 120 days after the expense is incurred unless good cause for later submission is shown. This includes travel for medical appointments or other necessary services related to the work injury.

The mileage submitted into evidence by Claimant coincides with her medical appointments and is thus reasonable travel for related medical treatment. Claimant received her treatment from Dr. McFarland. The treatment is authorized and necessary to treat her compensable injury. Therefore, the submitted related mileage would also be considered reimbursable under Colorado law.

ORDER

1. Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her left foot on June 26, 2023
2. Claimant has established by a preponderance of the evidence that the compensable injury resulted in a need for treatment for her left foot. All treatment associated with the injurious event is the financial responsibility of Respondents. This includes, but is not necessarily limited to, all treatment from the initial emergency room visit and all treatment provide by Dr. McFarland and any referrals stemming therefrom. Respondent is liable to reimburse Medicaid for the expenses documented in the Medicaid lien.

3. Claimant established she sustained wage loss as a direct result of the work injury from and including June 27, 2023 through and including August 17, 2023. Claimant is entitled TTD benefits for the above dates and shall be paid to Claimant based on an AWW of $382.20 with all past due benefits paid with 8% interest *per annum*.
4. Claimant has established by a preponderance of the evidence that she is entitled to mileage reimbursement as requested. Respondents shall reimburse Claimant for the mileage submitted.
5. All matters not determined herein are reserved for future determination.

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

DATED: September 19, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-010-153-010

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that Respondents are subject to penalties pursuant to Section 8-43-304(1), C.R.S. for failure to for his Skyrizi prescription on February 25, 2024?

- Whether Claimant has sufficiently plead his claim for penalties pursuant to Section 8-43-304(4), C.R.S.?

- Whether Respondents have proven by a preponderance of the evidence that they cured the penalty within 20 days of the Application for Hearing pursuant to Section 8-43-304(1), C.R.S.?

- If Respondents have proven by a preponderance of the evidence that they cured the penalty within 20 days of the Application for Hearing pursuant to Section 8-43-304(1), C.R.S., whether Claimant has proven by clear and convincing evidence that Respondents knew or reasonably should have known of the penalty violation prior to the Application for Hearing being filed?

FINDINGS OF FACT

1. Claimant sustained a work related injury while he was employed by Employer on March 12, 2016 when a back hoe tire he was replacing exploded causing significant injuries to Claimant. Claimant's injuries included a severe traumatic brain injury, requiring an extensive hospital stay including rehabilitation at Craig Hospital in Englewood, Colorado. Claimant testified at hearing that the injury resulted in a loss of hearing, loss of his sense of taste and smell, fatigue, loss of balance, moments of confusion and difficulty handling emotion.

2. For purposes of the issues before the court, Claimant testified that the injury also caused issues with psoriasis. The psoriasis causes clumps on his knuckles along with both elbows and knee caps in addition to his thigh and calf. For purposes of treating the psoriasis, Claimant has been prescribed Skyrizi. Claimant was initially prescribed the Skyrizi in May 2021 by Dr. Gaughan after Dr. Gaughan found that Claimant's topical medications provided inadequate control of Claimant's psoriasis. The Skyrizi is prescribed to Claimant as an injectable form. Claimant receives the injection through the pharmacy every three months.

3. After Claimant was prescribed Skyrizi, Respondents sought an opinion from Dr. Contreras to determine whether the Skyrizi was reasonable and necessary medical treatment related to Claimant's work injury. Dr. Contreras reviewed Claimant's medical records and issued a report dated August 30, 2021 that discussed potential other treatments, but noted that methotrexate was contraindicated for patients who were

taking a non-steroidal anti-inflammatory ("NSAID") medication. Dr. Contreras noted that Claimant had been prescribed Toradol, an NSAID, for his headaches. Dr. Contreras noted that biologic medications (such as Skyrizi) have better safety profile and are much more effective in clearing psoriasis and have become the mainstay in treatment of patients with moderate-to-severe disease that has failed topical management. Dr. Contreras noted that Skyrizi was just one of many options and it was possible that Claimant would be able to obtain another biologic through his health insurance or government assistance program.

4. After receiving Dr. Contreras' report, Respondents denied treatment involving the prescription for Skyrizi. Claimant then applied for hearing on the issue of the reasonableness and necessity of the Skyrizi prescription, in addition to numerous other issues including penalties against Respondents. The parties subsequently entered into a stipulation on March 3, 2023 that provided in pertinent part:

> "6. The parties agree that Respondents will in the future promptly authorize and pay for the Skyrizi until otherwise agreed upon in writing or ordered by a workers' compensation judge."
>
> "7. Respondents shall reconcile with and reimburse payments to Medicare and Medicare Advantage and claimant as reimbursements for the September and December 2022 medications within 30 days of the Order."
>
> "8. Claimant's claim for penalties against Respondents for failure to authorize the Skyrizi treatment is withdrawn and the April 19, 2023 hearing is canceled."

5. The Order was approved by ALJ Sidanycz on April 4, 2023. Based on the approval of the stipulation, the hearing on the issue of the reasonableness and necessity of the Skyrizi prescription that was set for April 19, 2023 was vacated.

6. An amended stipulation was entered into by the parties on April 17, 2024 that reiterated paragraphs 6-9 referenced above.

7. While the hearing on the Skyrizi was pending, the parties agreed to settle Claimant's indemnity benefits but specifically kept Claimant's medical benefits open. The settlement was reached on February 24, 2023 and approved by PALJ Mueller on February 24, 2023 (the Order approving the settlement is incorrectly dated February 24, 2022, but clearly references the settlement agreement being drafted in 2023).

8. Claimant testified his when his Skyrizi was denied he was required to provide the pharmacy a co-pay of $4.30 in order to get the Skyrizi. Claimant filed another Application for Hearing on May 25, 2023 endorsing the issue of authorization of the Skyrizi and penalties against Respondents for failing to authorize the Skyrizi as required by the Order approving the Stipulation of the Parties.

9. Respondents obtained a second medical records review independent medical examination ("IME") from Dr. Contreras on July 28, 2023. Dr. Contreras opined

in his July 28, 2023 report that he agreed with Dr. Gaughan that Claimant should not try another medical treatment because approximately 16% of treatments fail to recapture the previous response to the medication, and the potential cost savings of switching medications was not worth risking the effective treatment the Skyrizi was providing for Claimant's psoriasis.

10. After receiving the report from Dr. Contreras, the parties entered into a second stipulation which provided in pertinent part:

> "5. The medical treatment for psoriasis has been provided by respondents from authorized treating physician, dermatologist Dr. Laurence Gaughan. The treatment included a variety of topical ointments. Due to their ineffectiveness, Dr. Gaughan prescribed the injectable systemic biologic medicine, Skyrizi. Skyrizi is injected by the patient every three months. This medication proved effective and is deemed by claimant and Dr. Gaughan to be successful treatment to cure and relieve claimant's psoriasis.
>
> 6. Claimant has for twenty-six months received the Skyrizi injectable medication through the US Postal Service from [Redacted, hereinafter WS].
>
> 7. Because Skyrisis is expensive, respondents investigated alternative methods of treatment. They consulted with Dr. Michael Contreras, who issued two reports, 8/30/2021 and 7/28/2023.
>
> 8. Dr. Contreras opined in his 7/28/2023 report that he agreed with Dr. Gaughan that claimant should stay on Skyrizi because: (a) it had proven successful when topical treatment had been unsuccessful, (b) there are no other injectable biologic medications that are less expensive and proven defective, and (c) that studies show that once a paitient stops treatment with Skyrizi there is an unacceptable high risk that the patient will no longer respond well if Skyrizi is re-started.
>
> 9. Claimant had applied for a hearing on medical benefits (the authorization of Skyrizi) and penalties concerning respondents' alleged failure to comply with the Stipu8lation and Order dated April 17, 2023 concerning respondents' obligation to reimburse [Redacted, hereinafter CS] for its payment for Skyrizi on two prior occasions during a prior dispute concerning Skyrizi. Respondents added the issue of their obligation to pay ongoing for Skyrizi.
>
> 10. The parties now agree that
>
> (a) Respondents have shown that CS[Redacted] has issued a document stating the respondents' inquiry dated 7/28/2023 about conditional payments has received a response that no conditional

payments have been made by CS[Redacted], and thus, there is no way for respondents to reimburse CS[Redacted].

(b) Respondents shall continue to inquire about reimbursing whatever entity paid for the Skyrizi on the two prior occasions when respondents did not pay for Skyrizil.

(c) Respondents shall continue to authorized and pay for Skyrizi, provided to WS[Redacted].

(d) All parties have no more need to go to hearing to resolve the disputed hearing issues because the issues are resolved by this stipulation and requested order."

11. The Stipulation was signed by ALJ Sidanycz on August 16, 2023 and the hearing set for August 17, 2023 was vacated.

12. Claimant testified at hearing in this matter that issues arose in 2023 in that he would go to the pharmacy to fill his prescription and would be advised by the pharmacist that he had a co-pay for the Skyrizi because the workers' compensation insurer had not approved the Skyrizi. Claiimant testified he made a co-payment on March 2, 2023 before the August 17, 2023 stipulation. Claimant testified that Respondents stopped paying for Skyrizi on September 26, 2022. Claimant testified he agreed to the April 17, 2023 stipulation because he felt content that he would his Skyrizi covered by the workers' compensation insurer. Claimant testified that when his Skyrizi is not approved by the workers' compensation insurer, he is required to cover the co-pay that he puts on his credit card so he can receive his medication. Claimant testified that the remaining cost of the medication is covered by [Redacted, hereinafter WE]

13. Claimant testified that after the August 17, 2023 stipulation he was able to get his Skyrizi paid for up until February 2024 when he went to the pharmacy and the Skyrizi was not approved. Claimant testified he paid his co-pay of $4.60 in order to get the Skyrizi in a timely manner. Claimant testified he has not been reimbursed for the $4.60 co-pay he incurred in February 2024.

14. Claimant testified that the failure to have his prescription for Skyrizi paid brings on stress and anxiety which then brings on headaches for Claimant.

15. Respondents presented the testimony of [Redacted, hereinafter KN] at hearing. KN[Redacted] is the claims adjuster for Insurer assigned to the claim. KN[Redacted] testified that it is her responsibility to authorize benefits and oversee the claim. KN[Redacted] testified that Insurer contracts with a third party vendor to help coordinate the medical benefits. KN[Redacted] testified that SmithRx manages the prescription medications for Insurer. KN[Redacted]testified that when a claim is accepted SmithRx will give a prescription card to the injured worker and bills are then processed as being within the diagnostic code that is plugged into the system. KN[Redacted] testified that any prescriptions that come in that correspond to the diagnostic codes are then approved by SmithRx.

16. KN[Redacted] testified that she did not receive a request from SmithRx on February 19, 2024 seeking to authorize the Skyrizi prescription. KN[Redacted] testified that the first time she became aware of the issue with the February 19, 2024 prescription was when she received communication from Claimant's attorney on February 27, 2024. KN[Redacted] testified she then called SmithRx to authorize the Skyrizi as the Insurer had agreed to pay for the Skyrizi prescription.

17. KN[Redacted] testified that the denial of the Skyrizi was due to a clerical error in the system. KN[Redacted] explained that the February 19, 2024 Skyrizi had changed the delivery system of the medicine from a pre-filled pen to a single dose pen, which caused a change in the code resulting in the Skyrizi being denied. KN[Redacted] testified that it was possible for SmithRx to override the denial, but it wasn't done in Claimant's case. KN[Redacted] testified that the issue involving the denial of the Skyrizi was fixed on February 28, 2024 and the Skyrizi prescriptions since that time have been paid by Insurer. KN[Redacted] testified that she did not intend to deny Claimant's prescription for Skyrizi.

18. With regard to the reimbursement of Medicare, KN[Redacted] testified that they sought information from CS[Redacted] regarding reimbursement for the Skyrizi prescriptions that have been filled, but have not received information yet from CS[Redacted] regarding the reimbursement. KN[Redacted] testified that she has worked with a third party vendor, [Redacted, hereinafter VK], to request information regarding the Medicare liens, but has not received information that would allow her to reimburse the appropriate parties for the cost of the Skyrizi that was paid by an entity other than Insurer.

19. KN[Redacted] testified that she has the ability to pay Claimant for reimbursement for his co-pays and was made aware of Claimant's co-pays for the Skyrizi in the stipulations. However, KN[Redacted] did not testify that she has made any effort to reimburse Claimant for his co-pay that he incurred based on Respondents denial of the February 19, 2024 Skyrizi prescription.

20. Claimant filed an Application for Hearing on March 22, 2024 seeking penalties against Respondents for failure to "authorize and pay for Skyrizi when requested by historical pharmacy, in violation of earlier orders, inc. 4/17/2023. CRS 8-43-304 & 304 & 401/2/a." Claimant indicated in the application for hearing that the penalties begin on 2/13/24 and are ongoing.

21. The ALJ credits the testimony of the Claimant and KN[Redacted] and finds that Claimant has established that it is more probable than not that Respondents violated the Order approving the stipulation that required Respondents to pay for Claimant's prescription of Skyrizi on February 19, 2024. The ALJ notes that the issue of the Skyrizi was denied on multiple prior occasions by Respondents resulting in Respondents seeking medical opinions from Dr. Contreras and two stipulations being entered into by the parties in which Respondents agreed to authorize and pay for the Skyrizi prescription. Respondents inactions on February 19, 2024 resulted in Claimant's prescription medications being denied despite a specific agreement between

the parties that was subject to multiple orders signed by an ALJ wherein Respondents agreed to pay for the prescription for Skyrizi. The ALJ therefore finds that Respondents are subject to penalties pursuant to Section 8-43-304.

22. Respondents argue in their position statement that even if they are found to have violated the order requiring Respondent to pay for the Skyrizi, the actions of Respondents in this case were reasonable based on an argument that the denial of Skyrizi was the result of a "minor clerical error". The ALJ is not persuaded.

23. Respondents' argument here is that they paid for the Skyrizi "throughout 2021, early 2022, and 2023". This argument fails to mention that Claimant's Skyrizi was again denied on March 2, 2023 before the second stipulation was entered into which resulted in Claimant incurring a co-pay of $4.30 as testified to by Claimant at hearing. While the issue of Respondents' liability for the Skyrizi was to be addressed at the August 17, 2023 hearing, Respondents at that time were still under the obligation of the first stipulation to pay for the cost of the Skyrizi until otherwise agreed upon in writing or ordered by a workers compensation judge. While this issue of failure to authorize the March 2023 Skyrizi prescription is not pending before the court, the ALJ may take it into consideration when determining the "reasonableness" of Respondents' actions and their knowledge of the facts giving rise to the penalty violation.

24. The ALJ further notes that this issue regarding Respondents failure to pay for the Skyrizi was the subject of prior applications for hearing and prior claims for penalties against Respondents. The ALJ therefore determines that Claimant has established that the Application for Hearing sufficiently pled the penalty issue to Respondents.

25. Moreover, Respondents argument that the minor clerical error was quickly corrected is likewise without merit. Each time Respondents fail to authorize the Skyrizi, Claimant is required to pay out of pocket for the co-pay on his prescription medication. Claimant testified at hearing that he has not been reimbursed for his out of pocket co-pays he incurs when the Skyrizi is denied at the pharmacy. Respondents specifically acknowledged in the April 4, 2023 stipulation that Claimant was having to pay his own money for the Skyrizi that was denied in September and December 2022 and were aware that Claimant would be out of pocket the cost of his co-pay each time they deny the prescription. Yet no credible evidence was presented as to actions taken by Insurer to reimburse Claimant for his out of pocket expenses that were incurred when Respondents failed to authorize Claimant's Skyrizi.

26. Based on the foregoing the ALJ finds that Respondents actions in this case in denying the Skyrizi were not reasonable. Regardless of whether the denial of the Skyrizi was intentional or not, Respondents were aware of the importance of Claimant receiving the Skyrizi prescription in a timely manner based on the report of their own IME physician, Dr. Contreras. The system established by Insurer to address prescription claims failed in a way that resulted in Respondents violating an Order requiring that they pay for Claimant's Skyrizi as agreed to in the stipulations. The ALJ

finds that the actions of Respondents that set up a system that led to this failure are not reasonable under the circumstances of this case.

27. Respondents further argue that they "cured" the penalty in this case as allowed pursuant to Section 8-43-304(4) by virtue of the fact that the Skyrizi was paid for after February 19, 2024. The ALJ is not persuaded.

28. First, Respondents argument that by approving the Skyrizi on the next prescription refill date three months later should absolve them of any penalties for their failure to approve the Skyrizi on February 19, 2024 is wholly without merit. Taking Respondents argument on its face, Respondents in this case could avoid penalty claims on each Skyrizi prescription by simply approving every other Skyrizi prescription and arguing that by paying for the next prescription, they have cured the actions that led to the original penalty claim. This is not the intent of Section 8-43-304.

29. Furthermore, the Application for Hearing was filed on March 22, 2024. Respondents would have needed to cure the penalty violation by April 11, 2024 in order to cure the penalty within 20 days of the Application for Heairng. However, Claimant's Skyrizi is administered every 3 months (Claimant's next prescription was scheduled for May 2024) and there is a lack of credible evidence presented at hearing that the payment for the next Skyrizi prescription was paid by April 11, 2024.

30. Moreover, this argument completely ignores the fact that Respondents had still not reimbursed Claimant for his out of pocket co-pay expenses, despite being aware that he would incur a co-pay expense each time they deny the Skyrizi prescription. No credible testimony was presented at hearing as to why Respondents felt that they did not need to reimburse Claimant for his out of pocket expenses Claimant incurred in filling his Skyrizi prescription despite being under an Order to pay for the Skyrizi.

31. The ALJ therefore finds that Claimant has proven that it is more likely than not that Respondents violated an Order that required them to pay for the Claimant's Skyrizi prescription medication. The ALJ further finds that Claimant properly pled the penalty claim and that Respondents were on notice as to the facts giving rise to the penalty. The ALJ further finds that Respondents have failed to establish that they cured the penalty violation within 20 days for the Application for Hearing being filed.

32. Because Respondents are liable for penalties for violating an Order of an ALJ under Section 8-43-304(1), the analysis then becomes what is the appropriate amount of the penalty. In this regard, the ALJ finds that the disregarding of a tribunal's order is a more egregious offense than violating a statute or a procedural rule.

33. Moreover, the issue in this case is that Respondents have been successful in avoiding liability for at least three (3) of the Skyrivi prescription refills obtained by Claimant. And despite stipulations that require Respondents to reimburse CS[Redacted] and Claimant for his out of pocket expenses, there was no credible evidence presented at hearing that Respondents had successfully made any payments

to any parties for the expenses they avoided by failing to authorize the prescription refills and specifically the February 19, 2024 Skyrizi prescription that is the issue in this case.

34. Additionally, the penalty in this case must be sufficient to ensure that these issues do not arise again. Notably, Claimant's testimony in this case with regard to the stress and anxiety that he incurs when the prescription medications are not approved is found to be credible and persuasive.

35. Additionally, the ALJ notes that the parties agreed in the stipulation that because the cost of the Skyrizi is expensive, Respondents investigated alternative methods of treatment, but were advised by their IME doctor to continue with the Skyrizi medication. If the penalty is not sufficient in this case, Respondents may have a financial incentive to attempt to pass the cost of the Skyrizi prescription on to the Medicare Part D provider, as they have on previous occasions. Therefore, the penalty must be sufficient to ensure that this does not continue to occur.

36. The ALJ therefore finds that the penalty for failure to pay for the Skyrizi commences on February 19, 2024 and continues for three months, until the next prescription, ending on May 19, 2024, when Respondents pay for the next prescription. This represents a period of 90 days.

37. Respondents are also subject to a penalty for their failure to reimburse Claimant for his out of pocket co-pay of $4.60. The ALJ finds that both violations in this case are egregious. Respondents should have been award of the importance of authorizing Claimant's Skyrizi in this case based on the history of the case and the risk that Claimant experiences with regard to his treatment in the event that he does not receive the prescribed medication as outlined in the report by Dr. Contreras.

38. Moreover, once it was determined by KN[Redacted] that Claimant's prescriptions had been denied, there was no action taken by Respondents to ensure that Claimant was reimbursed for his out of pocket costs. Claimant's testimony in this case that he was required to put the cost of his co-pay on his credit card is found to be credible and persuasive.

39. In determining that Respondents are liable for penalties to Claimant for failing to reimburse Claimant for his out of pocket expenses related to the denial of the February 19, 2024 Skyrizi the ALJ considers the fact that Respondents failure to approve the Skyrizi has adverse effects on Claimant as he testified to at hearing including increased stress and anxiety in addition to headaches.

40. The ALJ further finds that there is no appropriate explanation for the denial of the Skyrizi by Respondents. The argument that the denial was not intentional and occurred because of a coding error is without merit. It is not the responsibility of the Claimant or the pharmacy to approve Claimant's Skyrizi. It is the responsibility of the Insurer to approve the Skyrizi as agreed to in the Stipulation and required by the Order approving the Stipulation.

41. The ALJ further notes that Respondents stipulated in March 2023 that they would reimburse CS[Redacted] for the cost of the Skyrizi that was paid by CS[Redacted] within 30 days. The parties entered into a stipulation in August 2023 in which Respondents noted that they had not figured out how to reimburse CS[Redacted] for the cost of the Skyrizi and KN[Redacted] testified at hearing that well over a year after the March 2023 stipulation, Insurer had still not figured out how to reimburse CS[Redacted].

42. However, if Respondents had figured out how to reimburse CS[Redacted] in the 11 months between the March 2023 stipulation and the denial of Skyrizi in February 2024, they may have been able to mitigate the penalties in this case. The ALJ finds that there is insufficient evidence of appropriate actions by Respondents to mitigate the exposure to penalties in this case.

43. And even if Respondents could not ascertain how to reimburse CS[Redacted] for their cost of filling the Skyrizi prescriptions, nothing prevented Respondents from investigating and insuring that Claimant's out of pocket expenses related to the denial of Skyrizi were taken care of. Instead, Respondents took no action to attempt to reimburse Claimant for his out of pocket expenses in this case.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2013 The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If respondents committed a violation of the statute, rule or order, penalties can be imposed only if respondents actions were not reasonable under an objective standard. *Pioneers*

Hospital of Rio Blanco County v. Industrial Claim Appeals Office, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

4. Section 8-43-304(4), C.R.S., provides that an application for hearing on penalties "shall state with specificity the grounds on which the penalty is being asserted." The purpose of requiring that an application for hearing on penalties specifically state the grounds on which the penalty is being asserted, is to provide notice of the alleged conduct which must be corrected so as to afford an opportunity to cure. *See Delta City Memorial Hospital v. Industrial Claim Appeals Office,* 495 P.3d 984 (Colo.App. 2021)(broad statement of request for penalties sufficient to put hospital on notice); *Stilwell v. B &B Excavating Inc.*, W.C. No. 4-337-321 (July 28, 1999); *see Hendricks v. Industrial Claim Appeals Office, supra; Carson v. Academy School District # 20,* W.C. No. 4-439-660 (April 28, 2003).

5. Because Respondents have raised the issue with regard to the sufficiency of the pleading, the ALJ must first address whether the penalty claim was sufficiently plead before addressing whether a penalty is appropriate.

6. As found, Claimant filed an application for hearing alleging penalties for "Respondents failure to authorize and pay for Skyrizie" and referenced Section "8-43-304 & 305 & 401/2/a." Claimant further noted the date the penalty was to start as being February 13, 2024. While this date is a bit off from the February 19, 2024 denial that was discussed at hearing, the ALJ finds that the description of the penalty put Respondents on notice regarding the acts that gave rise to the penalty violation. The ALJ finds this notice to be sufficient to comply with the requirements of Section 8-43-305, C.R.S.

7. Respondents also raised the affirmative defense that the action giving rise to the penalty had been cured pursuant to Section 8-43-304(4), C.R.S. Section 8-43-304(4) provides that any party alleged to have committed a violation of the Act subject to penalties shall have twenty days to cure the violation from the date of mailing of the application for hearing in which penalties were alleged. Section 8-43-304(4) provides that if the violation cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. Section 8-43-304(4) further states that the curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

8. In this case, however, there is insufficient evidence to establish that the penalty was cured within 20 days. As noted, Respondents did not approve Appellant's Skyrizi until his next refill that occurred 90 days later and 58 days after the Application for Hearing was filed.

9. As found, the ALJ credits the testimony of Claimant and KN[Redacted] who testified that Respondents have not reimbursed Claimant's co-pay for having to fill the prescription for either the August 2023 denial nor the February 2024 denial of Skyrizie. While KN[Redacted] testified that Insurer has reached out through a third party to reimburse Medicaid for the cost of the Skyrizie that was covered by Medicaid, no such reimbursement has occurred as of the date of the hearing for either the March 2023 or the February 2024 denial of service. As such, the argument that the facts giving rise to the penalty in this case have been cured is rejected.

10. Moreover, Claimant had filed multiple applications of hearing requesting penalties for the exact same conduct, which has been an ongoing issue in this case. Insurer was aware of the issue with the denial of Skyrizie and was aware that this conduct had resulted in claims for penalties. Therefore, insofar as there could be an argument that the facts giving rise to the penalty had been "cured" the ALJ finds that Claimant has established by clear and convincing evidence that Respondents knew or reasonably should have know of the facts giving rise to the penalty claim in this case.

11. After determining that the conduct constituted a violation of an Order, the ALJ must next determine if the actions were "reasonable". The reasonableness of the violator's actions depends on whether the actions were predicated on rational argument based in law or fact, and this determination is to be made by the ALJ. *See Jiminez v. Industrial Claim Appeals Office, supra*. Further, where the violator fails to offer a reasonable factual or legal explanation for its actions, it may be inferred that the violation was objectively unreasonable. *See Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

12. As found, Respondents actions in this case were unreasonable in that they denied authorization for the Skyrizi despite having specifically stipulated that they would continue to pay for the Skyrizi.

13. As found, the egregiousness of the failure to approve the Skyrizi is significant. Respondents actions result in Claimant having to bear additional costs that have been resolved by the parties by an Order approved by an ALJ. Moreover, after Respondents have avoided having to pay for prescription medication they are ordered to pay for, Respondents also fail to reimburse Claimant for his out of pocket expenses.

14. As found, the penalty in this case must be significant enough to ensure that future violations of this nature do not occur. As found, if the penalty is not significant enough to deter future violations of the Order requiring Respondents to pay for the Skyrizi medication, Respondents may have a financial incentive to continue to attempt to defer the cost of the Skyrizi to Claimant and his Part D Medicare insurance coverage.

15. The ALJ finds that Respondents are liable for penalties of $300 per day for the period of February 19, 2024 through May 19, 2024 for a period of 90 days for failure to authorize Claimant's Skyrizi prescription.

16. The ALJ finds that Respondents are liable for additional penalties of $300 per day for the period of February 19, 2024 and ongoing for Respondents failure to reimburse Claimant his out of pocket co-pay Claimant was required to pay when his Skyrizi was improperly denied by Respondents on February 19, 2024. This penalty shall continue until such time as Respondents reimburse Claimant his co-pay.

17. The ALJ notes that the penalty of $300 per day for failing to reimburse Claimant's out of pocket expenses of $4.60 for filling the prescription may seem excessive. However, the issue in this case is not the amount Claimant has to pay out of pocket, but the fact that he continues to have to pay out of pocket after being involved in protracted litigation involving the issue of the Skyrizi and the fact that there is a lack of credible evidence that Respondents took action to attempt to reimburse Claimant his out of pocket expenses that were incurred by their failure to approve the Skyrizi.

18. Section 8-43-304(1) provides that the ALJ shall apportion any award of penalties, in whole or in part, at the discretion of the Administrative Law Judge, between the aggrieved party and the Colorado uninsured employer fund created in Section 8-67-105; except that the amount apportioned to the aggrieved party must be at least twenty-five percent of any penalty assessed.

19. Pursuant to Section 8-43-304(1), the ALJ apportions the penalty in this case 50% to the Claimant and 50% to the Colorado uninsured employer fund created in Section 8-67-105, C.R.S.

ORDER

It is therefore ordered that:

1. Respondents' shall pay penalties to Claimant in the amount of $300 per day for failure to authorize Claimant's Skyrizi for the period of February 19, 2024 through May 19, 2024.

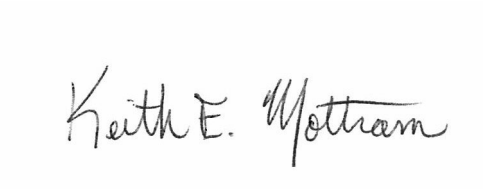
2. Respondents shall pay penalties to Claimant in the amount of $300 per day for the period of February 19, 2024 and continuing for failure to reimburse Claimant for his out-of-pocket co-pay that Claimant was forced to pay when the authorization for Skyrizi was denied by Respondents on February 19, 2024.

3. The penalty shall be apportioned 50% to the Claimant and 50% to the Uninsured Employer Fund established a Section 8-67-105, C.R.S. pursuant to Section 8-43-304(1), C.R.S.

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 email at oac-ptr@state.co.us, or at oac-dvr@state.co.us. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you

mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: September 25, 2024



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-252-496-002

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that on August 5, 2023, he suffered an injury arising out of and in the course and scope of his employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of his left lower extremity (including treatment he received at Bozeman Health Deaconess Regional Medical Center) is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to select his authorized treating physician (ATP)?

4. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning August 5, 2023, and ongoing until terminated by law?

5. If the claim is found compensable, what is Claimant's average weekly wage **(AWW)?**

FINDINGS OF FACT

1. Claimant resides in Fort Collins, Colorado. Respondent operates a roofing company. Respondent's address of record is in Denver, Colorado. Claimant was hired by Respondent to work as a roofer. This offer of employment was made in Colorado.

2. Claimant was paid $250.00 per day, and he worked six days a week for Respondent. This is a weekly wage of $1,500.00. Wages were paid to Claimant by check.

3. In May 2023, Respondent assigned Claimant to a roofing job in Montana. The Montana project was from approximately May 2, 2023 until August 8, 2023.

4. On August 5, 2023, Claimant was at the job location in Montana performing his normal roofing duties. On that day, it was raining and the roof became slippery. As a result of the slippery roof, Claimant fell and injured his left leg and left ankle.

5. Immediately after his fall, Claimant was transported to the emergency department at Bozeman Health Deaconess Regional Medical Center. The August 5, 2023 medical record demonstrates that Claimant underwent x-rays of his left ankle and left foot. Claimant also underwent computed tomography (CT) of his left lower extremity.

6. Claimant was diagnosed with a calcaneus fracture. The August 5, 2023 medical record also indicates that Claimant was at risk for compartment syndrome. Claimant was placed in a splint, given crutches, told to take ibuprofen for pain, and advised not to bear any weight on the left foot. In addition, Claimant was referred for an orthopedic consultation. Claimant testified that it was his understanding that he would need to undergo surgery for the fracture.

7. Claimant testified that when Respondent learned that Claimant would need surgery, Respondent provided Claimant transportation back to Colorado. Respondent did not provide Claimant with a list of designated medical providers. Respondent did not refer Claimant to a specific medical provider in Colorado.

8. Since returning to Colorado, Claimant has not received any treatment for his left leg and left ankle. Claimant testified that he is unable to afford the necessary treatment. Claimant also testified that he is in need of treatment for his injured left leg and left ankle.

9. Since his fall and resulting injury on August 5, 2023, Claimant has not returned to full time work. Claimant testified that although the condition of his left lower extremity has improved over time, he continues to experience pain and physical limitations. Claimant testified that he is currently limited in his ability to work and has difficulty walking for more than 15 minutes at a time.

10. Claimant testified that approximately two weeks prior to the hearing he began to work for his cousin on an as needed basis. Claimant testified that the pay he receives from that position varies.

11. On November 9, 2023, the Colorado Division of Workers' Compensation (DOWC) sent Claimant a letter regarding this claim. In that letter, the DOWC informed Claimant that Respondent did not have workers' compensation coverage.

12. The ALJ credits the medical records and Claimant's testimony. The ALJ finds that Claimant has successfully demonstrated that it is more likely than not that on August 5, 2023, he suffered an injury arising out of and in the course and scope of his employment with Employer. The ALJ also finds that Claimant was working for the Colorado based Respondent at the jobsite in Montana at the time of the injury.

13. The ALJ credits the letter generated by the DOWC on November 9, 2023 and finds that as of August 5, 2023, Respondent did not have workers' compensation insurance coverage.

14. The ALJ further credits the medical records and Claimant's testimony and finds that Claimant has successfully demonstrated that it is more likely than not that treatment of his left lower extremity (including treatment he received at Bozeman Health Deaconess Regional Medical Center) constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury.

15. The ALJ credits Claimant's testimony and finds that Employer did not provide Claimant with a list of designated medical providers. Therefore, the ALJ finds that Claimant has successfully demonstrated that selection of an ATP has passed to Claimant.

16. The ALJ credits Claimant's testimony and finds that Claimant has successfully demonstrated that it is more likely than not that as a result of his work injury he has been unable to work. Therefore, Claimant has suffered a wage loss and is entitled to temporary total disability (TIO) benefits beginning August 5, 2023, and ongoing until terminated by law.

17. The ALJ further credits Claimant's testimony and finds that at the time of his August 5, 2023 injury, his average weekly wage (AWW) was $1,500.00.

CONCLUSIONS OF LAW

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

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

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

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *SubsequentInjury 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. Vico,y, supra.*

5. As found, Claimant has demonstrated, by a preponderance of the evidence, that on August 5, 2023, he suffered an injury that arose out of an in the course and scope of his employment with Employer. As found, the medical records and Claimant's testimony are credible and persuasive.

6. As found, Claimant has demonstrated, by a preponderance of the evidence, that at the time of Claimant's August 5, 2023 work injury, Respondent did not carry workers' compensation insurance.

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

8. As found, Claimant has demonstrated, by a preponderance of the evidence, that treatment of his left lower extremity (including treatment he received from Bozeman Health Deaconess Regional Medical Center) constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury. As found, the medical records and Claimant's testimony are credible and persuasive.

9. Section 8-43-404(5)(a) specifically states: "[i]n all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

10. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that selection of an ATP has passed to Claimant. Claimant's testimony is credible and persuasive.

11. 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 they left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and

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

12. As found, Claimant has demonstrated, by a preponderance of the evidence, that he continues to have work restrictions due to his work injury. As found, Claimant has demonstrated, by a preponderance of the evidence, that his wage loss was caused by his work injury. Therefore, Claimant is entitled to temporary total disability (TTD) benefits beginning August 5, 2023 and ongoing until terminated by law. As found, Claimant's testimony are credible and persuasive.

13. Section 8-42-102(2), C.R.S. requires the ALJ to base a claimant's average weekly wage (AWW) on their earnings at the time of the injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon their AWW on a date other than the date of the injury. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid* & *Waldron v. Vigil,* 856 P.2d 850 {Colo. 1993). The overall objective of calculating **AWW is** to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food* & *Commercial Workers Local No.* 7, W.C. No. 4-240-475 {ICAO, May 7, 2007).

14. As found, Claimant's AWW at the time of his injury was $1,500.00. As found, Claimant's testimony on this issue is credible and persuasive.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable injury on August 5, 2023.

2. Respondent did not have workers' compensation insurance on August 5, 2013.

3. Respondent shall pay for reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury. Such reasonable and necessary medical treatment includes the treatment Claimant received for his left leg and left ankle at Bozeman Health Deaconess Regional Medical Center.

4. Claimant is entitled to temporary total disability (TTD) benefits beginning August 5, 2023, and ongoing until terminated by law.

5. Claimant's average weekly wage (AWW) for this claim is $1,500.00.

6. Selection of an authorized treating physician (ATP) has passed to Claimant.

7. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

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

Dated September 3, 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.**

ISSUE

I. Whether Claimant established, by a preponderance of the evidence that the need for surgery recommended by Dr. Barker is due to her compensable work related injury or is it preexisting?

FINDINGS OF FACT

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

1. In a previous hearing, ALJ Spencer determined that Claimant sustained a compensable injury to her back. That order was issued on August 18, 2023. That order was not appealed. In that order, the ALJ noted that Claimant did not request approval for a lumbar fusion, and that issue was reserved.

2. Following the issuance of that order, Claimant returned to Dr. Brianna Fox on September 5, 2023. She reiterated that Claimant had lumbar radiculopathy, spondylolistesis at L5-S1 and lumbar spinal stenosis with neurogenic claudication. She also indicated that a TLIF from L3-S1 was recommended previously by two separate neuro spine surgeons, but she could not get it authorized through workers compensation. Dr. Fox recommended a referral back to Physician's Assistant (PA) Schweid at Rocky Mountain Spine Clinic to get the surgery scheduled.

3. Following the visit with Dr. Fox, Claimant was seen by Mr. Schweid on September 27, 2023. He indicated that the surgery that had been denied had now been approved.[1] However, due to the age of the prior MRI, he wanted to do an updated MRI of the low back.

4. On March 7, 2024, a request for prior authorization of the fusion surgery from Dr. Barker's office was sent to Respondents. The surgery was denied as unrelated.

5. Dr. Ogin's deposition was taken by Respondents on July 22, 2024. With respect to the causal connection of the proposed surgery to the compensable work injury, he testified "Well, [Redacted, hereinafter HN] has the record - as subsequently demonstrated, had a long history of preexisting back issues, dating back at least to 2010, if not before that. Indeed, she had already been referred for a spine surgeon, I believe, in 2016 or 2017, and was having similar complaints of debilitating back pain, numbness and tingling in her feet. It's expected that those degenerative changes, which were

[1] This statement regarding authorization of the surgery appears to be inaccurate based on correspondence from Respondents' counsel date March 18, 2024 to Dr. Barker indicating that the surgery was denied as unrelated.

pronounced on MRI in 2014 and 2015, would have progressed over time, as degenerative changes typically do. She then had a minimal exposure, which was simply bending down to pick up a vacuum tube, on the date of injury. Her subsequent MRI, which was performed in September 23rd, 2022, revealed multilevel degenerative changes, many of which were already previously present from her prior MRIs. But there is certainly some progression at the L5-S1 level, mainly having to do with posterior element arthropathy and thickening, which was producing stenosis or tightness at that level, particularly on the right side affecting, potentially, the S1 nerve root and possibly along the L5 nerve roots."

6. Dr. Rook initially performed an IME on January 23, 2023 to determine causation for the Claimant's low back pain. He performed a second IME via teleconference on June 26, 2024. After review of Dr. Ogin's report, he opined with a reasonable degree of medical certainty that Ms. Hanson is in need of surgery at this point in time because of the injury she sustained on August 16, 2022. He disagreed with Dr. Ogin that the need for surgery was preexisting. In support of his opinion, Dr. Rook noted that Claimant only had occasional flare ups prior to the work injury and was working full duty with no restrictions since February 24, 2017.

7. I find that the incident on August 16, 2022 aggravated and accelerated Claimant's low back pain and resulted in the recommendation for fusion surgery.

CONCLUSIONS OF LAW

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

Generally

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

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

P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

D. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he/she sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

E. Assuming that Dr. Ogin is correct that Claimant may have suffered from pre-existing degeneration in her low back, the presence of a pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

F. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent, as asserted by Respondents in this case, the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Based upon the evidence

presented, the ALJ is convinced that the increased symptoms and disability Claimant experienced on August 16, 2022 were a consequence of an aggravation and the industrially based acceleration of her underlying lumbar degeneration. I conclude that Dr. Rooks's analysis is credible and persuasive. The ALJ rejects Dr. Ogin's contrary opinions as unpersuasive.

Medical Benefits

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

H. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). I conclude that the surgery recommended by Dr. Barker and P.A. Schweid is reasonable, necessary and related to the compensable work injury of August 16, 2022.

ORDER

It is therefore ordered that:

1. Respondents are liable for Claimant's surgery recommended by Dr. Barker and P.A. Schweid.

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

DATED: September 3, 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

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-178-127-006

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the August 24, 2022 Division Independent Medical Examination (DIME) opinion of Justin D. Green, M.D. that she reached Maximum Medical improvement (MMI) on June 22, 2021 and warranted a 13% lower extremity impairment rating as a result of her February 17, 2021 industrial injury.

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 her industrial injury or prevent further deterioration of her condition.

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

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

5. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive continuing indemnity benefits.

FINDINGS OF FACT

1. Claimant is a 51-year-old female who worked for Employer as a paraprofessional. Claimant testified that on February 17, 2021 she suffered a right knee injury while attempting to physically control a student experiencing behavioral issues.

2. On February 17, 2021 Claimant visited Urgent Care. She was diagnosed with a right knee sprain.

3. On February 22, 2021 Claimant underwent a right knee x-ray. The imaging was unremarkable with indications of arthritic/degenerative changes.

4. On February 23, 2021 Claimant saw Authorized Treating Physician (ATP) Jay Reinsma, M.D. at Concentra Medical Centers for an evaluation. He noted that Claimant had visited Advanced Urgent Care on the date of the injury. Claimant reported that on February 17, 2021 she was attempting to help restrain a combative student. While Claimant was attempting to arise after going down to a knee, she experienced pain in her right knee. Dr. Reinsma diagnosed a right knee strain, prescribed physical therapy and assigned work restrictions.

5. On March 1, 2021 Claimant returned to Dr. Reinsma for an evaluation. She reported pain at the level of 0/10 and that her condition had returned to baseline. Dr. Reinsma released Claimant to full duty work and determined she had reached Maximum Medical Improvement (MMI).

6. On March 19, 2021 Claimant returned to Dr. Reinsma for an examination. She noted she had returned to full duty work but was experiencing knee pain. Dr. Reinsma suspected Claimant may have suffered an initial partial meniscus tear that had progressed to a complete tear. He ordered an MRI. Dr. Reinsma was uncertain of a new MMI date until he reviewed the MRI results.

7. On April 22, 2021 Claimant again visited Dr. Reinsma for an evaluation. He remarked that Claimant's right knee MRI revealed slight evidence of a strain to her MCL, she had no meniscal tears, and her ACL was intact. Dr. Reinsma commented that Claimant had returned to regular duty employment without increased pain or swelling. Although Claimant felt that physical therapy had been helpful, she still believed her right knee was going to "give out." Dr. Reinsma reasoned that, although Claimant had been having some "fear avoidance," she was pain-free and had achieved her functional goals. He thus determined Claimant had reached MMI and released her from care. Dr. Reinsma concluded Claimant had suffered no permanent impairment and did not recommend medical maintenance treatment.

8. Claimant testified at the hearing in this matter that she suffered a second work injury during May 2021. However, Claimant did not file a Workers' Compensation claim for the May 2021 injury and Respondents have not authorized treatment.

9. On May 28, 2021 Claimant returned to Dr. Reinsma for a one-time evaluation authorized by Respondent's adjuster. Claimant denied any new injuries, but had been experiencing burning and swelling in the medial knee area since her release from care on April 22, 2021. Dr. Reinsma referred Claimant to a physiatrist for a possible injection because she continued to suffer exertional knee swelling and the MRI revealed injuries that should have been well-healed.

10. On June 22, 2021 Claimant visited Frederic Zimmerman, D.O. for an examination. He assessed Claimant with a right knee strain and mild chondromalacia/osteoarthritis of the knee joint that was exacerbated by her work injury. Dr. Zimmerman agreed Claimant had reached MMI. He assigned a 5% lower extremity impairment rating for mild chondromalacia and an 8% rating for range of motion deficits for a total 13% right lower extremity impairment. Dr. Zimmerman also recommended maintenance care in the form of a one-time steroid injection over the next six months, if necessary. as well as a right patellar strap replacement in the next six months.

11. On June 23, 2021 Claimant again returned to Dr. Reinsma for an examination. He conducted a comprehensive discharge evaluation and concluded Claimant had reached MMI. Dr. Reinsma assigned work restrictions and recommended medical maintenance care.

12. On August 5, 2021 Respondent filed a Final Admission of Liability (FAL) acknowledging that Claimant had sustained a 13% lower extremity impairment and reached MMI on June 23, 2021 for her February 17, 2021 work injury. Respondent also admitted that Claimant had received medical benefits in the amount of $4,126.17 and $9,115.45 in Permanent Partial Disability (PPD) benefits.

13. On September 17, 2021 Claimant returned to Dr. Reinsma for a one-time evaluation. Because Claimant continued to experience right knee pain and an injection administered by Dr. Zimmerman had failed, he referred Claimant for another MRI of her right knee.

14. On September 23, 2021 Claimant reported to Dr. Reinsma that she had re-injured her right knee three days earlier when she was attempting to restrain a combative student at work. Dr. Reinsma did not assign any additional restrictions but noted an MRI had been scheduled.

15. On October 4, 2021 Respondent filed a General Admission of Liability (GAL) reopening the February 17, 2021 claim. Respondent acknowledged continuing Temporary Total Disability (TTD) benefits beginning on September 21, 2021 at an Average Weekly Wage (AWW) of $763.74.

16. On October 5, 2021 Dr. Reinsma remarked the MRI had revealed some fraying of the meniscus and thinning of cartilage. However, the imaging was essentially unchanged from the prior MRI. Nevertheless, he recommended a follow-up visit with Dr. Zimmerman to determine whether repeat injections or a trial of viscous gel would be beneficial.

17. Through the remainder of 2021 and 2022, Claimant continued to receive treatment from Dr. Reinsma and other medical providers. On February 1, 2022 providers determined Claimant was not a surgical candidate based on her personal beliefs and she would not be comfortable receiving treatment through platelet-rich plasma (PRP). Because of a lack of continuing treatment options, Claimant was instructed to continue her physiatry appointments. Dr. Zimmerman ultimately released Claimant from specialist care.

18. On March 15, 2022 Dr. Reinsma again determined Claimant had reached MMI. Claimant subsequently continued to attend medical maintenance appointments.

19. Claimant requested a Division Independent Medical Examination (DIME). On August 24, 2022 Claimant underwent a DIME with Justin D. Green, M.D. of Front Range Center for Spine & Sports Medicine. Dr. Green reviewed Claimant's medical records and conducted a physical examination. Claimant detailed that she initially injured her right knee when she arose after attempting to restrain a student in an autistic classroom on February 17, 2021. Subsequently, in a different classroom, she knelt down and experienced a right knee pop and swelling while changing a diaper. Finally, she suffered additional swelling when a student fell on the anterior aspect of her right knee. Dr. Green summarized that Claimant had suffered a work-related right knee injury on February 17, 2021 with multiple interim right knee traumas. He diagnosed right knee chondromalacia. Dr. Green agreed with Dr. Zimmerman that Claimant reached MMI on June 22, 2021.

20. Relying on the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*), Dr. Green concurred with

Dr. Zimmerman's final report of June 22, 2021 and assigned a 5% chondromalacia impairment pursuant to Table 40. Based upon the Division of Workers' Compensation (DOWC) Impairment Rating Tips, Dr. Green observed non-physiologic active range of motion deficits and chose to use the measurements obtained by Dr. Zimmerman on June 22, 2021. He thus assigned an 8% lower extremity range of motion impairment. Combining the ratings yielded a total 13% right lower extremity impairment. Dr. Green recommended medical maintenance treatment in the form of two to three visits over the next year for medication management, as well as one to two visits over the following year for patellar strap replacement.

21. On October 20, 2022 Respondent filed a FAL consistent with Dr. Green's DIME report. The document specified that Claimant had reached MMI on June 22, 2021 with a 13% lower extremity permanent impairment rating. The FAL also noted Claimant was entitled to receive medical maintenance benefits. Notably, Dr. Green had recommended two to three visits over the next year for medication management, as well as one to two visits over the following year for patellar strap replacement.

22. Claimant subsequently underwent medical maintenance treatment and medication management with various authorized providers. On August 1, 2023 Claimant visited Dr. Zimmerman. She expressed interest in PRP injections for her right knee. Dr. Zimmerman perceived a very low chance of success and recommended against PRP injections. He advised Claimant to follow-up with John Aschberger, M.D.

23. On October 5, 2023. Claimant visited Dr. Aschberger for treatment. She reported going for a long drive five days earlier and suffering right leg swelling. Dr. Aschberger remarked Claimant was not a candidate for additional injections based on her evaluation with Dr. Zimmerman. He explained Claimant did not suffer any trauma to her right leg and any issues of a potential deep vein thrombosis needed to be evaluated under her personal health insurance because they were not Workers' Compensation-related.

24. On March 7, 2024 Claimant visited Dr. Reinsma for an examination. He commented that Claimant remained at MMI and recommended maintenance care. Dr. Reinsma diagnosed Claimant with a right knee strain and chronic pain syndrome. He specifically mentioned that Claimant should receive medication management for chronic pain with Dr. Aschberger and follow-up with Dr. Zimmerman for repeat injections as needed. However, there is no pending recommendation for any specific maintenance medical treatment that has been denied by Respondent.

25. Indemnity payment logs reveal that all Temporary Total Disability (TTD) benefits, PPD benefits, and disfigurement benefits have been paid to Claimant. The CINCH payment logs in Respondent's Exhibit I demonstrate that all indemnity checks have been cashed and cleared.

26. The CINCH payment logs specifically reveal that Claimant has received $24,344.45 in indemnity benefits and $5,413.52 in disfigurement benefits for a total of $29,757.97. The TTD benefits from September 21, 2021 through March 14, 2022 total $12,729.00. The 13% scheduled rating totals $9,115.45 in PPD benefits. Combining the

admitted PPD and TTD benefits thus yields $21,844.45. Claimant also received a disfigurement award of $5,413.52. Combining TTD benefits, PPD benefits and disfigurement totals $27,257.97. Because Claimant has received benefits of $29,757.97, she has received an overpayment of $2,500.00.

27. On March 28, 2024 Claimant submitted a Request for Change of Physician. She mentioned that she had been ignored by Dr. Reinsma, but did not list a preferred provider. On April 8, 2024 Respondent denied the request because Claimant had not listed a preferred provider and more than 90 days had passed since her date of injury.

28. Claimant has failed to produce clear and convincing evidence to overcome the August 24, 2022 DIME opinion of Dr. Green that she reached MMI on June 22, 2021 and warranted a 13% lower extremity permanent impairment rating as a result of her February 17, 2021 industrial injuries. Specifically, Claimant has not demonstrated it is highly probable that Dr. Green's determination was incorrect. Initially, on February 17, 2021 Claimant suffered a right knee injury while attempting to physically control a student experiencing behavior issues. ATP Dr. Reinsma diagnosed a right knee strain, prescribed physical therapy and assigned work restrictions.

29. Claimant subsequently underwent physical therapy and diagnostic testing. On June 22, 2021 Dr. Zimmerman assessed Claimant with a right knee strain and mild chondromalacia/osteoarthritis of the knee joint that was exacerbated by her work injury. He determined Claimant had reached MMI. Dr. Zimmerman assigned a 5% lower extremity impairment rating for mild chondromalacia and an 8% rating for range of motion deficits for a total 13% right lower extremity impairment. Dr. Zimmerman also recommended maintenance care in the form of a one-time steroid injection over the next six months, if necessary, as well as a right patellar strap replacement in the following six months. Dr. Reinsma agreed Claimant had reached MMI. He assigned work restrictions and recommended medical maintenance care.

30. DIME Dr. Green reviewed Claimant's medical records and conducted a physical examination. He summarized that Claimant had suffered a work-related right knee injury on February 17, 2021 with multiple interim right knee traumas. Dr. Green diagnosed Claimant with right knee chondromalacia. He agreed with Dr. Zimmerman that Claimant reached MMI on June 22, 2021. Relying on the *AMA Guides*, Dr. Green concurred with Dr. Zimmerman's final report of June 22, 2021 and assigned a 5% chondromalacia impairment pursuant to Table 40. Based upon the DOWC Impairment Rating Tips, Dr. Green observed non-physiologic active range of motion deficits and chose to use Dr. Zimmerman's measurements from June 22, 2021. He thus assigned an 8% lower extremity range of motion impairment. Combining the ratings yielded a 13% right lower extremity impairment. Dr. Green recommended medical maintenance treatment in the form of two to three visits over the next year for medication management, as well as one to two visits over the following year for patellar strap replacement.

31. Claimant has not presented persuasive, clear and convincing evidence that DIME Dr. Green's report contained any significant errors or mistakes. Claimant's focus on Dr. Reinsma's and Dr. Zimmerman's impairment assessments is not convincing

because DIME Dr. Green applied his independent judgement in his MMI and impairment rating determinations. Because Dr. Green's opinion is consistent with both Dr. Reinsma's and Dr. Zimmerman's MMI and impairment decisions, there is not even a medical difference of opinion regarding MMI and impairment ratings. Notably, Dr. Green observed non-physiologic active range of motion deficits and properly chose to use the measurements obtained by Dr. Zimmerman on June 22, 2021. Claimant's arguments regarding typographical errors related to dates of reports, dates of injuries, or minor discrepancies within the DIME do not satisfy the clear and convincing evidentiary standard to establish that Dr. Green's opinion was clearly erroneous. Accordingly, Claimant has not produced unmistakable evidence free from serious or substantial doubt that Dr. Green's MMI and impairment determinations were incorrect.

32. On October 20, 2022 Respondent filed a FAL consistent with Dr. Green's DIME report. The document specified that Claimant had reached MMI on June 22, 2021 with a 13% lower extremity permanent impairment rating. The FAL also noted Claimant was entitled to receive medical maintenance benefits. Notably, Dr. Green had recommended two to three visits over the next year for medication management, as well as one to two visits over the following year for patellar strap replacement.

33. A reasonable construction of Respondent's FAL reflects that it is consistent with the DIME report and authorized medical maintenance care for one year after August 24, 2022. Claimant has failed to present substantial evidence to support a determination that additional medical maintenance treatment will be reasonably necessary to relieve the effects of her industrial injury or prevent further deterioration of her condition. On March 7, 2024 Dr. Reinsma mentioned that Claimant should receive medication management for chronic pain with Dr. Aschberger and follow-up with Dr. Zimmerman for repeat injections as needed. However, the record is replete with evidence that Claimant has obtained significant medical maintenance treatment and there has been no request for specific additional care. Claimant has not demonstrated by a preponderance of the evidence that she is entitled to any specific maintenance medical benefit beyond the one year recommended by Dr. Green. Moreover, there is no pending recommendation from an ATP for any particular maintenance medical treatment that has been denied by Respondent. Claimant's vague allegations of additional medical treatment lack support to demonstrate they are reasonable, necessary and related to her February 17, 2021 industrial injury. Accordingly, Claimant's request for additional medical maintenance benefits is denied and dismissed.

34. Claimant suffered her admitted right knee injury on February 17, 2021 and reached MMI on June 22, 2021. The record reveals that Claimant did not mail a Request for Change of Physician until March 28, 2024. She mentioned that she had been ignored by Dr. Reinsma, but did not list a preferred provider. On April 8, 2024 Respondent denied the request because Claimant had not listed a preferred provider and more than 90 days had elapsed since the date of her injury.

35. Based on §8-43-404(5)(a)(III), C.R.S. and DOWC Rule 8-5, Respondent properly denied Claimant's request. The document was not filed within 90 days from the date of Claimant's February 17, 2021 admitted right knee injury and she reached MMI on

June 22, 2021. Accordingly, Claimant's request for a change of physician is denied and dismissed.

36. On October 4, 2021 Respondent filed a GAL acknowledging that Claimant earned an AWW of $763.74. Claimant also asserts that she is entitled to receive an AWW of $763.74. She has not provided evidence that the admitted AWW is incorrect or otherwise erroneous. Therefore, the record reveals an AWW of $763.74 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

37. Claimant has failed to prove it is more probably true than not that she is entitled to receive continuing indemnity benefits. CINCH Indemnity payment logs in Respondent's Exhibit I reveal that all TTD benefits, PPD benefits, and disfigurement benefits have been paid to Claimant. All indemnity checks have been cashed and cleared. The CINCH payment logs specifically reveal that Claimant has received $24,344.45 in indemnity benefits and $5,413.52 in disfigurement benefits for a total of $29,757.97. The TTD benefits from September 21, 2021 through March 14, 2022 total $12,729.00. The 13% scheduled rating totals $9,115.45 in PPD benefits. Combining the admitted PPD and TTD benefits thus yields $21,844.45. Claimant also received a disfigurement award of $5,413.52. Combining TTD benefits, PPD benefits and disfigurement yields a total of $27,257.97. Because Claimant has received benefits totaling $29,757.97, she has received an overpayment of $2,500.00.

38. Nevertheless, Claimant asserts that the indemnity tog provided by Respondent is not accurate because her disfigurement award remained unpaid until April, 2024 and TTD payments ceased. However, Claimant's general allegations of erroneous logs are not supported by credible and persuasive evidence. Moreover, Claimant acknowledged receiving the disfigurement award and TTD benefits. Finally, TPD and TTD benefits terminate when a claimant reaches MMI. Accordingly, Claimant's request for additional indemnity benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to

a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. 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).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Off.,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Off.,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S. *See Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Off.*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C.

No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Claimant has failed to produce clear and convincing evidence to overcome the August 24, 2022 DIME opinion of Dr. Green that she reached MMI on June 22, 2021 and warranted a 13% lower extremity permanent impairment rating as a result of her February 17, 2021 industrial injuries. Specifically, Claimant has not demonstrated it is highly probable that Dr. Green's determination was incorrect. Initially, on February 17, 2021 Claimant suffered a right knee injury while attempting to physically control a student experiencing behavior issues. ATP Dr. Reinsma diagnosed a right knee strain, prescribed physical therapy and assigned work restrictions.

9. As found, Claimant subsequently underwent physical therapy and diagnostic testing. On June 22, 2021 Dr. Zimmerman assessed Claimant with a right knee strain and mild chondromalacia/osteoarthritis of the knee joint that was exacerbated by her work injury. He determined Claimant had reached MMI. Dr. Zimmerman assigned a 5% lower extremity impairment rating for mild chondromalacia and an 8% rating for range of motion deficits for a total 13% right lower extremity impairment. Dr. Zimmerman also recommended maintenance care in the form of a one-time steroid injection over the next six months, if necessary, as well as a right patellar strap replacement in the following six months. Dr. Reinsma agreed Claimant had reached MMI. He assigned work restrictions and recommended medical maintenance care.

10. As found, DIME Dr. Green reviewed Claimant's medical records and conducted a physical examination. He summarized that Claimant had suffered a work-related right knee injury on February 17, 2021 with multiple interim right knee traumas. Dr. Green diagnosed Claimant with right knee chondromalacia. He agreed with Dr. Zimmerman that Claimant reached MMI on June 22, 2021. Relying on the *AMA Guides*, Dr. Green concurred with Dr. Zimmerman's final report of June 22, 2021 and assigned a 5% chondromalacia impairment pursuant to Table 40. Based upon the DOWC Impairment Rating Tips, Dr. Green observed non-physiologic active range of motion deficits and chose to use Dr. Zimmerman's measurements from June 22, 2021. He thus assigned an 8% lower extremity range of motion impairment. Combining the ratings yielded a 13% right lower extremity impairment. Dr. Green recommended medical maintenance treatment in the form of two to three visits over the next year for medication management, as well as one to two visits over the following year for patellar strap replacement.

11. As found, Claimant has not presented persuasive, clear and convincing evidence that DIME Dr. Green's report contained any significant errors or mistakes. Claimant's focus on Dr. Reinsma's and Dr. Zimmerman's impairment assessments is not convincing because DIME Dr. Green applied his independent judgement in his MMI and impairment rating determinations. Because Dr. Green's opinion is consistent with both Dr. Reinsma's and Dr. Zimmerman's MMI and impairment decisions, there is not even a medical difference of opinion regarding MMI and impairment ratings. Notably, Dr. Green

observed non-physiologic active range of motion deficits and properly chose to use the measurements obtained by Dr. Zimmerman on June 22, 2021. Claimant's arguments regarding typographical errors related to dates of reports, dates of injuries, or minor discrepancies within the DIME do not satisfy the clear and convincing evidentiary standard to establish that Dr. Green's opinion was clearly erroneous. Accordingly, Claimant has not produced unmistakable evidence free from serious or substantial doubt that Dr. Green's MMI and impairment determinations were incorrect.

Medical Maintenance Benefits

12. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of her condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Specifically, respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

13. As found, on October 20, 2022 Respondent filed a FAL consistent with Dr. Green's DIME report. The document specified that Claimant had reached MMI on June 22, 2021 with a 13% lower extremity permanent impairment rating. The FAL also noted Claimant was entitled to receive medical maintenance benefits. Notably, Dr. Green had recommended two to three visits over the next year for medication management, as well as one to two visits over the following year for patellar strap replacement.

14. As found, a reasonable construction of Respondent's FAL reflects that it is consistent with the DIME report and authorized medical maintenance care for one year after August 24, 2022. Claimant has failed to present substantial evidence to support a determination that additional medical maintenance treatment will be reasonably necessary to relieve the effects of her industrial injury or prevent further deterioration of her condition. On March 7, 2024 Dr. Reinsma mentioned that Claimant should receive medication management for chronic pain with Dr. Aschberger and follow-up with Dr. Zimmerman for repeat injections as needed. However, the record is replete with evidence that Claimant has obtained significant medical maintenance treatment and there has been no request for specific additional care. Claimant has not demonstrated by a preponderance of the evidence that she is entitled to any specific maintenance medical

benefit beyond the one year recommended by Dr. Green. Moreover, there is no pending recommendation from an ATP for any particular maintenance medical treatment that has been denied by Respondent. Claimant's vague allegations of additional medical treatment lack support to demonstrate they are reasonable, necessary and related to her February 17, 2021 industrial injury. Accordingly, Claimant's request for additional medical maintenance benefits is denied and dismissed.

Change of Physician

15. 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).

16. Section 8-43-404(5)(a)(III), C.R.S. provides, 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).

17. As found, Claimant suffered her admitted right knee injury on February 17, 2021 and reached MMI on June 22, 2021. The record reveals that Claimant did not mail a Request for Change of Physician until March 28, 2024. She mentioned that she had been ignored by Dr. Reinsma, but did not list a preferred provider. On April 8, 2024 Respondent denied the request because Claimant had not listed a preferred provider and more than 90 days had elapsed since the date of her injury.

18. As found, based on §8-43-404(5)(a)(III), C.R.S. and DOWC Rule 8-5, Respondent properly denied Claimant's request. The document was not filed within 90 days from the date of Claimant's February 17, 2021 admitted right knee injury and she reached MMI on June 22, 2021. Accordingly, Claimant's request for a change of physician is denied and dismissed.

Average Weekly Wage

19. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at

which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury, the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of injury. *Id.*

20. As found, on October 4, 2021 Respondent filed a GAL acknowledging that Claimant earned an AWW of $763.74. Claimant also asserts that she is entitled to receive an AWW of $763.74. She has not provided evidence that the admitted AWW is incorrect or otherwise erroneous. Therefore, the record reveals an AWW of $763.74 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Continuing Disability Benefits

21. 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). Section 8-42-106(2), C.R.S. provides that TPD benefits shall continue until either of the following occurs: "(a) [t]he employee reaches MMI; 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).

22. To prove entitlement to TTD benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily

function; and (2) impairment of wage earning capacity as demonstrated by 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.

23. PPD benefits do not require a showing of actual wage loss but are instead based on the potential loss of future earning capacity. *Duran v. Indus. Claim Appeals Off.*, 883 P.2d 477 (Colo.1994); *see also Hussion v. Indus. Claim Appeals Off.*, 991 P.2d 346 (Colo. App.1999) (TTD benefits compensate employee for lost wages, while PPD benefits compensate for the loss of future earning capacity). The Workers' Compensation system is premised on the assumption that the future earning capacity of a partially disabled worker will be less than that of a non-disabled worker. *Business Ins. Co. v. BFI Waste Systems of North America*, Inc. 23 P.3d 1261, 1265 (Colo. App. 2001).

24. As found, Claimant has failed to prove by a preponderance of the evidence that she is entitled to receive continuing indemnity benefits. CINCH Indemnity payment logs in Respondent's Exhibit I reveal that all TTD benefits, PPD benefits, and disfigurement benefits have been paid to Claimant. All indemnity checks have been cashed and cleared. The CINCH payment logs specifically reveal that Claimant has received $24,344.45 in indemnity benefits and $5,413.52 in disfigurement benefits for a total of $29,757.97. The TTD benefits from September 21, 2021 through March 14, 2022 total $12,729.00. The 13% scheduled rating totals $9,115.45 in PPD benefits. Combining the admitted PPD and TTD benefits thus yields $21,844.45. Claimant also received a disfigurement award of $5,413.52. Combining TTD benefits, PPD benefits and disfigurement yields a total of $27,257.97. Because Claimant has received benefits totaling $29,757.97, she has received an overpayment of $2,500.00.

25. As found, nevertheless, Claimant asserts that the indemnity tog provided by Respondent is not accurate because her disfigurement award remained unpaid until April, 2024 and TTD payments ceased. However, Claimant's general allegations of erroneous logs are not supported by credible and persuasive evidence. Moreover, Claimant acknowledged receiving the disfigurement award and TTD benefits. Finally, TPD and TTD benefits terminate when a claimant reaches MMI. Accordingly, Claimant's request for additional indemnity benefits is denied and dismissed.

ORDER

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

1. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Green that she reached MMI on June 22, 2021 and suffered a 13% right lower extremity permanent impairment rating.

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

3. Claimant's request for a change of physician is denied and dismissed.

4. An AWW of $763.74 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

5. Claimant's request for additional indemnity benefits is denied and dismissed.

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

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

DATED: September 3, 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 5-252-732-001

ISSUES

- Did Claimant prove she suffered bilateral hip injuries, a left ankle strain/sprain, or a respiratory condition because of her admitted June 24, 2023 work accident?

- Did Claimant prove that treatment she received for her hips from Boulder Centre of Orthopedics and SimonMed (bilateral hip MRIs) was authorized?

FINDINGS OF FACT

1. Claimant worked for Employer as a large loss inspector, project manager, and commercial roofing estimator. She typically worked on commercial properties, but because of numerous storms in spring and early summer 2023, Claimant was assigned residential roof inspections.

2. On June 24, 2023, Claimant performed a residential roof estimate that required her to enter the home's attic. The floor of the attic was covered with blown-in insulation, which obscured Claimant's view of the floor. Claimant inadvertently stepped on unsupported drywall between the joists and the drywall gave way. She fell partially through the attic floor into the room below and ended up hanging from just under her armpits. The renter of the property got on a ladder and pushed Claimant back up to the attic.

3. Claimant suffered a large laceration and abrasions on her left shin, but appreciated no other specific injuries at the time. She cleaned up the mess created by the ceiling debris and left the property.

4. Over the next 48 hours, Claimant's left leg and ankle became hot, swollen, and painful, and she was worried about an infection. She requested medical attention and Employer referred her to Concentra.

5. Claimant saw Sabrina Hamilton, NP at Concentra Highlands Ranch on June 26, 2023. Inspection of the left leg showed a large abrasion with surrounding erythema and pitting edema. The leg was hot to touch and painful. Claimant also reported a prior history of asthma and allergies but she did not identify any active or acute respiratory issue or a cough. Respiratory examination was documented as normal. Nurse Hamilton gave Claimant a tetanus booster and prescribed an antibiotic for a likely infection. Claimant was released to work with no restrictions.

6. Claimant returned to Concentra on June 28, 2023, and saw PA Michael Pete. The wound was improving but her leg was still swollen. Claimant was working full duty but was having increased leg pain and swelling while driving long distances. Mr. Pete imposed a work restriction limiting long drives. There is no mention of any respiratory problems or cough.

7. On July 6, 2023, Claimant saw Dr. David Hnida at Concentra. She was working regular duty and doing better overall. Dr. Hnida noted a slowly resolving abrasion with swelling and erythema. Claimant had no pain with range of motion testing distal to the injury. A respiratory examination was recorded as normal. There is no documentation of any coughing.

8. Claimant returned to Dr. Hnida the next day to request a change in work restrictions. She was primarily concerned about attic inspections, which can be dirty. She also felt she could drive more. Dr. Hnida relaxed Claimant's driving restriction and referred her to a wound care clinic. The report makes no mention of coughing or other respiratory issues.

9. Claimant had an initial appointment with Dr. Daniel Mallett at the Parker Adventist Hospital Wound Care clinic on July 17, 2024. Thereafter, she was seen six more times through August 28, 2023. As would be expected, the primary focus of treatment was on wound care. Nevertheless, the reports document no other potentially injury-related problems involving Claimant's ankle, hips, or respiratory system.

10. Claimant testified her right hip started bothering her approximately one month after the accident. She noticed the pain while sleeping and driving.

11. Dr. Hnida re-evaluated Claimant on August 10, 2023. Her shin injury was 60% improved and her discomfort had diminished significantly. She did not report hip or left ankle issues. However, Claimant described a cough that she attributed to the accident. Claimant related a history of asthma for which she took medications but stated the coughing had gotten "much worse" since the accident. The pulmonary exam that day was negative. Dr. Hnida reviewed Claimant's chart and saw no prior mention of any respiratory issues potentially related to the work accident. Therefore, he concluded the issue is not work-related and recommended she see her personal care provider for it. Claimant said nothing about any hip symptoms.

12. Claimant continued working regular duties after the accident, including performing roof inspections. Claimant typically takes photographs of the roofs, and occasionally records video. Claimant is heard talking freely on multiple videos in July and August 2023 without a cough or other apparent respiratory problems.

13. Claimant participated in a recorded interview with Insurer's adjuster on August 25, 2023. Claimant coughed frequently during the interview. She told the adjuster her shin injury was continuing to heal but she was concerned about a persistent cough, which she said was related to the accident. Claimant wanted to change providers because Dr. Hnida would not refer her to a pulmonologist. Claimant did not mention any hip issues.

14. On September 6, 2023, Claimant started seeing Dr. Johathan Claassen at a different Concentra facility in Parker. She told Dr. Claassen she started having right hip pain "shortly" after the accident. The right hip was tender to palpation at the greater trochanter. Claimant did not report any groin pain. Additionally, Claimant said she inhaled particles and developed a cough. She further claimed that her left ankle was swelling after

driving for an hour. There was no discussion of why these issues had not been raised previously, and Dr. Claassen appears to have simply accepted Claimant's history without question. Dr. Claasen diagnosed an inhalation injury due to particulate matter, a right hip contusion, a left ankle strain, in addition to the previously diagnosed left lower leg abrasion and cellulitis. He ordered a chest x-ray and PT for Claimant's right hip and left ankle.

15. The chest x-ray showed two small lung nodules, and Dr. Claassen ordered a chest CT to better characterize the nodules.

16. The chest CT was completed on September 21, 2023. It showed several "nonspecific" pulmonary nodules. The radiologist recommended a follow-up CT if Claimant was at high risk for cancer.

17. Dr. Claassen reviewed the CT report and noted the radiologist did not comment whether the nodules might be infections in nature. Therefore, he recommended evaluation by a pulmonologist.

18. Dr. Albert Hattem performed a record review at Insurer's request, on October 3, 2023. He noted that "[w]hen [Claimant] first presented at Concentra on 06/26/2023, two days after the incident at work, she reported only a left shin abrasion. She did not report right hip pain, a respiratory problem/cough, and/or left ankle pain." Dr. Hattem opined that the interval between the date of injury and the date of reporting a cough did not support causal relatedness. He further opined that the findings on the chest CT scan were not caused by the work accident, and more likely the cough was related to Claimant's asthma.

19. Dr. Claassen wrote a letter on October 17, 2023, to appeal the denial of the pulmonary evaluation. He opined that Claimant inhaled a significant amount of insulation and possibly dust particles from bird and rodent droppings and had been having respiratory symptoms "since" the work accident. He had requested the pulmonary evaluation to evaluate whether the nodules shown on the CT scan were infectious. If so, they would possibly be related to the accident. If they were not infections, any further follow up would be with Claimant's primary care provider.

20. Dr. Hattem reviewed Dr. Claassen's appeal letter, and but was not persuaded to change his opinions. He thought the suggestion that the lung nodules were infectious made no medical sense, because the radiologist who reviewed the CT scan would "clearly" have recommended an immediate evaluation if there was a concern for infection.

21. Despite Insurer's official position that the right hip and left ankle are unrelated to the work accident, Claimant participated in at least 16 PT sessions through Concentra. The therapist documented negative FABER, FADIR, and Trendelenburg tests, suggesting the absence of significant structural hip pathology.

22. On October 27, 2023, Claimant reported the PT was helping the hip and ankle pain. Pulmonary examination on that date was normal.

23. The last documented appointment with Dr. Claassen occurred on December 5, 2023. Claimant had received a statement from Insurer indicating the only covered condition was the lower leg abrasion and cellulitis.

24. Dr. Claassen submitted another appeal letter to Insurer on December 18, 2023. He opined falling through sheetrock was "reasonable to cause multiple lower extremity injuries." As a result, he concluded the hip and left ankle symptoms were caused by the accident.

25. Claimant saw Dr. Scott Primack for an IME at Respondents' request on March 27, 2024. Dr. Primack concluded Claimant suffered no work-related hip injury. He opined the mechanism of injury was not consistent with a labral injury, because Claimant ended up "dangling" in the air and did not fall to the ground. He also emphasized the lack of contemporaneous documentation of any hip symptoms, with the first mention of hip pain being more than two months after the accident. He noted that maneuvers performed by the physical therapist intended to elicit hip symptoms were negative (FABER, FADIR, and Trendelenburg tests). Additionally, Dr. Primack saw no evidence of any injury-related respiratory issue that required evaluation or treatment.

26. Dr. Jeffrey Schwartz, a pulmonologist, performed a record review for Respondents on April 1, 2024. Dr. Schwartz opined that if Claimant had inhaled particulate matter during her accident as claimed, she would have been hypersensitive to irritation because of her asthma. Given her lack of reported cough for several weeks after the accident, it is very unlikely she had a significant pathogenic inhalation of such matter. More important, her chest CT scan showed no signs of recent infection. The pulmonary nodules seen on imaging were preexisting and unrelated. Because there were no signs of infection, Dr. Claassen's referral to a pulmonologist was unnecessary and unrelated to Claimant's injury. Finally, he noted that while the source of Claimant's cough is unknown, the most common causes of an acute cough are acute respiratory infections from exposures to common respiratory pathogens, asthma, upper respiratory inflammation, or gastroesophageal reflux. Dr. Schwartz saw no persuasive evidence that her cough occurred secondary to her brief possible exposure to dust when she fell on June 24, 2023.

27. Insurer filed a General Admission of Liability ("GAL") on April 8, 2024, admitting only for the left shin injury.

28. On April 2, 2024, Claimant was evaluated by Dr. Erik Bowman, an orthopedic surgeon. Claimant saw Dr. Bowman on her own initiative and not on referral from any authorized provider. Claimant told Dr. Bowman she had bilateral hip pain "ever since" the work accident. She said the left hip was worse than the right, and now she also had severe groin pain. FADIR test was positive bilaterally. Dr. Bowman suspected bilateral acetabular labral tears, and recommended MRIs of the hips. Based on Claimant's report of hip pain contemporaneous with the accident, he opined the hip symptoms were "most likely" related to her fall.

29. MRIs of both hips were completed on June 3, 2024. They showed bilateral femoral acetabular impingement syndrome with bilateral labral tears.

30. Claimant followed up with Dr. Bowman on June 12, 2024. Dr. Bowman opined, the bilateral labral tears "could [have] been exacerbated from her fall in the attic. Certainly, she does have some femoral acetabular impingement which puts her at risk of labral tears, but due to the fall there is a possibility that she may have damaged the labrum further and caused acute exacerbation of this condition." Dr. Bowman referred Claimant to Dr. Chen for injections. He did not recommend hip replacement.

31. Claimant saw Dr. Chen on June 12, 2024. Dr. Chen explained he did not want to become involved in any of her "legal" issues and was only interested in providing treatment. He did not recommend arthroscopy which he believed had too great a risk for complications. He performed steroid injections into both hips. The injections were of no benefit.

32. Dr. Primack testified at hearing, primarily regarding causation of the bilateral labral tears, which were identified after his IME. Dr. Primack opined that the labral tears are probably degenerative in nature, rather than traumatic. He explained that most labral tears are non-acute, either from overload from activities of time or from hip dysplasia. Acute labral tears usually occur from a direct load, and torque, which did not happen during Claimant's accident. He emphasized the lengthy delay between the accident and the onset of hip symptoms. Had the accident caused or aggravated bilateral labral tears, Claimant would have noticed pain immediately, or at least very soon thereafter. The fact that Claimant continued working for a month or more before noticing any hip pain indicates the symptoms were not caused by the accident. Dr. Primack is not convinced the labral tears are pain generators, because Claimant received no benefit from the injections. But even if the labral tears are symptomatic, Dr. Primack opined they were neither caused nor aggravated by the work accident.

33. The opinions of Dr. Primack, Dr. Schwartz, and Dr. Hattem are credible and more persuasive than any contrary opinions in the record.

34. Claimant failed to prove the work accident caused or aggravated her bilateral labral tears.

35. Claimant failed to prove the work accident caused or aggravated a respiratory condition.

36. Claimant failed to prove the work accident caused or aggravated a left ankle strain or sprain.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The 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 claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove the work accident proximately caused or aggravated bilateral labral tears, a pulmonary condition, or a left ankle strain or sprain. The opinions of Dr. Primack, Dr. Schwartz, and Dr. Hattem are credible and persuasive.

As explained by Dr. Primack, Claimant's mechanism of injury was unlikely to cause bilateral labral tears. Moreover, the lengthy delay between the accident and the onset of symptoms is inconsistent with a causal relationship. Dr. Claussen and Dr. Bowman were under the mistaken impression that Claimant started having symptoms immediately or very soon after the accident. But Claimant testified she first noticed hip symptoms approximately one month later, and she failed to report it to multiple providers for more than two months after the accident. Nor did she mention hip symptoms when she spoke with the adjuster on August 25, 2023.

Similarly, there is no documentation of any respiratory issues until two months after the accident, and several recordings of Claimant speaking during that period evidence no coughing or other breathing issues. Dr. Claassen obtained chest imaging out of an abundance of caution given the history related by Claimant. But Dr. Schwartz persuasively opined that the chest CT ruled out any infectious process or other injury-related pulmonary issue.

Finally, Claimant failed to prove she sustained a left ankle sprain/strain from the accident of June 24, 2023. Claimant did not report ankle injury to any of her providers for ten weeks after the accident, despite working full duty, which included ascending and descending ladders. Nor did she mention any ankle issues when she was interviewed by the adjuster and asked directly about her work-related injuries. There are no examination findings suggesting an ankle sprain, and the diagnosis appears to have been based primarily on Claimant's report to Dr. Claassen that her left ankle was swelling after driving long distances. There is insufficient persuasive evidence to establish a work-related left ankle injury.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits related to bilateral hip labral tears, respiratory issues, and a left ankle strain/sprain are denied and dismissed.

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

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

be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 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: September 4, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that his scheduled permanent impairment rating for his right upper extremity should be converted to a whole person impairment rating.

2. Whether Claimant established an entitlement to an award for disfigurement.

3. Whether Claimant established an entitlement to temporary partial disability benefits for the period of February 26, 2023 to June 24, 2023.

FINDINGS OF FACT

1. Claimant has works as a truck driver for employer, transporting and delivering concrete and other materials. Claimant sustained an admitted injury to his right shoulder on February 24, 2023, when he fell on ice.

2. As a result of his injury, Claimant underwent a reverse total shoulder arthroplasty (RTSA) on June 27, 2023, performed by Frank Wydra, M.D. RTSA is a procedure in which the patient's shoulder joint is replaced with an implant that reverses the natural anatomical "ball and socket" configuration. Specifically, the humeral head or "ball" is removed and replaced with a "socket," and that natural "socket" at the glenoid is removed and replaced with a "ball." (Pompei testimony, p. 56).

3. On February 20, 2024, Claimant's authorized treating physician, Richard Pompei, D.O., placed Claimant at maximum medical improvement, and performed an impairment rating the following day. Dr. Pompei assigned Claimant a 30% impairment rating for the right shoulder RTSA, and 15% impairment rating for decreased shoulder range of motion. The two ratings combine for a 41% upper extremity impairment rating, which corresponds to a 25% whole person impairment. Dr. Pompei's range of motion impairment consisted of a 4% rating for shoulder flexion, 1% for shoulder extension, 1% for shoulder adduction, 3% for shoulder abduction, 5% for internal rotation, and 1% for external rotation. (Ex. 3). Claimant's right upper extremity rating does not include any rating for range of motion deficits at the right wrist or elbow.

4. On February 23, 2024, Respondents filed a Final Admission of Liability admitting liability for a 41% scheduled upper extremity impairment rating. Additionally, Respondents admitted to an average weekly wage of $1,768.39, and for temporary total and temporary partial disability benefits beginning June 27, 2023. (Ex. A).

5. Dr. Pompei testified by deposition and was admitted as an expert in occupational medicine. Dr. Pompei testified that Claimant has a new shoulder joint, which is reversed from his natural anatomy. That is, the natural anatomical ball located on the humerus was removed and replaced with a socket, and the natural anatomical socket on the glenoid

was replaced with an artificial ball. Dr. Pompei further testified that there are "inherent range of motion deficits" as a result of the RTSA. Thus, the Claimant's range of motion deficits are the result of a replacement of his shoulder.

6. Claimant testified at hearing that due to his shoulder injury, he has difficulty showering, washing himself, putting on clothes and sleeping. He indicated that he had difficulty reaching across his body, and cannot reach as far overhead as before. Claimant testified that his shoulder does not prevent him from working overhead, but that is easier to work at shoulder height and below. On cross-examination, Claimant agreed he has no physician-imposed work restrictions, and that, after recovery from his surgery, he has continued to work without assistance or modified job duties.

7. At hearing, Respondents offered video surveillance of Claimant performing various tasks required in his employment, including Claimant entering and exiting a semitruck, using his right arm above his head, using his right arm to connect and disconnect various hoses, and using a hammer at approximately waist level. The video evidence was consistent with Claimant's testimony that he is able to perform his job duties.

8. Claimant's Earning Statement for the period ending February 25, 2023 shows that Claimant earned $4,317.13 in overtime pay for the period of January 1, 2023 through February 25, 2023. (Ex. 7, p. 100, "year to date" totals). Excluding the week of injury, Claimant worked an average of 12.34 hours of overtime prior to his injury.

9. Claimant testified credibly that after February 24, 2023, until his June 27, 2023 surgery, he was restricted to seated-only work, and was not able to do his regular job driving a truck. During this time, Claimant performed computer work for Employer, and did not work the overtime he normally worked in his capacity as a driver.

10. For the pay period beginning February 26, 2023 until the pay period ending June 24, 2023, Claimant continued to work for Employer, and was paid for 40 hours per week at the rate of $30.54 per hour, which increased to $32.29 per hour on April 16, 2023. From February 26, 2023 to April 15, 2023, Employer paid Claimant $1,221.60 per week, and from April 16, 2023 through June 24, 2023, Employer paid Claimant $1,291.60 per week.

11. For the period of February 26, 2023 through June 24, 2023, Claimant earned $21,467.20 from his employment, or an average of $1,262.78 per week for 17 weeks. Resulting in a loss of earnings of $8,595.43 or $505.61 per week. The ALJ finds it more likely than not that Claimant's loss of earnings during this period was the direct and proximate result of a disability caused by his work injury. Claimant is entitled to temporary partial disability benefits for this period in the amount of $5,730.31.

12. As a result of his surgery, Claimant has a four-inch surgical scar on the front portion of his right shoulder that is discolored and visibly distinct from the surrounding skin. Claimant's right shoulder is also slightly lower than his right shoulder.

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).

Conversion of Scheduled Impairment to Whole Person Impairment

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S. Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole-person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

Respondent's argument that Claimant has no manifestation of impairment is not persuasive. They contend Claimant's ability to perform certain job duties, including using his right arm, means he has no impairment. Claimant's ability to perform some tasks does not negate the fact that his shoulder range of motion is diminished as a result of his work-related injury. Moreover, the determination of whether to convert an impairment rating is not based on the degree of the impairment, but on the anatomical location of the functional impairment.

The issue before the ALJ is whether the situs of Claimant's functional impairment is on or off the schedule of impairment. The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO Feb. 4, 2015). In the case of a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora*, W.C. 4-452-408 (ICAP Oct. 9, 2002.) Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney, supra*; *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). *In re Claim of Barnes*, W.C. No. 5-063-493 (ICAO April 24, 2020).

Claimant has established by a preponderance of the evidence that he has sustained an impairment of anatomical structures beyond the arm at the shoulder. As found, Claimant's RTSA resulted in an alteration of Claimant's anatomy at both the glenoid and the humerus, by replacing and reversing the glenohumeral joint. The ALJ finds credible Dr. Pompei's testimony that the RTSA implant inherently results in less range of motion than a natural shoulder. No evidence was admitted indicating that Claimant's humerus does not function. In other words, Claimant's glenohumeral joint does not function as it did prior to his injury, which has resulted in limited range of motion of his arm. The situs of the functional impairment is the glenohumeral joint, which is beyond the arm at the shoulder. The Claimant's decreased range of motion is a manifestation of that functional impairment, and is therefore not a scheduled impairment. As found, Claimant's 41% right upper extremity impairment corresponds to a 25% whole person impairment. Claimant's request to convert his 41% right upper extremity permanent impairment rating to a 25% whole person impairment is granted.

Temporary Partial Disability

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's average weekly wage at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent

partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986)

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 TPD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

As found, as the result of his injury, from February 25, 2023 until June 24, 2023, Claimant was restricted to seated-only work and was not able to perform his normal job duties. During this time, Claimant performed primarily computer work, and was not able to work the overtime he worked prior to his injury. As a result of this disability, Claimant earned an average of $505.61 per week less than his average weekly wage at the time of employment, or a total of $8,595.43. Under 8-42-106 (1), C.R.S., Claimant is entitled to TPD benefits equal to sixty-six and two-thirds percent of the difference between his average weekly wage at the time of injury and the average weekly wage during the period of temporary partial disability, or a total of $5,730.31 (i.e., $8,595.43 x 66 2/3% = $5,730.31).

Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of the February 24, 2023 injury in the form of surgical scarring and a shoulder slump. Claimant is awarded $2,000.00 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's 41% right upper extremity impairment rating is converted to a 25% whole person impairment.

2. Respondent shall pay Claimant temporary partial disability benefits for the period of February 25, 2023 through June 24, 2023 in the amount of $5,730.31.

3. Respondent shall pay Claimant $2,000 for permanent disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

DATED: September 5, 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. WC 5-247-732-001

ISSUES

1. Whether Claimant sustained a compensable injury to his left knee arising out of the course of his Employment with Employer on August 5, 2023.

FINDINGS OF FACT

1. Claimant has worked for Employer as an electro-mechanic for approximately nine years. Claimant's job requires him to perform work and maintenance on light rail trains. Claimant typically works from 10:00 p.m. until 8:30 a.m., four days per week.

2. On August 5, 2023, Employer hosted a special event for the public at Employer's Elati station facility. Claimant reported for work at 10:00 p.m. on the evening of August 4, 2023. During his shift, Claimant's job duties differed from his normal activities and included walking round the station setting up games, displays and signage for the event. Claimant testified he wears a fitness tracker that counts his steps and, during his overnight shift from August 4 to 5, his step count was significantly higher than normal. Claimant testified he normally walks 8,000 – 10,000 steps during a shift, but on August 4-5, 2023, he walked in excess of 28,000 steps.

3. Claimant testified that at approximately 8:00 a.m., he was walking at the station and his left knee "popped" loudly, and he felt sudden pain in the knee. Claimant testified that he then dragged himself to a car to sit, and his knee immediately started to swell. He noticed an object protruding from within his knee joint that he had not noticed previously.

4. Claimant did injure his left knee in approximately 2003 or 2004 while in the military, when he dislocated his patella during an exercise. Claimant testified that he had minimal treatment for the left knee at that time, and was discharged from the military with a 10% disability rating for his knee and left foot. Claimant testified he had not had any additional treatment for his left knee after discharge from the military, and did not have any existing issues with his knee as of August 4, 2023. Claimant also has varicose veins in his left leg, and was wearing compression socks on August 4, 2023. (Ex. A).

5. Surveillance footage of the morning in question was admitted into evidence. (Ex. V). From 8:30 to 10:30, and 16:00 to 21:00 in the video, Claimant can be seen standing and walking throughout the Elati station.[1] At times, Claimant appears to walk without difficulty, and other times with a minimally altered gait. (Ex. V, pt. 2). At 24:00 into the video (Ex. V, pt. 2), Claimant is shown exiting a building walking from left to right on the screen with a normal gait. For the next two minutes, Claimant is obscured from view by a portion of a "bounce house." At 26:00, Claimant is shown standing with a group of individuals near the corner of the building for approximately five to six minutes, without any apparent issues with his knee. (Ex. V, pt, 2). At approximately 30:50 in the video,

[1] In the video, Claimant is wearing blue coveralls with yellow stripes.

Claimant is standing next to the corner of the building and extends his left knee slightly, reacts suddenly, and begins to flex and rub his left knee for approximately ten seconds. At approximately 36:35 Claimant again flexes his knee, reacts again, and periodically flexes and rubs his knee. At 37:51, Claimant walks away from the corner of the building (moving from left to right across the screen), with a noticeably altered gait and appears to be a talking on cell phone. At 38:01, Claimant moves out of view, obstructed by the bounce house, and returns to view at 38:10, hopping on one leg, with a significantly altered gait, favoring his left leg. Claimant can then be seen in the lower right-hand corner of the video bending over and examining his leg, and hobbling, until 38:58 when he exits the camera's field of vision. (Ex. V, pt. 2). Based on the video evidence, Claimant apparently experienced some symptoms in his knee while standing, and these symptoms worsened after he began walking.

6. Claimant initially sought medical treatment at Kaiser Permanente on August 8, 2023. Claimant reported pain in the left lateral knee joint. He reported hearing "popping" in his knee with each step, and then a more severe "pop" followed by swelling. Claimant reported injuring his knee when he was in the military. The provider at Kaiser indicated Claimant reported his knee could "feel unstable on weeks that it swells up." (Ex. 4). Claimant testified that he did not report prior sensations of instability, and that he did not have existing instability issues prior to August 5, 2023.

7. On August 10, 2023, Claimant began treatment with authorized treating physician (ATP) Brian Beatty, D.O. Claimant reported his symptoms began after walking extensively at work, and that he felt an object floating in his knee causing pain and discomfort. Claimant also reported his history of a prior left knee injury in the military in 2004 which had resolved. On examination, Dr. Beatty noted tenderness to palpation and an apparent loose body within the knee, with swelling, and referred Claimant for physical therapy and an MRI. Dr. Beatty noted that Claimant has swelling involving much of his left leg, but that Claimant reported this was commonly associated with his varicose veins, and that he had poor circulation. He diagnosed Claimant with a sprain of unspecified collateral ligament of the left knee and opined that the cause of the problem was related to work activities. (Ex. D).

8. An MRI performed on August 15, 2023 demonstrated significant pathology in Claimant's left knee. This included evidence of a lateral shifting or subluxation of the patella, advanced degeneration of the patella femoral facet, stretching of the medial patellar retinaculum (suggesting a history of patellofemoral dislocation); lateral and medial compartment degenerative changes, evidence of remote spraining of the medial collateral ligament; a 15 mm bony loose body; and a Baker's cyst with a 7 mm ossified body. (Ex. H).

9. On August 21, 2023, Dr. Beatty had a telephone meeting with [Redacted, hereinafter TR], a risk management specialist for Employer, and apparently reviewed a portion of the video footage of the day of Claimant's injury provided by TR[Redacted]. The precise footage viewed, and the content of Dr. Beatty's discussion with TR[Redacted] are not indicated in the record. Following this meeting, Dr. Beatty wrote: "Reviewed ongoing nature of the patient walking with a limp prior to his claimed injury. It appears [Claimant]

may have had a knee problem prior to his claimed work injury." (Ex. M). The following day, on August 22, 2023, Dr. Beatty responded to a letter from TR[Redacted], in which TR[Redacted] posed several questions. In response to the question "After reviewing the video the video do you believe the mechanism of injury is consistent with the patients [sic] reported symptoms and diagnosis?," Dr. Beatty wrote "No." In response to the question "If no, please explain why the incident would not result in the reported symptoms and diagnosis," Dr. Beatty wrote "The patient was standing/walking without an event to explain the patient's injury." (Ex. N).

10. On August 24, 2023, Dr. Beatty wrote "After reviewing the video of the event it is my determination that the problems he is experiencing with his left knee are nonwork related. He is now felt to be at maximum medical improvement without impairment and released from medical care to full duties." Dr. Beatty also opined that Claimant could return to full duty without restrictions. Dr. Beatty's records do not indicate that Claimant's physical condition had changed in any material respect in the two weeks between his initial visit and August 24, 2023, and he offered no medical basis for determining that Claimant was at MMI, or that he no longer required work restrictions. (Ex. O).

11. Dr. Beatty initially opined that Claimant's condition was work-related, with the knowledge that Claimant reported his knee symptoms began while walking, and that he had a history of a left knee injury. After apparently speaking with TR[Redacted] and viewing some unidentified portions of the video, Dr. Beatty changed his opinion. No evidence was admitted indicating Dr. Beatty sought any additional information from the Claimant regarding his injury or the reason for the "limp" Dr. Beatty perceived in the video, or whether Claimant's varicose veins affected his mobility. Similarly, no credible evidence was admitted indicating that Dr. Beatty considered whether the Claimant's job activities on August 4-5, 2023 combined with, exacerbated, or aggravated any pre-existing condition to cause the need for treatment. The ALJ finds Dr. Beatty's "no-causation" opinion to be unpersuasive.

12. On September 5, 2023, Claimant began seeing Paul Rahill, M.D., at Pikes Peak Orthopaedics, outside the workers' compensation system. Claimant reported to Dr. Rahill that he had originally dislocated his left knee in 2004, and had not had significant symptoms in approximately 20 years. On examination, Dr. Rahill noted that Claimant had effusion in the knee, a significantly high Q angle, and a grossly unstable patella laterally. He reviewed Claimant's MRI report, and diagnosed Claimant with left patellar instability with an intra-articular large loose body in the left knee. Dr. Rahill recommended surgery to remove the loose body, and to potentially realign the patella. (Ex. 8).

13. On October 4, 2023, Dr. Rahill performed surgery on Claimant's left knee, including removal of the loose body, an open lateral release, reconstruction of the medial patellofemoral ligament, and a Fulkerson tibial tubercle osteotomy. (Ex. R).

14. On April 23, 2024, Claimant underwent an independent medical examination at Respondent's request with Carlos Cebrian, M.D. Dr. Cebrian issued a report (Ex. A), and testified at hearing as an admitted expert in occupational medicine. Dr. Cebrian opined that Claimant's work activity (*i.e.*, walking and standing) did not cause the pathology in

Claimant's knee, and that his symptoms were the result of pre-existing knee pathology. He further opined that nothing Claimant was doing at work caused, aggravated, or accelerated his knee pathology or symptoms. At hearing, Dr. Cebrian testified that the emergence of Claimant's knee symptoms at work on August 5, 2023 was merely coincidental, and that he believed Claimant's knee symptoms would have begun on the morning of August 5, 2023 under any circumstance, and that his work activities played no part in the emergence of symptoms or the need for treatment.

15. The MRI evidence supports Dr. Cebrian's opinion that Claimant's work activity did not cause the underlying pathology in Claimant's knee. More specifically, that the act of walking at work did not cause the degenerative changes, or a loose body. The ALJ finds it more likely than not that Claimant's knee pathology was preexisting. Dr. Cebrian's opinion that the Claimant's work activity played no part in the emergence of Claimant's symptoms or the need for treatment is unpersuasive. Although Claimant had a remote history of a knee injury, including a patellar dislocation while in the military, no credible evidence was admitted establishing that Claimant's knee was symptomatic prior to August 5, 2023. The video evidence shows Claimant walking with what appears to be a slightly altered gait prior to his symptoms becoming significant is equivocal, and no credible evidence was admitted indicating the cause of the altered gait. Similarly, the ALJ does not find it credible that Claimant's asymptomatic preexisting condition spontaneously became symptomatic on August 4-5, 2023, when Claimant's job duties required him to walk significantly two the three times more than he normally walked during his job. The ALJ finds that it is more likely than not that Claimant's significantly increased walking and activity on August 4-5, 2023 aggravated Claimant's dormant knee condition causing the need for treatment.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the

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

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

Compensability

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

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. "To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is a sufficient basis for an award of medical benefits if it caused the claimant to need treatment he would not otherwise have required but for the accident." *In re Claim of Frank O'Neil Cambria*, W.C. No. 5-066-531-002 (ICAO May 7, 2019). Compensability of aggravation cases turns on whether work activities made the preexisting condition worse in some manner or simply demonstrated the natural progression of the preexisting

condition. *Bryant v. Mesa Cty. Valley Sch. Dist. #51*, W.C. No. 5-102-109-001 (ICAO, Mar. 18, 2020). "A compensable aggravation can be 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." *Id, citation omitted*.

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 Dept. Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). "Compensation is not dependent on the state of an employee's health or his freedom from constitutional weakness or latent tendency." *Peter Kiewit Sons' Co. v. Indus. Comm'n,* 236 P.2d 296 (Colo. 1951). Even if the exact medical cause of an injury is not known, "evidence is sufficient to establish compensability if the claimant presents circumstances indicating a reasonable probability that the injury resulted from or was precipitated by the employment activities." *Strange v. Wal-Mart Stores, Inc.*, W.C. no. 4-750-869 (ICAO 2009). 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. 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 left knee on August 5, 2023 arising out of the course of his employment with Employer. As found, the Claimant likely had significant, although asymptomatic, pre-existing pathology in his knee that became symptomatic after extensively walking in the course of his employment. Claimant credibly testified that he walked in excess of 28,000 steps during his work shift, which was approximately 2.5 to 3.5 times his normal work activity. The ALJ finds no other reasonable explanation for the emergence of Claimant's symptoms on August 5, 2023. Dr. Cebrian's testimony that Claimant's dormant knee condition became suddenly symptomatic by coincidence unpersuasive.

The ALJ does not find that the cause of Claimant's injury is "unknown," in that the precipitating event was Claimant's excessive walking on August 5, 2023, combining with his pre-existing pathology to create the disability and need for treatment. Claimant's job required him to move around the job site and to do so by walking, thus the act of walking was sufficiently related to Claimant's work-related functions to be considered part of his service to Employer.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable left knee injury arising out of the course of his employment with Employer on August 5, 2023.

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: September 10, 2024

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that the two level (L4-5, L5-S1) disc arthroplasty surgery recommended by Dr. Roger Sung is reasonable, necessary and related to her admitted March 9, 2022 work injury.

II. Determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Sung, the ALJ enters the following findings of fact:

1. Claimant works as a special education teacher at the [Redacted, hereinafter FM], a facility within "Respondent-Employer's School District. On March 9, 2022, Claimant was attempting to restrain a combative student when the child "flopped to the floor" causing Claimant to twist her back and fall backward into a wall. (CHE 2, p. 215). Claimant injured her low back and right hip.

2. On March 11, 2022, Claimant presented to Concentra Medical Centers (Concentra) and reported to Nurse Practitioner (NP) Brendan Madrid that she was experiencing pain in her low back, specifically in her sciatic nerve. She was referred for chiropractic treatment. She reported a history of sciatic pain several years prior. NP Madrid assigned work restrictions of no lifting, carrying, pushing, or pulling over 10 pounds, no bending or lifting from the ground, and no restraining of unruly students. (Claimant's Hearing Exhibits (CHE) 1; Respondent's Hearing Exhibit (RHE) C).

3. Claimant began chiropractic treatment with Dr. Kent Hill on March 25, 2022. At this appointment, Claimant reported experiencing sharp, shooting pain in the low back, radiating to the right hip, with restrictions in movement throughout her spine. She would continue chiropractic care with no notable changes or improvements until May 13, 2022. (CHE 2).

4. Claimant was also referred to physical therapy which she found painful. Due to lack of improvement with chiropractic care and physical therapy, NP Madrid referred Claimant for an MRI of the lumbar spine which was performed on May 13, 2022 at Open MRI of Pueblo. (CHE 3, p. 230-231). The May 13, 2022 revealed a L4-5 disc herniation protrusion type along with an L5-Sl focal disc herniation. *Id*. at 231. No canal stenosis was appreciated at either level and the neural foramina were "patent" at both levels. *Id.*

5. Following her MRI, NP Madrid referred Claimant for a consultation with a physical medicine and rehabilitation specialist. Claimant was evaluated by Dr. Kenneth

Finn on July 1, 2022. Dr. Finn found "no evidence of neurologic compromise that would clearly support an acute lumbar radicular process." (RHE H, p. 56). He recommended a diagnostic epidural steroid injection at L5-S1 and if that failed to improve Claimant's pain, consideration of a set of right L3-L5 medial branch blocks to assess for L4-5, L5-S1 facet mediated pain.

6. On July 6, 2022, Claimant presented to Colorado Springs Orthopedic Group for evaluation. (CHE 4). She was evaluated by Physician Assistant (PA-C) Kelsey Chrane. After obtaining a history and reviewing Claimant's imaging studies, PA Chrane recommended administration of a right sacroiliac (SI) joint injection. (CHE 4, p. 233).

7. Dr. Finn performed an L5-SI epidural steroid injection on August 3, 2022. (CHE 5, p. 278, 283). Claimant reported to NP Madrid on August 12, 2022 that this injection did not help and that she was still having lower back pain with numbness and tingling in her right leg with pain in her hip. (CHE 1, p. 69). At Claimant's August 19, 2022 follow-up appointment, Dr. Fin offered to perform right L3-5 medial branch blocks and if successful, in relieving her pain, to progress to radiofrequency ablation (RFA) (CHE 5, p. 281). Claimant wished to research the procedures before proceeding. Dr. Finn also noted that Claimant's examination was "significant" for right sacroillitis for which she could consider undertaking a right SI joint injection. *Id.*

8. On September 2, 2022, NP Madrid noted that Claimant was still struggling with numbness in her leg and hip and was experiencing bladder control issues. (CHE 1, p. 84).

9. On December 28, 2022, Claimant was evaluated by Dr. James Bee for persistent back and right SI joint pain. Because Claimant did not experience any significant relief with the injection administered by Dr. Finn, he did not think that Claimant's pain generator had been identified. (RHE M, p. 73). He could not explain Claimant's radicular complaints in the absence of stenosis on her MRI. He recommended a CT guided right SI joint injection and follow-up with Dr. Sung if the injection proved helpful in relieving her pain. *Id.*

10. Claimant underwent a successfully guided right-sided CT-guided right sacroiliac joint injection on February 17, 2023. (CHE 7, pp. 286-289).

11. At her follow-up appointment with NP Madrid on March 10, 2023, Claimant reported that her back pain had returned "about two weeks" after her SI joint injection and that she continued to experience numbness and tingling in the right leg with excessive activity. (CHE 1, p. 111).

12. During a March 22, 2023 encounter with Dr. Sung, Claimant reported that she was pain free immediately after her SI joint injection which lasted almost 2 ½ weeks. (RHE O, p. 79). At hearing, Claimant testified that this injection helped for 3 weeks. Surgical recommendations were discussed during this appointment and left to

Claimant for a final decision. Nonetheless, Dr. Sung recommended a right SI joint fusion with SI bone. Id. at 80. He referred Claimant for a CT of the pelvis for surgical planning. *Id*.

13. Claimant elected to proceed to surgery and Dr. Sung performed a minimally invasive SI joint fusion on May 8, 2023. (See RHEs Q & R). During her six week post-op appointment with Dr. Sung on June 21, 2023, Claimant reported feeling better but noted that her pain was not gone. (RHE U, p. 94). Dr. Sung felt that Claimant was doing "okay" noting that he would initiate therapy and reassess her in 2 months with repeat x-rays of the pelvis. *Id.*

14. During her July 7, 2023, follow-up, Claimant reported to PA Samantha Corey that she tripped on a shoe and twisted her low back while trying to catch herself. Following this incident, Claimant had increased pain in her SI joint with occasional shooting pain down her right leg when taking steps. Claimant was ambulating with the assistance of a cane. (RHE V, p. 98) Therapy was going well and Claimant denied any weakness, numbness or tingling in the right leg. *Id*.

15. Claimant continued with regular follow-ups with Mr. Madrid at Concentra. Of note, on August 18, 2023, she reported that her lower back pain was not as constant as it had been prior to the surgery. (CHE 1, p. 138).

16. The August 25, 2023 note from Dr. Sung indicates that Claimant was doing well and that her low back pain had "greatly" improved. (RHE X, p. 100). She was progressing with physical therapy and was no longer using an assistive device for ambulation. *Id*. Claimant was to follow-up in six months. *Id.*

17. On December 8, 2023, Claimant presented to Concentra with complaints that around Thanksgiving her back locked up and she was unable to stand straight. (CHE 1, p. 166). Claimant denied any new injury, fall or trauma, but reported that she was climbing stairs more frequently and that her back starting hurting as soon as the weather had turned colder. *Id*. at 167.

18. On January 3, 2024, Claimant returned to Dr. Sung for follow-up post-surgery. She told Dr. Sung that in mid-November, she started having increasing low back pain. She stated that her physical therapist believed that her problem was coming from her lower back rather than her SI joint. Dr. Sung ordered a new MRI. (CHE 4, p. 261).

19. On January 12, 2024, Claimant told NP Madrid that her physical therapy was discontinued, and that she was in a lot of pain and that the cold weather made her back lock up to the point where she couldn't move. (CHE 1, p. 172).

20. An updated MRI, as ordered by Dr. Sung, was completed on January 26, 2024. (RHE Z, p. 105). This imaging demonstrated disc desiccation with a small posterior disc bulge, as well as a posterior annular fissure, bilateral facet arthropathy,

and mild to moderate canal stenosis at L4-5. *Id.* at 105-106. At L5-SI, the reading radiologist reported disc height loss with a posterior disc bulge, as well as mild facet arthropathy. *Id*. at 106. The final impression is documented as: "Intervertebral disc degenerative changes with a posterior annular fissure at L4-5 with mild to moderate canal stenosis and mild bilateral neural foraminal stenosis." *Id*. at 105.

21. After reviewing the MRI, Dr. Sung referred Claimant to Dr. Finn for an epidural steroid injection (ESI) at L4-5. (CHE 4, p. 267).

22. Dr. Barry Ogin performed a Medical Record Review on February 20, 2024. (RHE A). Dr. Ogin was asked to opine regarding Claimant's current symptoms and whether the requested epidural steroid injection was related to Claimant's March 9, 2022 work injury. Before addressing the issue regarding the reasonableness, necessity and relatedness of the ESI in question, Dr. Ogin noted that pursuing an SI joint fusion on the basis of one SI joint injection without independent documentation of pre and post injection pain levels, which was not done in this case, would not be considered medically reasonable or appropriate. Because single SI joint injections have up to a 40% false positive rate, Dr. Ogin noted that the Medical Treatment Guidelines (MTGs) require a second confirmatory block, completion of a post-injection pain diary and a psychological evaluation before proceeding to an SI joint fusion. Here, Dr. Ogin cited to the lack of a second block or any documentation regarding Claimant's pre and post-injection pain levels as support for his conclusion that Dr. Sung's decision to pursue the SI joint fusion in this case was not contemplated in accordance with the MTGs nor was it reasonable based upon Claimant's symptoms and lack of a psychological evaluation. Indeed, Dr. Ogin stated:

> In essence, [Redacted, hereinafter YG] had a minimal mechanism injury and initially presented with back pain. Over time, her pain complaints dramatically widened and she began to develop leg pain and numbness in a diffuse nondermatonal distribution. Lumbar MRI failed to reveal any significant pathology. She failed to get relief with a lumbar epidural steroid injection. She reported transient subjective response to one sacroiliac joint injection. However, there was no documentation of actual pain levels or a pain diary. There was no documentation of any functional improvements pre- and post-injection. There was no confirmatory injection performed, as required by the Medical Treatment Guidelines for Colorado. Unfortunately, there was no psychological screening was (sic) performed, which may have offered an alternative explanation to her nonphysiologic presentation. Dr. Sung did perform a sacroiliac joint fusion, despite [Claimant] having diffuse pain from the back down to the right leg. While [Claimant] may have had transient improvement in her condition for a month or two while she remained on restricted activities, she had no lasting relief and by November 2023, it was documented that her

pain was essentially the same as it was prior to the fusion. Follow-up MRI imaging again revealed just mild disc pathology.

23. Turning his attention to the requested ESI, Dr. Ogin first noted that Claimant's pain complaints were "not consistent with the mechanism of injury" and that there "was no significant discogenic, facetogenic, or sacroiliac joint mediated pain that could explain [Claimant's] symptoms and her poor response to treatment." (RHE A, p. 7). Simply put, Dr. Ogin opined that Claimant's objective pathology did not support her subjective pain complaints. *Id.* Ultimately, Dr. Ogin stated, "YG[Redacted] current condition is not related to the work injury of 03/09/2022, which was no more than a lumbar strain, noting further that Claimant's "widening pain complaints, minimal spinal pathology, and failure to improve despite nearly two years of treatment cannot be explained on the basis of the injury." *Id.*

24. Concerning the ESI specifically, Dr. Ogin stated that per the MTGs (recommendation 87) "one needs to have severe radicular pain the correlates with objective findings, a positive straight leg raise with reflex motor or sensory changes on examination that correlate with imaging findings, and imaging findings that demonstrate impingement of the nerves or spinal cord." (RHE A, p. 8). Because Claimant already had a negative diagnostic and therapeutic response to a prior injection combined with a lack of qualifying pathology or motor or sensory deficits that correlate with her objective pathology (as revealed on MRI), Dr. Ogin opined that Claimant was not a candidate for another ESI. *Id*. at 8. Indeed, Dr. Ogin noted that because Claimant had failed to improve with time, activity modification, chiropractic treatment, physical therapy, diagnostic/therapeutic injections and surgery that outside factors, such as a somatoform pain disorder, or conscious factors such as secondary gain, were likely playing a role in her delayed recovery. *Id*. at 7.

25. At a March 27, 2024 appointment with Dr. Sung, Claimant reported that she did not feel she was getting any longstanding relief with conservative measures. After discussing both operative and nonoperative measures, Dr. Sung recommended an L4-, L5-S1 disc arthroplasty procedure. (CHE 4, pp. 270-271). Dr. Sung requested authorization for the procedure on April 8, 2024. (CHE 4, pp. 273-274).

26. At the request of Respondents, Claimant attended an independent medical examination (IME) with Dr. Qing-Min Chen. Dr. Chen completed the requested evaluation and drafted a report outlining his opinions regarding the reasonableness and necessity of the requested surgery on May 22, 2024. (RHE B). In his report, Dr. Chen opined that Claimant did not have objective findings to support her subjective complaints of radicular symptoms. He stated in his report that Claimant's examination was normal aside from mild loss of motion. Dr. Chen also wrote that he believed that Claimant's facet arthritis at L4-5 was a contraindication for the disc arthroplasty, and that he recommended against another surgery without identifying a pain generator. Dr. Chen opined that Claimant was at MMI and that no further treatment was necessary. (RHE B, pp. 17-18).

27. Dr. Chen agreed with Dr. Ogin that the SI joint fusion in this case was not done in accordance with the provisions of the MTGs. (RHE B). Specifically Dr. Chen stated, "Suffice it to say that Dr. Sung did not really meet the Colorado Medical Treatment Guidelines to perform this procedure. The claimant did not get any relief from this procedure at all, suggesting that this surgery was not really warranted and certainly had no effect long term." *Id*. at 17. He also mentioned that he had not seen a psychological evaluation and did not have any objective findings to support Claimant's subjective complaints from a structural standpoint.

28. Claimant continued regular follow-ups at Concentra, albeit without improvement, until she was released from care by NP Madrid on June 14, 2024. Her restrictions at that time were no repetitive bending or twisting, no lifting, carrying, pushing or pulling over 40 pounds, and restricted use of her keyboard to three hours a day. (CHE 1, p. 214).

29. Dr. Sung testified by Zoom Deposition on July 11, 2024. He was qualified as an expert in orthopedic surgery. (Depo. Tr. Sung, p. 6, ll. 5-8). Dr. Sung testified that Claimant's updated MRI "showed some degeneration at L4-5, a little bit at L5-S1 and an annular tear", all of which he attributed to the March 9, 2022, work incident. (Depo. Tr. Sung, p. 15, ll. 1-9).

30. Dr. Sung testified that after his request for an L4-5 ESI was denied, he discussed additional treatment options with Claimant. (Depo. Tr. Sung, p. 15, ll. 11-22). Dr. Sung raised stem cell injections and disc arthroplasty as treatment options for Claimant. *Id.* at ll. 22-24. Ultimately, the decision was made to pursue the disc replacement procedure because it was felt that this would "fix" the situation rather than continuing to "mask" Claimant's symptoms with additional injections. (Depo. Tr. Sung, p. 15, ll. 24-25, p. 16, ll. 1-4).

31. Dr. Sung acknowledged that he was not familiar with the MTGs, including the recommendation that a psychological evaluation be completed prior to proceeding with disc replacement surgery. (Depo. Tr. Sung, p. 17, ll. 8-23). Dr. Sung did not pursue a psychological evaluation because that was not part of his "normal practice for patients that are not through the work comp system." (Depo. Tr. Sung, p. 18, ll. 4-6). In justifying his decision not to seek a psychological evaluation, Dr. Sung testified that "when you speak with people over a period of time, you get a fairly good assessment as to who is reasonable, who is emotionally stable, and who is not, in a sense crazy". (Depo. Tr. Sung, p. 18, ll. 6-10). Based upon this testimony, the ALJ infers that Dr. Sung believes he has spent sufficient time with the Claimant to determine that she is psychologically capable of proceeding with the proposed surgery. Indeed, when asked if Claimant would be able to "handle" the suggested surgery, Dr. Sung answered, "Yes". (Depo. Tr. Sung, p. 18, ll. 14-17). The evidence presented supports a finding that Dr. Sung has seen Claimant 8 times in an office setting between March 22, 2023 and April 8, 2024. The vast majority of these visits focused on Claimant's SI joint condition and treatment, including the SI joint fusion surgery. (RHE O, S, U, V, Y, AA, BB, CC; See also CHE 4). Careful review of the records from Colorado Springs Orthopedic Group

persuades the ALJ that no psychological testing or in depth discussions regarding Claimant's psychological status were had prior to Claimant proceeding with SI joint fusion surgery as recommended by the MTGs. Likewise, the recent medical records authored by Dr. Sung support a finding that the necessary assessment regarding Claimant's psychological suitability to proceed with lumbar disc replacement surgery has not been done in this case. While Dr. Sung may feel he knows his patient well, the MTGs require more than a rudimentary conclusion that a "fairly good" psych assessment has been done because the surgeon who will perform the requested surgery has had opportunities to speak with the Claimant over the course of her care. Based upon the evidence presented, the ALJ finds that Dr. Sung's familiarity with Claimant is not a substitute for the requirement that Claimant undergo a pre-surgical psychological assessment by a qualified psychologist not employed by the physician proposing the surgery. Dr. Sung voiced no objection to Claimant proceeding with a psychological evaluation as referenced in the MTGs. Indeed, Dr. Sung testified that he had "no problem" with someone having one". (Depo. Tr. Sung, p. 18, ll.10-13).

32. Dr. Chen provided testimony at hearing as an expert in orthopedic surgery. Dr. Chen testified consistently with his written report, reiterating his opinion that the requested disc replacement surgery is not reasonably necessary, noting that this surgery can have dramatic impacts on Claimant's health if unsuccessful. (Hrg. Tr. p. 64, ll. 1-3, 65, ll. 17-21, 67, ll. 6-10). Dr. Chen concluded that a disc replacement procedure was not supported by the Workers' Compensation Medical Treatment Guidelines (MTGs), because the pain generator had not been adequately identified. (Hrg. Tr. p. 55, ll. 15-25, 67, ll. 24-25, 68, ll. 1-15). He testified that there is no reason to rush this surgery noting that further information and conservative measures, including additional diagnostic testing be undertaken before proceeding to a surgery of the magnitude requested by Dr. Sung. (Hrg. Tr. p. 56, ll. 1-11, 60, ll. 21, 61, l. 7 and 64, ll. 4-11).

33. On cross, Dr. Chen testified that Claimant had several abnormal findings on her MRI and agreed that a traumatic injury can make an asymptomatic condition symptomatic. (Hrg. Tr. p. 62, ll. 11-19). He testified that a doctor's clinical judgement is important and recognized that the Division of Workers' Compensation Medical Treatment Guidelines allow for deviations from the guidelines in individual cases. Dr. Chen went on to agree that treatment plans should be tailored to the individual and that a doctor's clinical judgement is important in determining that treatment plan.

34. The ALJ finds the opinions of Drs. Ogin and Chen credible and more persuasive than the testimony provided by Dr. Sung. Based upon the evidence presented the ALJ is convinced that the medical treatment guidelines have not be followed in this case and that it is necessary that Claimant proceed with a pre-surgical psychological evaluation prior to proceeding with a surgery of the magnitude requested by Dr. Sung.

35. Claimant testified that she was paid $4,752.68/month while teaching summer school, and $4,128.92 monthly during the normal school year. She testified

that she was not able to return to teach during the summer school session in 2024 due to her injury. (Hrg. Tr. p. 21, ll. 11-24; 22, ll. 8-9). Claimant testified further than she received an attendance bonus of $1,000 for having two or less absences in a year. (Hrg. Tr. p. 39, ll. 7-23). Claimant missed more than the two days allowed during the semester following her SI joint fusion. Consequently, she was denied her bonus for that semester. (Hrg. Tr. p. 40, ll. 1-2).

36. The Medical Treatment Guidelines, specifically WCRP, Rule 17, Exhibit 1, guide the principles surrounding the care and treatment of low back pain. Rule 17, Exhibit 1, Section 8.b addresses the general clinical and diagnostic indicators that should be considered before surgical intervention concerning the low back, including artificial disc replacement, is undertaken. Artificial lumbar disc replacement is a surgical procedure addressed by the MTGs at Section 8.b.iv which provides:

> Introduction. Lumbar total disc replacement (TDR) is a surgical procedure where a degenerated disc is replaced with a prosthetic device. The endplates are positioned under intraoperative fluoroscopic guidance for optimal placement in the sagittal and frontal planes. The prosthetic device physiologically distributes the mechanical load of the vertebrae and maintains ROM.

(WCRP, Rule 17, Exhibit 1, Section 8.b.iv).

37. The MTGs provide for following recommendations before proceeding to disc arthroplasty surgery:

> Recommendation 159. Psychological evaluation is required to assess suitability for lumbar disc replacement. Documentation should include the following items with associated treatment recommendations:
>
> ● psychological factors that might influence elective surgical treatment outcomes, or
>
> ● psychological factors that might complicate surgical recovery.
>
> Confounding depression or anxiety must be addressed prior to proceeding with surgery.
>
> Presurgical psychological evaluation should not be done by a psychologist employed by the physician performing the procedure. See the Behavioral and Psychological Interventions section.
>
> Recommendation 160. Lumbar TDR is reserved for patients who meet all of the following criteria:
>
> ● symptomatic 1- or 2-level disc disease established by objective testing (e.g., CT scan or MRI followed by provocation discography),

- symptoms unrelieved after 6 months of active nonsurgical treatment,

- all pain generators are adequately defined and treated,

- all physical medicine and manual therapy interventions are completed,

- imaging studies demonstrate disc pathology requiring decompression, and

- psychosocial evaluation as outlined in recommendation 159, with confounding issues addressed (tables 72, 73, 74, 75).

Recommendation 161. If there are signs suggestive of facet-mediated pain, the pain must be evaluated with medial branch blocks before proceeding with disc replacement.

Recommendation 162. A trial of multi-disciplinary therapy must occur prior to proceeding with surgery (table 73)

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The 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). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant has failed to make a convincing case that the L4-S1 disc replacement procedure requested by Dr. Sung is currently reasonable and necessary.

Medical Benefits

The Proposed L4-S1 Disc Replacement Surgery

D. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

E. The MTG's enumerated at WCRP, Rule 17 are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). WCRP Rule 17-

2(A) provides: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). Moreover, the Court is not bound by the MTGs in deciding individual cases based on the guidelines or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

F. While the Court is not required to utilize the medical treatment guidelines as the sole basis when deciding whether specific medical treatment is reasonable, necessary or related to an industrial injury or occupational disease, the Guidelines carry substantial weight as accepted guidance in the assessment and treatment of low back pain. Concerning the medical issue presented, Dr. Sung has not offered specific reasons why a deviation from the MTGs is necessary. Moreover, the evidence presented supports a finding/conclusion that Claimant has not undergone a psychological evaluation to determine her suitability for the proposed surgery. Given that the proposed TDR surgery would be the second major procedure undertaken by this Claimant in a relatively short period of time, the ALJ is convinced that it is necessary to identify and address the psychological, behavioral, emotional, cognitive, and interpersonal factors that might influence and complicate Claimant's surgical outcome and recovery. This is required by the MTG and the evidence presented fails to justify a deviation from this recommendation.

G. While the ALJ is convinced that the failure to obtain a psychological evaluation in this case renders the current request for authorization to proceed with a two level total disc replacement procedure unreasonable, the evidence presented supports additional reasons why the request is currently unreasonable. First, the ALJ is convinced that not all of Claimant's potential pain generators have been adequately defined and treated. As with any fusion procedure, all pain generators must be adequately defined and treated for those persons for whom disc replacement surgery is being recommended. Here, the evidence presented persuades the ALJ that Claimant's pain is probably multifactorial and could be emanating from facet arthritis, myogenic changes, continued SI joint dysfunction, disc disruption or annular tearing. Indeed, the evidence supports a finding that Claimant has objective pathology at two levels of her lumbar spine with complaints of chronic generalized back pain. A question was raised by Dr. Finn as to whether Claimant's pain was facet mediated and although he suggested that Claimant proceed medial branch blocks, these have yet to be undertaken. While it is possible that Claimant's symptoms could be emanating from

the L4-5 or L5-S1 disc, the ALJ credits Dr. Chen's opinion that additional diagnostic work-up is necessary to determine the source/cause of Claimant's pain before proceeding with surgery. Finally, the evidence presented fails to establish that Claimant has been referred for a trial of multidisciplinary therapy as recommended by the MTGs.

H. Based upon the evidence presented, the ALJ is not convinced that Claimant has demonstrated that the requested L4-S1 disc replacement procedure recommended by Dr. Sung is reasonable or necessary. Indeed, the ALJ credits Dr. Chen's opinions to find that the proposed surgery can be fraught with complications if the necessary factors to help insure a good surgical outcome, as addressed in the MTGs, are not safeguarded. When considered in its totality, the evidence presented persuades the ALJ that the proposed disc replacement surgery does not meet the criteria set forth in the MTG's and that deviation from the guidelines would not be appropriate in this case. Accordingly, Claimant's request for additional medical treatment in the form of a L4-S1 artificial disc replacement is denied and dismissed.

Average Weekly Wage

I. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993)[1]; *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo. App. 1997).

J. Sections 8-42-102(3) and (5)(b), C.R.S. (2013), give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*; *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008). It is well settled that if the specified method of computing a claimant's AWW will not render a fair computation of wages for "any reason," the ALJ has discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp., supra*.

K. The best evidence of Claimant's actual wage loss and therefore a fair approximation of her diminished earning capacity at the time of her industrial injury comes from the wage records admitted into evidence. Careful review of the wage records, excluding Claimant's bonus money (RHE DD; CHE 11) persuades the ALJ that between September 2, 2021 through February 28, 2022 (25.8571 weeks) Claimant earned $29,182.44 in wages. This results in an AWW of $1,128.60. ($29,182.44 ÷ 25.8571 = $1,128.60).

[1] The claimant in Campbell suffered three periods of temporary disability and for each subsequent period was earning a higher average weekly wage. The question resolved was whether Ms. Campbell was entitled to temporary disability benefits based on the higher AWW she was earning during each successive period of temporary disability. The Court held that it would be unjust to calculate her disability benefits in 1986 and 1989 on her substantially lower earnings she was making in 1979.

L. The criteria for including a benefit as a part of the employee's wages, that is, whether it is a part of the money rate at which the services are to be recompensed, depends upon whether a "reasonable, present-day, cash equivalent value can be placed upon it and whether the employee has reasonable access on a day-to-day basis, either actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances. *Meeker v. Health Partners,* 929 P.2d 26*,* (Colo. App. 1996).

M. In *Yex v. ABC Supply Co.,* the *Meeker* test was applied to determine whether bonuses paid to Claimant from the employer were considered fringe benefits or true wages. The court found that the bonus was contingent and did not have a present day cash equivalent value. Additionally, the court stated that the size of the bonus could only be discerned at the conclusion of the year or quarter. The bonus could only be paid out at that point and the claimant was unable to cash out any portion of the bonus until then, and only if still employed on the payout date. In addition to the absence of a present day cash equivalent value, the claimant had no access to the bonus on a day-to-day basis and had no immediate expectation of receiving the bonus. See *Yex ABC Supply Co*., W.C. No. 4-910-373-01 (May 16, 2014). In this case, the evidence presented, supports a finding/conclusion that the $1,000 attendance bonus was contingent on Claimant's attendance. Here the ALJ agrees with Respondents to conclude that the contingent nature of Claimant's bonus makes it a fringe benefit without an immediate cash equivalent value rather than a true wage as described in *Meeker*. Accordingly, the ALJ concludes that including the $1,000 bonus in Claimant's AWW is inappropriate due to the contingent nature of the benefit and there being no guarantee that but-for the alleged work injury, Claimant would have earned the $1,000.

ORDER

It is therefore ordered that:

1. Claimant's request for additional medical treatment in the form of a L4-S1 total disc replacement procedure is denied and dismissed.

2. Claimant's average weekly wage is $1,128.60.

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

DATED: September 11, 2024

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-258-791-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment on November 23, 2023.

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to medical benefits reasonably necessary to cure and relieve her of the effects of a November 23, 2023 work injury.

3. Who is Claimant's authorized treating physician.

4. What is Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant was a security guard for Respondent-Employer on November 23, 2023, when her chair slipped out from under her and she fell to the ground. On that day, while seated at her workstation monitoring a closed-circuit television, Claimant's chair became caught on a mat, causing her to fall. She landed on her right side but completed her shift.

2. Claimant reported the incident to her employer that same day, but she was not provided with a designated provider list as required by Rule 8-2, W.C.R.P. Claimant sought treatment at St. Anthony Hospital emergency department where she was diagnosed with "acute-on-chronic low back pain." Claimant was provided with one dose of oral Percocet in the hospital.

3. Claimant underwent an X-ray of her lumbar spine that same day. The radiologist compared the X-ray to a prior January 13, 2022 X-ray and found "[d]egenerative change of the lumbar spine, with no acute compression deformity."

4. After leaving the emergency room, while waiting for a ride-share, Claimant fell in the hospital parking lot. This second fall resulted in a fracture of her left pinky finger, which was diagnosed when she returned to the ER on November 24, 2023. Claimant was "unable to describe exactly why she fell" when she reported the mechanism of injury to the doctor. The doctor did a "basic medical workup" consisting of an EKG, blood tests, and urinary analysis to rule out possible causes of Claimant's fall, as Claimant could not recall why she fell. An X-ray showed "[i]ntra-articular mildly impacted and displaced fracture at the base of the fifth

proximal phalanx." Claimant underwent a reduction of her pinky fracture and was discharged home with casts on both upper extremities.

5. On January 8, 2024, Claimant was seen by Dr. Mani Singh at UC Health and reported right anterolateral and posterior hip pain. Claimant underwent a right hip X-ray which showed advanced degenerative joint disease and osteoarthritis. Dr. Singh recommended Claimant undergo evaluation with an orthopedist for the possibility of a right hip replacement.

6. On February 19, 2024, Claimant underwent an X-ray of the right hip that showed a loss of cartilage in the right hip joint as well as osteophytes on the femoral head and subchondral sclerosis. The radiologist opined that the findings were consistent with end-stage "KL Grade IV osteoarthritis" of the right hip.

7. On March 26, 2024, Claimant underwent right hip arthroplasty surgery with Dr. Jeremy Kinder.

Prior History

8. Claimant underwent a lumbar MRI on September 26, 2014. The MRI showed at the L4-L5 level: "The right paracentral disc herniation without significant spinal canal stenosis. There is mild bilateral facet osteoarthrosis all resulting in mild right neural foraminal compromise."

9. On January 29, 2018, Claimant underwent a fluoroscopic guided caudal epidural steroid injection for documented chief complaints of low back pain with bilateral lower extremity radiating pain.

10. On March 20, 2021, Claimant presented to North Suburban Medical Center complaining of low back and right hip pain after digging her car out of snow. She reported "several days of intermittent atraumatic right hip pain." She "localized pain over the right gluteus" and described the pain as achy and sharp, radiating down the right leg. Claimant specifically reported that she feels like "her right hip is going to give out on her" and that she had a fall the day prior due to the hip pain. Claimant underwent an X-ray of her lumbar spine and right hip and pelvis following a shoveling injury resulting in right hip pain, low back pain, and lower extremity pain. The right hip X-ray showed mild-to-moderate arthritic changes. The lumbar spine X-ray showed multilevel degenerative disc disease at L4-L5 and L5-S1, facet joint arthritis in the lower levels, and "slight dextroconvex lumbar curvature."

11. On January 13, 2022, Claimant presented to the St. Anthony Emergency Room, with pain from her right hip to her right foot, worse with hip flexion and weightbearing. Her right hip flexion was limited secondary to pain. She reported pain of "10/10 even when laying there sleeping" and that she began having difficulty moving her right lower extremity since before the beginning of the year. Claimant underwent a lumbar X-ray, which like prior imaging showed degenerative

changes in the lower lumbar spine, including disc space narrowing at L4-L5 and L5-S1 with "multilevel ventral osteophyte formation and facet arthropathy" as well as degenerative changes of the sacroiliac joints. An X-ray of the right hip from that same date showed moderate right hip degenerative changes.

12. On January 31, 2022, Claimant presented for treatment with Dr. John Douthit at Douthit Family Medicine PC. She reported that she was recently seen at the St. Anthony Emergency Room for "back, hip and leg pain" and difficulty walking. Claimant reported that her pain would begin in her low back and radiate to her leg, and she reported the pain as being a fifteen-out-of-ten.

13. Claimant proceeded with a lumbar spine MRI on January 31. The MRI showed a "[s]mall cranially-directed central disc extrusion and mild central spinal stenosis at L3L4" and "[a] medium to large, caudally-directed, right paracentral disc extrusion at L4-L5 displaces the traversing right L5 and S1 nerve roots and contributes to mild central spinal stenosis and moderate right lateral recess stenosis. Moderate left lateral recess stenosis at the same level."

14. Another X-ray of the lumbar spine on February 3, 2022, showed five-millimeter spondylolisthesis at L4-L5 and L5-S1.

15. On February 10, 2022, Claimant was seen at Panorama Orthopedics, Physical Therapy. She reported back pain since December 2021 across the mid back and down the right leg to the mid shin. She reported that her right leg "feels like it is going to give out" and that the pain is constant, and present with all prolonged activities. She was noted to have an antalgic gait, and pain with right lower extremity weight bearing. She specifically had an evaluation of her right hip and was unable to do flexion of the right hip due to pain.

16. Claimant underwent a transforaminal epidural steroid injection at the L4-L5 level on February 21, 2022.

17. On January 12, 2023, Claimant was again admitted to the St. Anthony's Hospital emergency department with chronic and progressively worsening low back pain radiating down Claimant's right lower extremity over the past two weeks. Claimant was given an injection and discharged with a referral for an orthopedist.

18. Claimant returned several weeks later on March 15, 2023, with complaints of an acute exacerbation of her right back pain that would travel down her right leg. Claimant was prescribed Oxycodone.

19. That same day, Claimant went to Arbor Family Medicine where she was attended by Dr. Kent Schreiber. Dr. Schreiber noted that Claimant had severe degenerative disc disease with nerve compression and a history of vertebral fusions. Claimant also reported difficulty falling asleep, though she would take Ibuprofen PM which

provided some help with sleeping. Dr. Schreiber referred Claimant to see an orthopedist or spine specialist.

20. Several weeks later on April 10, 2023, Claimant returned to Dr. Schreiber. Claimant reported that she had an appointment with orthopedics scheduled for April 24 for her back pain. Claimant reported that her diclofenac was helping to a small degree, sufficient for her to perform her activities of daily living and work.

21. Claimant returned once again to St. Anthony's emergency department on June 7, 2023, with right sided back pain and leg pain. The attending clinician noted that Claimant had tried treating her condition with ibuprofen and Lidoderm patches as well as massage without relief. Claimant was again prescribed Oxycodone.

IME

22. Respondents obtained an independent medical examination (IME) with Dr. Lawrence Lesnak. Dr. Lesnak issued his report on May 30, 2024. In his report, he indicated that he took Claimant's subjective history and reviewed Claimant's medical records and the video of the incident. Claimant reported to Dr. Lesnak that after her accident, she was able to get up and finish her work shift, going home as scheduled. Claimant reported to Dr. Lesnak that after she arrived home she began to notice some low back pain and reported it to her supervisor. Claimant also reported that her low back pain and right buttocks and thigh pains had improved significantly since her right hip surgery. Regarding her prior history, Claimant reported that she had been taking daily, diclofenac, as well as frequent oxycodone for the treatment of her chronic low back pain.

23. Dr. Lesnak ultimately concluded that that Claimant's reported symptoms and medical history were not related to the occupational incident on November 23, 2023. According to Dr. Lesnak, while video surveillance confirmed that Claimant experienced a fall from her chair at work on that day, he felt that there was no medical evidence to suggest that the incident resulted in any injury or new medical diagnosis nor were there any current symptoms that could be attributed to the work incident.

24. Dr. Lesnak highlighted in his report that Claimant had a long history of chronic low back pain, buttocks pain, and right leg symptoms, which predated the incident by many years. He noted that her symptoms began around 2012 and that she had undergone numerous treatments, including lumbar spine injections, MRIs, and evaluations for her chronic pain conditions. X-rays and MRIs conducted before the work incident revealed significant degenerative changes in her lumbar spine and right hip, and her condition remained, in his opinion, largely unchanged after the November 2023 incident. Dr. Lesnak pointed out that Claimant had already been experiencing severe back, hip, and leg pain prior to the event, frequently seeking treatment at St. Anthony's North Hospital for these issues.

25. Regarding Claimant's right hip condition and the right hip replacement in March 2024, Dr. Lesnak pointed out a separate report from Dr. Jeremy Kinder, which explicitly stated that Claimant's hip condition was not work-related. Furthermore, he noted, the lumbar and hip x-rays taken on the day of the work incident revealed no acute abnormalities that could be linked to her fall at work.

26. Based on his evaluation, Dr. Lesnak concluded that the November 2023 incident did not cause any injury or aggravate Claimant's preexisting conditions. There was no need for medical care or treatment as a result of the incident, in his opinion, aside from the initial emergency room evaluation on the day of the fall.

27. Lastly, Dr. Lesnak addressed Claimant's fall in the hospital parking lot on the same day as her work accident. She had sustained fractures to her bilateral little fingers during this fall, but Dr. Lesnak found no medical evidence linking this second fall to her workplace incident. Therefore, he felt that the fractures were also unrelated to the occupational event of November 23, 2023.

Testimony

28. Claimant testified at hearing on her own behalf. She described her job responsibilities, which primarily involved monitoring closed-circuit television (CCTV) systems. On the day of the incident, while seated in a rolling chair on a rubber mat, the chair tipped over, causing her to fall to the floor. Claimant testified that she did not initially experience any significant pain, but by the time she was preparing to leave for home, she began feeling discomfort in her hip and back. As the pain intensified, Claimant contacted her employer and reported the incident before visiting the emergency room later that day.

29. Claimant testified that at the emergency room, she received two injections, one of Oxycodone and another muscle relaxer, which provided her temporary relief. After being discharged, she arranged for a Lyft ride home as she was in too much pain to drive herself. She testified that while waiting outside the emergency room, she experienced dizziness, possibly due to the medications, and fell in the parking lot, injuring her wrist.

30. Claimant testified regarding her return to the emergency room the following day, November 24, 2023. Claimant testified that despite these new injuries, Claimant did not immediately receive an X-ray for her right hip, which had been a source of pain since the chair incident. It was only on January 8, 2024, that she underwent a hip X-ray due to ongoing discomfort. This eventually led to hip surgery on March 26, 2024, which she testified significantly alleviated her hip pain and improved her mobility, although she still experienced some difficulties moving around.

31. During her testimony, Claimant emphasized that before the chair incident, she had not experienced significant problems with her right hip and had not sought any medical treatment for it. She confirmed that she had previously been treated for

low back issues, but the last time she received treatment had been in 2015, and she had not experienced major problems since then. The incident at work re-aggravated her back pain alongside the hip injury.

32. In terms of her employment, Claimant testified that she was placed on leave following the incident and had not returned to work since. Although she expressed willingness to return to work, particularly since the hip surgery had alleviated much of her pain, she noted that she might not be able to perform the more physically demanding duties of a Flex Security Officer.

33. Claimant also testified that she was never instructed to see a workers' compensation physician by Respondent-Employer. She had contacted her employer after the injury but received no specific guidance about seeking medical attention through the workers' compensation system.

34. Regarding her prior use of a cane, Claimant testified that while she had used a cane occasionally, it was primarily for stability due to prior back treatments involving silicone injections. She denied having significant issues with falling or requiring a cane for daily activities before the chair incident.

35. The Court finds Claimant's testimony unreliable and does not credit it. Claimant's testimony minimized her prior symptoms and treatment for her low back and right hip. However, the medical records demonstrated significant prior treatment for many years up to several months before Claimant's accident. The Court has difficulty reconciling these inconsistencies and therefore does not rely on Claimant's testimony.

36. Dr. Lesnak also testified at hearing. Dr. Lesnak testified that Claimant's previous radiographic studies showed advanced-to-moderate degenerative changes in her right hip and that the radiographic studies from after Claimant's alleged injury showed advanced arthritis, changes which Dr. Lesnak felt were progressive rather than acute.

37. Dr. Lesnak testified regarding the inconsistency of Claimant's testimony with Claimant's medical records concerning her prior right hip condition. He also reviewed the security footage showing the incident itself and felt that it was inconsistent with Claimant's testimony that the chair fell on her right hip.

38. Otherwise, Dr. Lesnak's testimony was largely consistent with his IME report.

39. The Court finds Dr. Lesnak's testimony credible and persuasive. His opinions are consistent with Claimant's medical history and reflect a review of Claimant's medical history that is more thorough and complete than that of any attending physician.

40. Respondents also called [Redacted, hereinafter RO] to testify at hearing. RO[Redacted] was a coworker of Claimant's who worked with her on the night Claimant fell out of the chair. He testified that he found her on the ground and helped her up. Claimant did not report to him that she injured herself. The Court finds RO[Redacted] testimony credible.

41. Respondents also called [Redacted, hereinafter HS] to testify. HS[Redacted] testified that she was an operations manager for Respondent-Employer. HS[Redacted] testified that she was notified by the site supervisor on the date of the accident that there had been a work injury. HS[Redacted] called Claimant, and Claimant indicated only that she had hurt her wrist, but not that she had hurt her back or right hip. HS[Redacted] testified that she never provided Claimant with a list of designated medical providers.

42. HS[Redacted] testified that some clients had complained about Claimant, prior to the accident, not performing her patrols due to lack of mobility. The Court finds HS[Redacted] testimony credible.

43. Ultimately, the Court finds that Claimant has not proved by a preponderance of the evidence that her November 23, 2023, accident caused a compensable injury resulting in disability or the need for medical treatment. The evidence demonstrates that Claimant did not immediately report an injury at the time of the incident, and, by her own testimony, she did not begin experiencing discomfort in her hip and back until the end of her shift. Imaging studies from both before and after the accident reveal only progressive degenerative conditions in Claimant's hip and lumbar spine, with no evidence of an acute injury resulting from the fall. Furthermore, Claimant's extensive history of medical treatment for chronic back and hip pain, including her continued use of pain medication prior to the incident, strongly suggests that her post-accident medical care was a continuation of her preexisting conditions rather than the result of a new injury. As such, the Court concludes that Claimant has not established a compensable injury related to the workplace accident.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

An injury must "arise out of and occur in the course of" employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S.; *see also Madden v. Mountain*

West Fabricators, 977 P.2d 861 (Colo. 1999). An injury "arises out of" the employment when it is sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Indus. Claim Appeals Off.*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. *Popovich*, 811 P.2d at 383.

The existence of a preexisting condition will not prevent an injury from "arising out of" the employment. *Peter Kiewit Sons' Co. v. Indus. Comm'n of Colo.*, 124 Colo. 217, 220, 236 P.2d 296, 298 (1951); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). Generally, an injury will be found compensable if the employment aggravated, activated, caused, or accelerated a medical disability or need for medical treatment. *Id*.

The Act distinguishes between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause, and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01 (Aug. 25, 2014).

Here, as found above, Claimant has not established by a preponderance of the evidence that the November 23, 2023, accident caused a compensable injury. While Claimant did experience a fall at work, the evidence demonstrates that her ongoing medical issues with her low back and right hip were longstanding and preexisting. Imaging studies taken after the accident reveal only progressive degenerative changes that were present prior to the fall, and no acute injury was observed. Furthermore, Claimant's need for medical treatment following the accident was a continuation of her preexisting conditions rather than a result of any new injury or aggravation. Therefore, the Court concludes that Claimant has not proved by a preponderance of the evidence that the work-related incident caused a compensable injury resulting in disability or the need for medical treatment, and her claim for benefits is therefore denied.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim based on the November 23, 2023 accident is denied and dismissed.

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

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

DATED: September 13, 2024.

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury on July 7, 2023?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that the cervical surgery recommended by Dr. Price is reasonable medical treatment necessary to cure and relieve the Claimant from the effects of his industrial injury?

FINDINGS OF FACT

1. Claimant was employed by Employer as a ditch rider. Claimant's job duties include monitoring the irrigation canals and 385 headgates along his route. Claimant testified that his job duties require him to clean grates along the canals of weeds and other debris that collect in the canals.

2. Claimant testified that on Friday, July 7, 2023 at approximately 12:30 p.m., he was at gate 508 on his route and was cleaning a catch trough when he slipped and fell on wet concrete and struck his head, back and left shoulder on the ground. Claimant testified he had a prior history of concussions and his primary concern was that he may have sustained a concussion.

3. Claimant testified he reported the injury to his supervisor, [Redacted, hereinafter CE], but thought he was OK and did not request medical treatment. This testimony was corroborated by a handwritten statement from CE[Redacted] that was entered into evidence at hearing. Claimant testified he also reported the injury to [Redacted, hereinafter MA] in the office, but they could not find the workers' compensation paperwork. Claimant testified he returned to the shop on the afternoon of July 7, 2023 and was washing his truck when he noticed the pressure washer felt different in his left hand.

4. Claimant testified he was off work on July 8 and July 9 (Saturday and Sunday) before returning to work on July 10. Claimant testified his supervisor, [Redacted, hereinafter JN], was not there that day, so he did not report his injury. Claimant testified that JN[Redacted] returned on July 11, 2023 and Claimant reported his injury to JN[Redacted] on July 11, 2023.

5. Prior to reporting his injury, however, Claimant attended a small meeting before work and then went to read meters. Claimant testified that while he was normally able to read the maters without using the ladder to get into the hole, the second meter he went to read on July 11, 2023 was filled with spiders and he needed to take the ladder down to read the meter. Claimant testified that when he went down the

ladder his left arm popped. Claimant testified he also reported this incident to JN[Redacted] on July 11, 2023.

6. Claimant testified that when he reported his slip and fall injury from July 7, 2023 to JN[Redacted], JN[Redacted] informed Claimant that he should report the injury as happening on July 11, 2023, because more than 3 days had elapsed since Claimant's July 7, 2023 injury. Claimant's testimony with regard to this conversation with JN[Redacted] is found to be credible.

7. Claimant was referred to Southwest Memorial Walk In Care for medical treatment on July 11, 2023. Claimant reported to Nurse Practitioner ("NP") Nicholas Preston that he developed left shoulder pain while descending a ladder on July 11, 2023. Claimant testified at hearing that while he reported to NP Preston that the injury occurred on July 11, 2023, that information was not correct, as the initial injury was July 7, 2023. NP Preston recommended physical therapy and an x-ray of the left shoulder.

8. Claimant returned to Southwest Memorial on July 13, 2023 and was evaluated by Dr. Jennifer Gero. Claimant reported to Dr. Gero that he was having worsening left shoulder pain and experiencing tingling in his thumb and pointer finger. Claimant denied neck pain during this evaluation. Dr. Gero noted that Claimant's symptomology was consistent with radiculopathy.

9. Claimant sought treatment in the emergency room ("ER") on July 16, 2023 and was examined by Dr. Kenton Asche. Dr. Asche noted that Claimant reported he had much worse pain that day. Claimant denied neck pain, but noted that he hurts around his scapula. Dr. Asche diagnosed Claimant with a possible rotator cuff tear versus ongoing muscular spasm and prescribed hydrocodone.

10. Claimant returned to NP Preston on July 18, 2023. NP Preston noted Claimant was still having numbness in his fingers and had been taking Norco since his ER visit. NP Preston recommended against Claimant's continued use of narcotic medication after completing his original prescribed dosage and recommended physical therapy and referred Claimant for a magnetic resonance image ("MRI") and orthopedic consultation.

11. Claimant began physical therapy on July 20, 2023.

12. Respondents filed a General Admission of Liability ("GAL") on August 2, 2023 admitting for medical benefits and temporary total disability ("TTD") benefits. The GAL lists a date of injury of July 11, 2023.

13. Claimant continued to treat with Dr. Gero on August 11, 2023. Dr. Gero noted Claimant continued to complain of tingling in 2-3 fingers along with decreased range of motion and decreased strength with lifting.

14. Claimant underwent a left shoulder MRI on August 17, 2023 which demonstrated a 2-3 millimeter intrasubstance tear of the anterior distal supraspinatus tendon at it attachment of the greater tuberosity and a small 6 millimeter articular sided

tear of the posterior distal infraspinatus tendon at its attachment on the greater tuberosity.

15. Claimant also underwent a cervical MRI on August 17, 2023. The cervical MRI showed a moderate size left lateral recess disc extrusion at C6-7 that was superimposed on degenerative disc disease. The MRI noted that the disc extrusion at C6-7 was causing stenosis of the left lateral recess and causing moderate to severe central canal stenosis with cord flattening.

16. Claimant was referred to Dr. Braden Jones with Spine Colorado. Dr. Jones evaluated Claimant on August 21, 2023 and performed a physical examination along with reviewing Claimant's MRI films. Dr. Jones opined in his August 21, 2023 report that Claimant had a new partial thickness rotator cuff tear and new cervical radiculopathy on the left along with a cervical disc disorder at C5-6 with radiculopathy. Dr. Jones noted that Claimant had altered sensation in this radial 3 digits which corresponded with the cervical spine films, but also noted that Claimant had a positive provocative test for carpal tunnel syndrome. Based on these findings, Dr. Jones ordered a nerve conduction study.

17. Claimant was examined by Dr. Amber Price with Spine Colorado on August 30, 2023. Following her examination and review of the MRI films, Dr. Price opined that Claimant's findings were consistent with a disc herniation at C6-7 resulting in a moderate spinal cord compression with significant lateral recess and foraminal stenosis. Dr. Price noted Claimant had radiculopathy symptoms that were consistent with a C7 nerve root distribution. Dr. Price recommended surgery consisting of an anterior cervical discectomy and fusion at the C6-7 level.

18. Respondents obtained a physician advisor review from Dr. Marjorie Eskay-Auerbach on September 24, 2023. Dr. Eskay-Auerbach opined that Claimant's findings on MRI were degenerative in nature and that Claimant's mechanism of injury involving slipping on a ladder and grabbing a rung was not consistent with the cervical findings.

19. Respondents denied the request for cervical surgery recommended by Dr. Price. Dr. Price responded to the denial on October 17, 2023 noting that it was her opinion that Claimant has sustained an acute cervical disc extrusion as a result of his work injury with resultant C7 radiculopathy. Dr. Price further noted that her objective findings on examination of Claimant were consistent with Claimant's imaging and history. Dr. Price again recommended the anterior cervical discectomy and fusion at the C6-7 level.

20. Respondents obtained a second IME opinion from Dr. Michael Janssen on November 1, 2023. Dr. Janssen agreed that the recommended surgery was reasonable, but opined that the surgery was not related to Claimant's work injury. Dr. Janssen opined that the shoulder pathology was the result of the injury, but the cervical condition was unrelated to the injury.

21. Claimant underwent a nerve conduction study on November 27, 2023 under the auspices of Dr. Robert Wallach. Dr. Wallach noted that the nerve conduction study demonstrated findings were consistent with the C6-C7 left sided herniated disc and associated nerve compression. Dr. Wallach also noted there was no evidence of medial or superficial radial neuropath and ruled out carpal tunnel syndrome as being a cause of Claimant's symptoms. Claimant also reported to Dr. Wallach that in addition to the July 11, 2023 ladder incident, he had a slip and fall injury on July 7, 2023. Dr. Wallach noted that if the history Claimant provided to him was the truth, the mechanism of injury as described would be consistent with the disc herniation and radiculopathy within a reasonable degree of medical probability.

22. Dr. Janssen reviewed Dr. Wallach's study on January 31, 2023. Dr. Janssen opined in his report that based upon the overall consistency of the history, the onset of symptoms and correlation would highly suggest this is a long-standing, pre-existing, single-level degenerative disc disease rather than an atraumatic work underlying pathology. Dr. Janssen's opinion also took into consideration medical records from Claimant's treatment to his neck and upper extremity dating back to May 3, 2021. These records included Claimant's treatment with 4-Corners Chiropractic and Dr. Hope Barkhurst. Notably, Claimant reported to Dr. Barkhurst on August 26, 2021 that he had left shoulder pain with pain in his neck that was radiating into his left hand. Dr. Barkhurst had referred Claimant for physical therapy.

23. Claimant testified at hearing that in 2021 he had neck pain and shoulder pain with radiating pain into his left hand. Claimant testified these symptoms developed without any inciting event. Claimant testified his treatment consisted of a shoulder x-ray and physical therapy and his symptoms resolved.

24. Dr. Price issued a report on May 30, 2024 in response to an inquiry from Claimant's attorney that opined that assuming Claimant had slipped and fell at work and landed on his left shoulder, left upper back and struck his head on the concrete with a corresponding onset of symptoms involving the left shoulder and arm pain, it was more probable than not that the slip and fall caused the need for the cervical surgery Dr. Price was recommending.

25. Dr. Price noted that Claimant had pre-existing degenerative condition at the C6-C7 level, but noted that Claimant was asymptomatic for a year and a half prior to the fall. Dr. Price opined that given Claimant's acute onset of symptoms and matching pathology on cervical MRI, it was her opinion within a reasonable degree of medical probability that Claimant's injury was acute and related to the workplace injury.

26. Dr. Janssen issued another IME opinion on June 12, 2024 which reiterated his opinion that even though Claimant did not seek medical treatment between December 2022 and July 2023, it was his opinion that the recommended surgery was not related to Claimant's work injury.

27. Dr. Janssen testified by deposition in this matter. Dr. Janssen's deposition testimony was consistent with his medical reports. Dr. Janssen testified that while the

surgery was reasonable based on Claimant's MRI findings, it was his opinion that the surgery was not related to the work injury. Dr. Janssen noted that it can be common for a patient that has a shoulder injury and the clinicians are not certain if there is something going on that involves the neck, the will get an MRI of the neck and will discover an incidental findings of a longstanding pathology involving the cervical spine that necessitates treatment. Dr. Janssen testified that based on his experience, Claimant had an incidental finding involving the cervical spine that was longstanding in nature and did not appear to be traumatic. Based on this opinion, Dr. Janssen opined that the recommended cervical surgery was not related to the work injury.

28. The ALJ credits the Claimant's testimony at hearing along with the medical reports from Dr. Price and Dr. Wallach and finds that Claimant has established that it is more probable than not that Claimant sustained a work injury arising out of and in the course of his employment with Employer on July 7, 2023 when he slipped and fell at work. The ALJ notes that Claimant reported this injury to Employer on the date of the injury, but due to his discussion with his general manager, JN[Redacted] on July 11, 2023, reported the injury to have occurred on July 11, 2023 instead of July 7, 2023.

29. However, the ALJ finds that the actual date of injury for this claim is represented by the slip and fall incident on July 7, 2023. The ALJ further finds that the initial reports to his treating providers as to the nature of his injury involving a July 11, 2023 incident when he was on a ladder is understandable based on Claimant's discussions with his general manager, JN[Redacted], and the recommendations JN[Redacted] gave Claimant based on the incorrect theory that Claimant's claim may be effected by virtue of the fact that he had not reported the injury in writing within 3 days.

30. The ALJ further credits the testimony of Claimant and the opinions expressed by Dr. Price in her medical records along with the report of Dr. Wallach and finds that Claimant has demonstrated by a preponderance of the evidence that the recommended anterior cervical discectomy and fusion at the C6-7 level is reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the work injury.

31. The ALJ recognizes the opinion expressed by Dr. Janssen that Claimant's cervical condition is related to a pre-existing degenerative condition for which Claimant sought treatment in 2021 and 2022, but the ALJ finds the opinions expressed by Dr. Price and Dr. Wallach to be more persuasive with regard to this issue.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2013 The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer.

Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

4. As found, Claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with Employer on July 7, 2023 when he slipped and fell while at work. As found, Claimant's testimony regarding the nature of the work accident along with the testimony that he reported the accident to his Employer on the date that it occurred are credible and persuasive with regard to this issue of the work injury.

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.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. As found, Claimant has proven by a preponderance of the evidence that the anterior cervical discectomy and fusion at the C6-7 level recommended by Dr. Price is reasonable medical treatment necessary to cure and relieve the effects of the July 7, 2023 work injury. As found, the opinions expressed by Dr. Price in her medical records and reports along with the opinions expressed by Dr. Wallach are credible and persuasive with regard to this issue.

ORDER

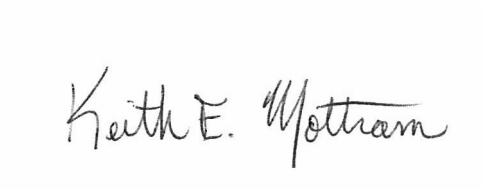
It is therefore ordered that:

1. The proper date of injury for Claimant's work injury with W.C. No. 5-248-248 is determined to be July 7, 2023.

2. Respondents' are liable for the cost of medical treatment related to Claimant's July 7, 2023 work injury including but not limited to, the cost of the anterior cervical discectomy and fusion at the C6-7 level recommended by Dr. Price.

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 email at oac-ptr@state.co.us, or at oac-dvr@state.co.us. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: September 16, 2024



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-242-005-001

ISSUES

- Did Claimant prove that a lumbar surgery recommended by Dr. Sergiu Botolin is reasonably needed and causally related to the admitted industrial injury?

FINDINGS OF FACT

1. Claimant works for Employer as an Engineering Inspector. She suffered a compensable injury to her low back on April 10, 2023, while inspecting a pond structure. The surrounding embankment gave way causing Claimant to lose her balance and step backwards, tripping and falling over a concrete form. She felt immediate sharp pain in her low back. Claimant attempted to continue working briefly and experienced an audible pop in her back after bending over, which severely increased her pain.

2. Claimant initially went to Penrose Community Urgent Care. She reported pain in her low back and right leg, with difficulty walking. She was diagnosed with acute right-sided low back pain with right sciatica. Claimant was given a Toradol injection, prescriptions, and advised to follow up with a workers' compensation provider.

3. Employer referred Claimant to Colorado Occupational Medicine Providers, where she saw Dr. Douglas Bradley on April 10, 2023. Dr. Bradley found pain across Claimant's low back at L4-L5/S1 with pain into her right hip and leg. He administered a pain injection and referred Claimant to physical therapy. Claimant also reported a history of low back problems, with a prior diagnosis of lumbar spondylolisthesis. Claimant stated the symptoms resolved with therapy.

4. Claimant saw a chiropractor episodically for issues including low back pain, starting in 2013. The symptoms were frequently triggered by incidents or activity, such as a fall, painting, moving furniture, abdominal surgery, and bending over. The last chiropractic visit before the work accident was February 20, 2023. On that date Claimant reported 5/10 low back pain after twisting and bending to pick up a water bottle. She received adjustments.

5. Claimant also received treatment for her low back at Joint Effort Physical Therapy, beginning in October, 2021. This was for a work injury with a different employer when that occurred from "catching a heavy automotive part." Lumbar x-rays showed grade 1 spondylolisthesis at L4-5 and disc space narrowing at L5-S1. Claimant attended 14 sessions of PT over approximately six months. Her progress was impeded by a fall down some stairs in January 2022, and the "very physically demanding" nature of her job. Claimant underwent surgery for ovarian cysts in March 2022 which helped her back pain, and the therapist opined at least some of the pain was referred from the ovarian cysts. The last PT record is dated April 29, 2022, on which date Claimant reported she was "doing alright. Back isn't hurting too bad."

6. Neither the pre-injury PT records nor the chiropractic records documented any lower extremity symptoms.

7. Dr. Bradley ordered a lumbar MRI to evaluate the work injury, which was completed on April 21, 2023. It showed increased signal in the L4-5 disc, consistent with an annular tear, and an L5-S1 disc bulge contacting the but not compressing the left S1 nerve root.

8. Claimant followed up with Dr. Bradley on April 24, 2023, to review the MRI. Claimant described severe low back pain radiating into both legs. Dr. Bradley reassured Claimant the recent MRI showed no "serious injury" such as a fracture or ruptured disc. He recommended she continue PT and working sedentary duty only. Claimant and Dr. Bradley also discussed her 2021 low back injury, which took several months of PT to resolve. Dr. Bradley maintained his opinion that Claimant's current back symptoms were related to the April 2023 work accident.

9. Claimant saw Dr. Erik Ritch at COMP on May 17, 2023. The pain in her back and legs was worsening despite PT. Dr. Ritch referred Claimant for an EMG and physical medicine evaluation.

10. Dr. Michael Sparr evaluated Claimant and performed electrodiagnostic testing on June 23, 2023. Claimant described ongoing low back pain and radiating leg symptoms, worse on the left. Physical examination showed markedly positive facet loading bilaterally at L4-5 and L5-S1, bilateral SI joint tenderness, and positive straight leg raise testing, worse on the left. The EMG showed no evidence of lumbosacral radiculopathy but there was evidence of peroneal neuropathy. Dr. Sparr opined that the peroneal neuropathy was probably contributing to the leg symptoms, but she also had mechanical back pain, sacroiliitis, and facet dysfunction. He referred Claimant for injections.

11. Claimant underwent multiple injections including bilateral SI joint injections, bilateral trochanteric bursa and lateral piriformis injections and bilateral lumbar medial branch blocks of the L4-5, L5-S1 facets. The injections provided minimal pain relief.

12. In September 2023, Claimant's ATP was changed from COMP to Dr. Mark Siemer at UCHealth Occupational Medicine Clinic. Dr. Siemer referred claimant to Dr. Jason Rosenberg for pain management.

13. Dr. Rosenberg evaluated Claimant on October 4, 2023. She reported constant low back pain with pain and numbness radiating to both legs, worse on the left. Dr. Rosenberg reviewed the MRI images and noted a small disc protrusion with fissure at L4-5 and a L5-S1 central disc protrusion and left subarticular herniation at L5-S1. Dr. Rosenberg opined the imaging was consistent with S1 radiculopathy, left worse than right. He recommended epidural steroid injections (ESIs).

14. Claimant underwent a caudal ESI on October 26, 2023. It provided no significant benefit. Therefore, Dr. Rosenberg recommended a surgical evaluation.

15. Claimant saw Dr. Sergiu Botolin on January 9, 2024. He reviewed the MRI images and noted spondylosis at L4-5 with an annular tear, which could be causing the low back pain. He also saw a left-sided disc herniation at L5-S1, but no significant pathology on the right. He ordered an updated lumbar MRI since the previous MRI did not explain the bilateral lower extremity symptoms.

16. The repeat MRI was performed on February 2, 2024. The findings were not described as "stable" compared to the 2023 MRI. However, the radiologist noted the L5-S1 disc herniation partly impacted the bilateral L5 nerves.

17. Claimant returned to Dr. Botolin on February 7, 2024. Dr. Botolin reviewed the MRI and noted a left-sided paracentral disc protrusion at L5-S1 contacting and displacing slightly the traversing left S1 nerve root. Dr. Botolin concluded that all non-surgical treatment options had been exhausted and he recommended a left-sided L5-S1 discectomy. He opined the goal of the surgery is to help with the left lower extremity symptoms and low back pain.

18. Dr. Carlos Cebrian performed an IME for Respondents on April 5, 2024. He issued a report and testified via deposition. Dr. Cebrian opined the proposed surgery is not reasonably needed or causally related to the work accident. Dr. Cebrian noted Claimant initially only complained of right leg symptoms, and did not report left leg symptoms until April 23, 2023, thirteen days after the accident. As a result, he opined the left-sided MRI findings are incidental and not clinically significant. Dr. Cebrian further opined that Claimant's pain generator had not been specifically identified. Different pain generators were pursued with injections to the bilateral SI joints, medial branch blocks, and caudal epidural steroid injections, but Claimant did not have a diagnostic or therapeutic response to any of the injections. Dr. Cebrian also noted Claimant had received regular chiropractic and physical therapy treatment from 2013 to 2023 to reduce her low back pain. Dr. Cebrian pointed out that Dr. Botolin advised Claimant the surgery could address her left lower extremity symptoms but would not address her low back pain or the pain in her right lower extremity. Dr. Cebrian recommended 6 to 12 sessions of chiropractic care, at which point Claimant should be at MMI.

19. Dr. Siemer wrote to Respondents on June 17, 2024, and expressed disagreement with Dr. Cebrian's conclusions. He opined the surgery recommended by Dr. Botolin will be beneficial for Claimant.

20. On June 18, 2024, Dr. Siemer documented muscle atrophy in Claimant's left thigh and calf, which he opined is caused by the lumbar radiculopathy.

21. Dr. Rosenberg authored a report on July 3, 2024 addressing the surgery. Dr. Rosenberg explained that his review of the MRI "clearly" showed a left paracentral disc protrusion/herniation impacting the left nerve root, consistent with Claimant's symptoms. He disagreed that chiropractic care was likely to help. Given Claimant's lack of response to multiple conservative interventions, he agreed with Dr. Botolin that the appropriate next set is to move forward with surgery.

22. Claimant testified that she continues to experience chronic pain from the work accident, which substantially interferes with her ability to perform routine activities. Claimant has been medically separated from her job with Employer because she has could not return to her regular job. Claimant's ongoing symptoms include constant, severe back pain and shooting pain and numbness in her left leg. She agreed the leg symptoms started on the right side but spread to the left leg relatively quickly. The left leg symptoms progressed and have been worse than the right for quite some time. The left leg pain is aggravated by prolonged walking, sitting, and moving her hip. She also appreciated the left leg atrophy documented by Dr. Siemer. Claimant acknowledged her prior low back problems, but testified she had no pre-existing symptoms comparable to the symptoms since the work accident.

23. Claimant's testimony is credible.

24. The opinions of Dr. Botolin, Dr. Rosenberg, and Dr. Siemer are credible and more persuasive than the contrary opinions offered by Dr. Cebrian.

25. Claimant proved the left L5-S1 discectomy recommended by Dr. Botolin is reasonably needed to cure and relieve the effects of the work injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved the L5-S1 discectomy recommended by Dr. Botolin is reasonably needed to cure and relieve the effects of the work injury. Multiple treating physicians agree the surgery is appropriate, and Dr. Cebrian is the only physician with a contrary opinion. Claimant developed back pain and lower extremity symptoms immediately after the work accident. Although initially she had right leg pain, within a short time symptoms were present on both sides. The left leg symptoms progressed and have been worse than the right for quite some time. Dr. Botolin and Dr. Rosenberg observed pathology on the MRIs they believe accounts for at least a substantial portion of Claimant's symptomology. Dr. Siemer documented left leg atrophy, consistent with lumbar radiculopathy and a progressive neurological deficit. Claimant has attempted multiple conservative modalities but remains significantly disabled by her injury. At this stage, surgery offers the best remaining chance for appreciable improvement.

The preponderance of persuasive evidence also shows the proposed surgery is causally related to the admitted injury. Claimant's previous low back problems were generally episodic and responded to conservative care. By contrast, she had remained

continuously symptomatic since the April 2023 injury despite extensive treatment. There is no persuasive evidence any provider considered Claimant a surgical candidate before the work accident, whereas now three treating physicians agree she needs surgery. Furthermore, the pre-injury pain was generally confined to Claimant's low back, whereas lower extremity symptoms are a major factor in the current surgical recommendation.

ORDER

It is therefore ordered that:

1. Insurer shall cover the L5-S1 discectomy recommended by Dr. Botolin.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 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: September 16, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that the left total hip arthroplasty recommended by Dr. Ryan Albrecht is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted March 22, 2023 work injury?

FINDINGS OF FACT

1. Claimant is employed with Employer as an assistant manager. On March 22, 2023, Claimant was at work feeding chickens. As he was leaving the scale house in the early morning, Claimant unexpectedly stepped with his left foot into a 14 inch deep hole. As a result, Claimant felt pain "like a flash" up into his neck. Initially Claimant returned to his job duties. However, he had worsening pain during his shift. Claimant testified that he had pain from his left ankle up to his neck. As a result, Claimant reported the tripping incident to Employer.

2. Due to ongoing symptoms, on March 23, 2023, Claimant sought treatment in the emergency department (ED) at Delta Health. At that time, Claimant was seen by Dr. Peter Pruett. Claimant reported severe pain in the right low back, and pain into his left groin with movement of his left hip. Dr. Pruett ordered x-rays of Claimant's lumbar spine. Those x-rays were performed on March 23, 2023 and showed minimal scoliosis, with no acute injury. Dr. Pruett diagnosed a low back muscle strain and spasm. Claimant was instructed to avoid heavy lifting and to use Tramadol for pain. Dr. Pruett recommended Claimant follow-up with a workers' compensation physician.

3. At some time following that initial treatment, Claimant took a three week vacation to Columbia. Claimant testified that he was incapacitated during this trip due to pain in his left leg and hip.

4. Thereafter, Claimant did not undergo any medical treatment until September 7, 2023. Claimant testified that the reason he did not seek treatment during that time was because of delays related to his workers' compensation claim.

5. On September 7, 20231, Claimant was seen by his authorized treating physician (ATP), Dr. Randal Shelton. At that time, Claimant reported pain in his low back

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' A September 28, 2023 record is the first record from Dr. Shelton admitted into evidence at the hearing. However, that record includes brief summaries of Claimant's treatment with Dr. Shelton on September 7, 2023, September 14, 2023, and September 19, 2023. The ALJ relies upon these summaries in reciting Claimant's treatment with Dr. Shefton.

and left thigh following the March 22, 2023 incident. Claimant also reported that the low back pain had resolved quickly, but pain in his left thigh persisted.

6. On September 14, 2023, Claimant returned to Dr. Shelton and reported ongoing left thigh and left hip pain. Dr. Shelton made reference to radiologic evidence of "severe osteoarthritis".

7. On September 19, 2023, Claimant was again seen by Dr. Shelton, at that time, Claimant referenced a prior similar incident that had occurred approximately one year prior. Claimant further reported that following that prior incident he sought treatment with a chiropractor and his back pain resolved. Dr. Shelton again referenced the presence of severe arthritis in Claimant's left hip and that an orthopedic consultation had been recommended.

8. On September 25, 2023, Claimant underwent magnetic resonance imaging (MRI) of his left hip. The MRI showed severe arthrosis of the left hip, extensive loss of cartilage, and stress related edema at the acetabulum and femoral head.

9. On September 28, 2023, Dr. Shelton noted that Claimant continued to have symptoms of left groin and left hip pain. In the medical record of that date, Dr. Shelton opined that on the date of the work injury, Claimant experienced an aggravation of the pre-existing osteoarthritis. Dr. Shelton further opined that Claimant likely needed surgical intervention to address his left hip issues. Dr. Shelton continued to recommend an orthopedic consultation.

10. On October 17, 2023, Respondents filed a General Admission of Liability (GAL).

11. On December 8, 2023, Claimant was seen by Dr. Ryan Albrecht with Western Slope Orthopaedics. At that time, Claimant reported that his pain began almost one year prior when he "fell into a hole." Claimant also reported that his pain was primarily in his left groin. Dr. Albrecht recorded that Claimant "recently had an incident where he was carrying approximate[ly] 20 pounds and the leg gave out on him and he fell." Dr. Albrecht reviewed the x-rays and MRI studies and diagnosed Claimant with severe and chronic left hip osteoarthritis. Dr. Albrecht recommended Claimant undergo a left total hip arthroplasty.

12. On March 4, 2024, Claimant attended an independent medical examination (IME) with Dr. Qing-Min Chen. In connection with the IME, Dr. Chen reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. It is Dr. Chen's opinion that on March 22, 2023, Claimant suffered a lumbar strain and a hip strain. Dr. Chen agrees that reasonable treatment of Claimant's left hip condition is a left total arthroplasty. However, Dr. Chen is of the opinion that the need for surgery is not related to the March 22, 2023 incident at work. In support of this opinion, Dr. Chen noted that after receiving initial treatment at the hospital, Claimant did not pursue any other treatment until September 2023. Dr. Chen also noted that Claimant has "bone-on-bone arthritis that likely predated this injury by

years, if not decades." Dr. Chen explained that this is the natural progress of Claimant's underlying osteoarthritis.

13. Medical records from New Life Chiropractic were admitted into evidence. Specifically, on May 3, 2022, Claimant sought chiropractic treatment at that practice. Claimant's symptoms included mid-back pain and cramping in his left leg and thigh. On May 17, 2022, Claimant was provided a letter from New Life Chiropractic Ors. Jacob Sims and Laura Sims. This letter provided that Claimant was being treated for "mid back pain between his shoulder blades, left leg pain, and poor circulation of his left hand." This letter further provided that Claimant could return to light duty work May 23 2022, with a bending and lifting restriction of 50 pounds. Claimant provided a similar and undated letter to Employer that stated that Claimant's "only restriction is bending and lifting frequently" and Claimant was to be reevaluated further on June 1, 2022. On May 26, 2022, Claimant received adjustments to his bilateral hips.

14. Dr. Chen's testimony was consistent with his IME report. Dr. Chen reiterated his opinion that the pre-existing osteoarthritis in Claimant's left hip has no relationship to the March 22, 2023 work injury. In support of this opinion, Dr. Chen noted that the MRI results showed "bone on bone arthritis" that had likely been present for many years. Dr. Chen also testified that Claimant's March 22, 2023 work injury did not make the pre-existing arthritis any worse. With regard to the New Life Chiropractic records, Dr. Chen testified that this prior treatment indicates that Claimant's symptomology existed well before the Claimant's March 2023 work injury. Dr. Chen further testified that Claimant's need for a left total hip arthroplasty is solely related to the natural progression of the pre-existing end-stage osteoarthritis in that hip.

15. The ALJ does not find Claimant's testimony regarding the nature and onset of his symptoms to be credible or persuasive. The ALJ credits the medical records and the opinions of Dr. Chen over the contrary opinions of Dr. Shelton. The ALJ specifically credits the opinion of Dr. Chen that Claimant's need for a left total hip arthroplasty is solely related to the natural progression of the pre-existing end-stage osteoarthritis in that hip.

16. The ALJ finds that the left total hip arthroplasty is reasonable and necessary to treat the arthritic condition of Claimant's left hip. The ALJ also finds that Claimant's March 22, 2023 work injury did not aggravate, accelerate, or combine with the pre-existing osteoarthritis present in Claimant's left hip to necessitate medical treatment. Therefore, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the left total hip arthroplasty recommended by Dr. Albrecht is necessary to cure and relieve Claimant from the effects of the admitted March 22, 2023 work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.$. 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); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *H & H Warehouse v. Vicory; supra.*

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

6. As found, while the recommended surgery is reasonable and necessary to treat Claimant's condition, Claimant has failed to demonstrate that the left total hip arthroplasty recommended by Dr. Albrecht is necessary to cure and relieve Claimant from the effects of the admitted March 22, 2023 work injury. As found, Claimant's March 22, 2023 work injury did not aggravate, accelerate, or combine with the pre-existing

osteoarthritis present in Claimant's left hip to necessitate medical treatment. As found, the medical records and the opinions of Dr. Chen are credible and persuasive.

ORDER

It is therefore ordered that Claimant's request for a left total hip arthroplasty is denied and dismissed.

Dated September 18, 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.**

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury within the course and scope of his employment.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to a general award of reasonable, necessary, and related medical benefits.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive temporary total disability (TTD) and temporary partial disability (TPD) benefits.

STIPULATION

- The parties agreed to an average weekly wage (AWW) of $3,559.50.[1]

FINDINGS OF FACT

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

1. Around March 2022, Claimant began working for Employer as a master mechanic with a primary focus on heavy equipment such as cranes. (Hrg. Tr. 16:23 – 17:7). Claimant performed most of his work inside the Employer's shop.
2. Although Claimant was not a welder, there were approximately 5-6 coworkers who were welders and performed various welding activities in the same shop. The welders worked in close proximity to where Claimant worked.
3. The welding caused smoke and fumes to flow throughout the shop and were inhaled by the workers - including Claimant. While the Employer did have two "smoke eater" machines, which helped remove the welding fumes and smoke generated by a single welder, they were seldom used. Plus, there were more welders than "smoke eaters" at the shop. Therefore, even if the "smoke eaters" were used, they would only be able to reduce the fumes and smoke from two welders at a time – even though more than 2 welders might be welding at a time. Therefore, they would be unable to keep up with fumes and smoke when more than 2 welders were working at the same time.
4. Sometimes Claimant worked 10 to 12 feet off the ground where the smoke was usually more concentrated. At times, the fumes and smoke were so bad, it made it hard for him to breathe – or see when it got in his eyes.

[1] This corresponds with a maximum TTD rate of $1,228.99.

5. Claimant did complain to the Employer multiple times about the large amount of smoke in the shop. On at least one occasion he filled out a "start card." The start card would be turned in at the end of the day. Usually, Claimant did not get a response from his supervisors. On one occasion he did get a response from the shop's superintendent, [Redacted, hereinafter SZ]. The response was "as soon as we get $10 million dollars, we will build the welders a new shop."
6. The shop does have six large garage-type doors which can be opened for ventilation. That said, the superintendent required the doors to remain closed so dirt would not get in the shop. Therefore, they usually remained closed and were not opened very often to help ventilate the smoke and fumes from the shop.
7. Claimant was diagnosed with mild bronchial asthma when he was a child. The asthma became symptomatic by cold weather. Therefore, he would get an inhaler about once every two years and used it primarily in the winter months. Yet his asthma never prevented him from working.
8. In February 2023, the Employer expanded the welding area of the shop and started welding more.
9. On March 7, 2023, Claimant was on top of a crane when the welders climbed onto a dump truck and started welding extension plates. A yellow cloud of smoke and fumes from the welding went to the top of the crane where Claimant was working. He became nauseous and went to the restroom where he vomited. On that day, there were about 5 to 6 welders working and performing various tasks.
10. Following the incident, Claimant sat in the break room to try to catch his breath and drank some water. The vomiting incident was witnessed by a shop supervisor, [Redacted, hereinafter MS]. SZ[Redacted], a shop superintendent, also saw Claimant that day and asked what happened. After Claimant told SZ[Redacted] what happened, SZ[Redacted] said that the welders should use the smoke eaters. Following that incident, Claimant noticed that he started running out of breath more often. As result, he started using an inhaler more often.
11. On April 12, 2023, the mechanics were finishing working on a crane and were pulling it out of the shop. [Redacted, hereinafter BN], another master mechanic with whom the Claimant worked, was helping Claimant pull down some scaffolding while some welding was also being done in the shop. Claimant kept running out of breath and eventually found himself lying next to his toolbox. As a result, BN[Redacted] called the Claimant's wife to pick him up-which she did.
12. Claimant's wife drove him to the emergency room at Parker Adventist Hospital. At the hospital, the treatment notes indicate Claimant has a history of asthma and presented with shortness of breath. According to the medical records, Claimant said his symptoms started 2 months ago and started getting worse to the point where they were severe over the past 3 days. The records also say Claimant works as a welder in an unventilated building and that he was attributing his symptoms secondary to breathing in fumes and smoke. Claimant also said he had a dry cough and a hoarse voice. He underwent a physical examination and it revealed that his pulmonary effort was normal and his breath sounds were normal. There was no stridor, wheezing, rhonchi, or rales. In addition, his

oxygenation levels were normal and ranged from 95-100 percent. Chest x-rays were taken and showed left lateral basilar airspace opacity which the radiologist thought might represent an infectious or inflammatory pneumonitis. In the end, they thought Claimant's symptoms could be related to inhalation exposure. Based on their assessment, Claimant was prescribed a course of steroids and an albuterol inhaler. He was directed to use the inhaler by taking two puffs by mouth every four hours as needed for shortness of breath or wheezing. He was also advised to follow up with his PCP (Primary Care Physician/Provider). Moreover, they took Claimant off work from April 12th through April 17, 2023.

13. On April 21, 2023, Claimant was seen by his PCP for dyspnea – shortness of breath. Due to having shortness of breath, Claimant had started using his inhaler frequently. In fact, he was using more than the recommended use of every 4 hours. This is a drastic increase in the use of his inhaler due to his exposure and shortness of breath. Based on his presentation and symptoms, his PCP sent him to the emergency room. Thus, Claimant went to the emergency room that day.

14. On April 21, 2023, when he went to the emergency room, Claimant said that he felt dyspneic, could not get a full breath, lightheaded, and that he has had discoloration and coolness of his hands. On physical examination it was noted that he was anxious. But his oxygen saturation level was 100%. Moreover, his pulmonary effort was normal, his lungs were clear, and he was not in respiratory distress. Based on his complaints and their assessment, they performed a CT scan of his lungs. The CT scan showed:

    - Small left hilar calcifications compatible with sequela of remote granulomatous disease.
    - Mild diffuse bronchial wall thickening.
    - Small cluster of micronodules in the left lower lobe, probably infectious though may be subclinical. The lungs are otherwise clear.
    - Small hiatal hernia with mild lower esophageal wall thickening, nonspecific though most commonly secondary to GERD/reflux esophagitis.

15. The final diagnosis was:

    - Acute dyspnea.
    - Acute bronchitis, unspecified organism.
    - Pulmonary lesion.

16. Based on their findings and assessment, they discharged Claimant and provided him a disc of his CT scan to show to the pulmonologist, with whom Claimant was already scheduled to see at National Jewish Health (National Jewish).

17. On April 24, 2023, OSHA conducted air sampling testing at the shop in light of a complaint filed regarding the working conditions. The air sampling was conducted to determine the

extent of employee exposure to various metals released from welding.[2] The report from OSHA found that all levels of particulates were below occupational exposure limits. However, it also stated that at the time of the testing, no hard surface welding was conducted and there was only one person welding. Based on the credible testimony of Claimant and coworker BN[Redacted], this was not representative of the usual working conditions in the shop. Thus, the conditions tested by OSHA, were not representative of the air during a typical day. As a result, OSHA's findings shed no light on Claimant's typical daily exposure nor his exposure during the specific event that occurred in March 2023. And despite the OSHA findings, the welders were ultimately provided full face respirators with fresh air backpacks to protect them from the fumes-which demonstrates the welding fumes and smoke were not safe. The mechanics, however, were not provided the same type of safety breathing equipment.

18. On April 27, 2023, Dr. Klein, from SCL Cherry Creek Family Medicine, took Claimant completely off work due to concerns for environmental exposure leading to shortness of breath / reactive airway disease.

19. On May 3, 2023, additional air testing was performed at the shop by [Redacted, hereinafter HN] and a report was issued on May 17, 2023. They tested the air while only two welders were working. Plus, each worker was using a smoke eater. The large doors were also open and that created natural ventilation. Under those circumstances, their testing found that the air quality met OSHA standards. But the air testing was not conducted under usual work conditions or the conditions of March 2023 when a large yellow plume of smoke engulfed Claimant. For example, there could be more than two welders working at a time and they usually did not use the smoke eaters. Plus, management did not allow the doors to be open for ventilation. As a result, the report is not reliable for determining the shop's air quality because it was conducted under atypical conditions—both in terms of the number of welders working and the use of the smoke eaters that were seldom used, and having the doors open for additional ventilation. Thus, the findings are unrepresentative of the real work environment and do not help determine the extent of Claimant's exposure to dangerous smoke and fumes while working.

20. On or about May 20, 2023, Claimant was evaluated at Occupational Medicine Clinic at National Jewish Health by Dr. Koslow. The clinical question was whether "occupational exposure as [a] mechanic could explain [Claimant's] dyspnea and multiple systemic symptoms." As a result of the issues to be addressed, Dr. Koslow made an internal referral for additional evaluations at National Jewish.

21. On May 21, 2023, Claimant again presented to the emergency room. His primary complaints were shortness of breath and headaches. Claimant indicated that his symptoms have been ongoing for the last 6 weeks and that they have been getting progressively worse and that he thinks it was triggered by his working environment. While it was noted that Claimant had visible shortness of breath, he had normal vital signs, had normal breath sounds, and did not have any change in his oxygen saturation-which was

[2] The metals tested for included: Zinc, Vanadium, Iron (Bulk), Cadmium, Nickel, Metal and Insoluble compounds (as Ni), Molybdenum (as Mo), .Insoluble, Compounds (Total Dust) , Manganese Fume (as Mn), Lead, Inorganic (as Pb), Copper Fume (as Cu) Cobalt, Metal, Dust and Fume (as Co), Chromium, Metal and Insoluble Salts, Antimony and Compounds (as Sb).

100%. Based on his complaints of a headache, which he stated had been going on for weeks, they performed an MRI of his brain-which was normal. The final diagnosis was chronic non-intractable headache, unspecified.

22. On May 26, 2023, Claimant returned to National Jewish for an additional evaluation. At the end of this evaluation, the doctors had still not come up with a diagnosis. They were still trying to figure out what was wrong with Claimant. Because there was not a definitive diagnosis to account for Claimant's symptoms, Dr. Hua stated that Claimant "will undergo additional evaluation to help establish a diagnosis. Given the acute worsening of his symptoms following his workplace exposure, there is certainly a temporal component that would indicate relation to his work exposure."

23. On June 7, 2023, Claimant saw Dr. Koslow again at National Jewish. After this extensive evaluation, it was unclear to Dr. Koslow what was causing all of Claimant's respiratory symptoms. Although he concluded Claimant had mild respiratory impairment, he could not explain Claimant's shortness of breath at rest. Regarding his respiratory symptoms, Dr. Koslow stated:

> Spirometry demonstrates a borderline airflow obstruction at baseline with significant improvement postbronchodilator otherwise normal lung volumes and DLCO. He has had some symptomatic improvement on ICS but given multiple use of rescue inhaler throughout the day up to 3 or 4 times a day, we will increase his controller to ICS/LABA which can also be used as a rescue inhaler. The mild impairment however would not sufficiently explain his symptoms of shortness of breath at rest and I would continue to look for alternative explanations including the possibility of dysfunctional breathing which as we described before is a diagnosis of exclusion. He is set up for a CT chest tomorrow which will help clarify any additional etiology. He is also seeing our occupational medicine doctors to better understand the relationship of his work exposure. He will follow-up with me in 3 months. Our goal would be that he is feeling better and using his rescue inhaler less or not at all and sleeping better. We reviewed the asthma control test. As above for his atypical chest pain, if any worsening of his symptoms he should follow-up with urgent care or emergency room.

24. On June 8, 2023, Claimant had a CT scan. The CT scan showed diffuse airway inflammation that was consistent with asthma as well as bronchial wall thickening that was consistent with bronchitis and aspiration. The scan also showed a small hiatal hernia.

25. On June 16, 2023, Claimant returned to National Jewish. During this visit, he underwent a laryngoscopy to evaluate his esophagus. The test found evidence of laryngopharyngeal reflux and vocal cord dysfunction.

26. On June 28, 2023, Drs. Hua and Pacheco, at National Jewish, after numerous evaluations and tests, issued a report setting forth their assessment and opinions regarding Claimant's conditions and the cause of those conditions. They concluded that it is more likely than not that:

    - Claimant suffered a marked aggravation of his preexisting mild asthma that was caused by his occupational exposure to welding

fumes, vapors, and other irritant dusts, including the significant exposure in March 2023.

- Claimant developed vocal cord dysfunction, which was also caused by the hazardous occupational exposure to welding fumes and vapors, including the significant exposure in March 2023.
- Claimant's gastroesophageal or silent reflux (a component of GERD) was aggravated by his use of bronchodilators and/or his exposure to particulates at work.

27. The ALJ finds the opinions of Dr. Hua and Pacheco to be persuasive for a number of reasons. First, they performed numerous evaluations and tests before providing final diagnoses to explain Claimant's symptoms, and concluding that Claimant's conditions were caused by his exposure at work. Second, the tests Claimant underwent provided objective evidence of Claimant's conditions. Third, Claimant's respiratory response at work was contemporaneous to being exposed to a large plume of yellow fumes and smoke at work in March of 2023.

28. On August 25, 2023, Claimant underwent a Respondent Independent Medical Examination with Jeffrey Schwarz, M.D. Dr. Schwartz reviewed Claimant's medical records, performed a physical examination, and also performed spirometry testing. Dr. Schwartz concluded that Claimant's respiratory complaints, including shortness of breath and asthma, were not supported by objective clinical evidence. Despite claims of exposure to welding fumes at work, and a large plume in March 2023, Dr. Schwartz found no evidence of lasting respiratory damage or significant lung function impairment.

29. Dr. Schwartz highlighted several instances of inconsistent performance during pulmonary function testing, suggesting that Claimant's inability to perform reliable spirometry was indicative of malingering. The repeated suboptimal efforts during testing led him to conclude that Claimant's was exaggerating his symptoms and possibly malingering.

30. Dr. Schwartz was highly critical of the diagnoses provided by Dr. Pacheco and other evaluators, who attributed Claimant's symptoms to asthma exacerbation and vocal cord dysfunction caused by work-related exposures. Dr. Schwartz argued that these diagnoses were not backed by objective evidence, such as valid spirometry results, and instead reflected diagnostic bias.

31. While Claimant was diagnosed with conditions like reactive airway dysfunction syndrome (RADS) and gastroesophageal reflux disease (GERD) related to his exposure by other physicians, Dr. Schwartz found no compelling evidence to support these conclusions. He emphasized that GERD and asthma were more likely related to non-work-related factors.

32. Dr. Schwartz pointed out inconsistencies in Claimant's symptom reporting, particularly in relation to his alleged asthma exacerbation. Despite claims of severe respiratory distress, physical examinations often showed normal lung function and unremarkable findings.

33. Overall, Dr. Schwartz concluded that there was no significant work-related respiratory injury and expressed concerns about malingering based on the lack of objective evidence and inconsistent testing results.

34. On September 11, 2023, Dr. Schwartz issued a supplemental report based on the receipt of additional records, specifically the pulmonary function tests (PFTs) and evaluations from National Jewish Health regarding Claimant's condition. His key findings and conclusions are as follows:
    - The PFTs conducted on June 7, 2023, did not show significant airflow obstruction. He noted that Claimant's pre- and post-bronchodilator forced expiratory volume in one second (FEV1) increased by 11%, which falls below the 12-15% threshold required to show a meaningful bronchodilator response. Dr. Schwartz also pointed out that the FEV1/FVC ratio of 0.80 is within the normal range, further indicating the absence of significant airflow limitation.
    - He critiqued the interpretation by other providers, specifically noting that Dr. Koslow incorrectly described the post-bronchodilator improvement as 18% when it was actually 11%. He also disputed the claim that the PFTs showed "borderline airflow obstruction," citing that the FEV1/FVC ratio remained within the normal range.
    - Dr. Schwartz further expressed doubt about the validity of the PFT results, highlighting that the tests did not meet performance standards set by the American Thoracic Society (ATS). He suggested that the suboptimal performance during spirometry, along with the inconsistencies in test results, could indicate malingering or dysfunctional breathing rather than genuine respiratory impairment.
    - He indicated that the suggestion of dysfunctional breathing as a potential diagnosis, is considered a diagnosis of exclusion when there is no objective evidence to fully account for the reported symptoms.
    - On the other hand, Dr. Schwartz did not address, in a sensible manner, the CT scan findings that demonstrated "diffuse mild to moderate bronchial wall thickening" with "probable mild air trapping in the mid and upper lungs" and which the radiologist concluded could be compatible with large and small airways disease such as asthma.
    - Dr. Schwartz reaffirmed his earlier conclusions that Claimant's respiratory condition is not consistent with a work-related injury or significant pulmonary impairment based on the available medical data. He continued to express concerns about the reliability of the PFTs and suggests that Claimant's symptoms may be due to non-physical factors, such as malingering or psychogenic causes.
35. On January 11, 2024, Dr. Hua, from National Jewish, issued a very credible and persuasive rebuttal report that provided a comprehensive critique of Dr. Schwartz's opinions regarding Claimant's medical conditions and the cause of those conditions. Dr. Hua addresses several key points raised by Dr. Schwartz as follows:
    - <u>Spirometry and Malingering</u>: Dr. Schwartz accused Claimant of malingering during spirometry tests. Dr. Hua refutes this, stating that while the strict ATS/ERS standards were not met, the results were acceptable for clinical interpretation. Dr. Hua also questioned the quality of the technicians' training at Dr. Schwartz's office, noting that NJH technicians were able to obtain satisfactory results-when Dr. Schwartz's allegedly could not.

- Asthma Diagnosis: Dr. Schwartz claimed that Claimant did not have documented asthma and questioned the diagnosis of work-exacerbated asthma. Dr. Hua disagreed, citing clinical history, pulmonary function tests, and improvement in symptoms with medication. He emphasizes that the evidence strongly supports that Claimant's preexisting asthma was aggravated by his occupational exposure.
- Reactive Airways Dysfunction Syndrome (RADS): Dr. Schwartz challenged the notion that Claimant developed RADS after the acute exposure. Dr. Hua clarified that while strict RADS criteria may not apply due to preexisting asthma, the intense exposure could still have caused RADS-type injury and aggravated the preexisting asthma.
- Vocal Cord Dysfunction (VCD): Dr. Schwartz dismissed the idea that the welding fume exposure caused VCD, calling the case "medically preposterous." Dr. Hua disagreed, providing references to scientific literature that support the development of VCD after high-dose irritant exposures, including those from welding fumes. He outlined the symptoms and treatment of VCD in Claimant, further supporting the diagnosis.
- GERD and VCD: Dr. Schwartz suggested that GERD, not welding fume exposure, was the more likely cause of Claimant's VCD. Dr. Hua countered this by stating that there was no evidence of preexisting GERD in Claimant before the exposure. He noted that exposure to fumes can irritate the upper digestive tract, and GERD is a common issue in similar occupational exposures and in those that use bronchodilator inhalers.

36. The ALJ finds Dr. Hua credibly and persuasively supports the diagnosis of work-exacerbated asthma, VCD, and GERD due to Claimant being exposed to welding fumes while working and the use of an inhaler. Dr. Hua also noted the improvement in Claimant's symptoms with treatment, indicating the appropriateness of his clinical assessment. Dr. Hua emphasized that the medical literature and clinical evidence supports his conclusions and critiques Dr. Schwartz's assertions as overly dismissive and not aligned with the available evidence.
37. On February 9, 2024, Claimant underwent a Claimant IME with Dr. Orent. Dr. Orent firmly concluded that Claimant's symptoms, including shortness of breath and exacerbated asthma, were caused by his exposure to welding fumes in a poorly ventilated workplace. He emphasized that welding fumes are known irritants, and the timing of Claimant's symptoms aligns closely with his workplace exposure.
38. Dr. Orent relied on spirometry data and other lung function tests, which showed abnormalities consistent with airway irritation and inflammation. For instance, his findings were supported by reduced lung capacity and borderline bronchodilator responses, which were interpreted as indicative of respiratory distress caused by inhalation of irritants. Despite some inconsistencies in the testing, Dr. Orent believed that the overall clinical picture strongly supported a work-related cause.
39. Dr. Orent also relied on imaging studies that revealed bronchial wall thickening and signs of airway inflammation, which are consistent with exposure to toxic fumes.

40. Dr. Orent dismissed other potential causes of Claimant's conditions, such as gastroesophageal reflux disease (GERD), emphasizing that the primary driver of the symptoms was the documented exposure to welding fumes rather than any preexisting or unrelated conditions. He also rejected any suggestion of malingering, highlighting that Claimant's symptoms were consistent with those experienced by individuals exposed to respiratory irritants.

41. Dr. Orent also relied on the improvement in Claimant's symptoms with inhaled bronchodilators that further reinforced Dr. Orent's conclusion that his respiratory distress was caused by irritant exposure rather than any other condition.

42. Dr. Orent's conclusions are based on a combination of objective clinical tests, such as spirometry and imaging, as well as the temporal association between Claimant's exposure to welding fumes and the onset of his symptoms, providing a well-rounded justification for linking the work environment to the respiratory issues and associated conditions.

43. Dr. Orent's opinions in his report are found to be credible and persuasive because they are well-supported by both objective medical evidence and consistent clinical findings. His conclusions are based on spirometry tests, imaging studies, and the timing of Claimant's symptoms following workplace exposure to welding fumes. Additionally, his findings are consistent with reports from other medical providers, who also linked Claimant's respiratory symptoms to workplace exposure. Dr. Orent thoroughly addresses alternative causes, rejecting them with logical, evidence-based reasoning, and his reliance on clinical data strengthens the credibility of his conclusions. Overall, his assessment aligns with the objective medical evidence, making his opinions both credible and well-supported.

44. On March 11, 2024, Dr. Schwartz issued his third report and reviewed and responded to the opinions of Dr. Orent and Dr. Hua regarding Claimant's respiratory condition and its alleged connection to workplace exposure. The key conclusions and the basis for his opinions are as follows:

    - Dr. Schwartz strongly reiterated his position that Claimant's inconsistent and unreliable performance during spirometry tests indicates malingering. He emphasized that both Dr. Orent and Dr. Hua failed to adequately address the significant issues with Claimant's test performance, and he critiqued their reliance on suboptimal data to support their conclusions. Dr. Schwartz believed that the inconsistent results, as evidenced by repeated abnormal efforts during pulmonary function tests, point to intentional submaximal effort.

    - Dr. Schwartz disputed the assertion by Dr. Orent and Dr. Hua that welding fume exposure caused or exacerbated Claimant's asthma or other respiratory issues. He argued that there is no objective evidence to support the claim that welding fumes caused a lasting injury, pointing out that Claimant's chest exams and lung function tests were repeatedly normal. He also dismissed the idea that the exposure could have caused reactive airway dysfunction syndrome (RADS), as there was no documented evidence of severe respiratory injury immediately following the exposure.

- Dr. Schwartz criticized Dr. Orent's and Dr. Hua's diagnostic reasoning, describing it as lacking objective support. He took issue with Dr. Orent's statement that Claimant was "sincerely affected" by welding fumes, claiming that such a statement lacks medical meaning and is unsupported by evidence. Similarly, he disputed Dr. Hua's conclusion that Claimant's condition could be attributed to a RADS-like injury, maintaining that there was no objective evidence to support this diagnosis.
- Dr. Schwartz continued to propose alternative explanations for Claimant's symptoms, such as gastroesophageal reflux disease (GERD) or psychogenic causes. He emphasized that GERD is a well-known cause of chronic cough and shortness of breath and argues that it is more likely to explain Claimant's symptoms than a work-related injury. He also highlights findings such as laryngopharyngeal reflux (LPR) and a hiatal hernia, which support his conclusion that GERD is the underlying issue.
- Overall, Dr. Schwartz argued that neither Dr. Orent nor Dr. Hua provided objective, consistent medical evidence to support their conclusions of a work-related respiratory injury. He critiqued their reliance on patient-reported symptoms and their dismissal of the inconsistent spirometry results, which he views as central to understanding Claimant's case.

45. Dr. Schwartz's opinions and conclusions, as outlined in his reports, are not found persuasive by this ALJ due to a pattern of selectively dismissing both the opinions of other medical experts and key pieces of evidence that can support a connection between Claimant's work exposure and his respiratory symptoms. While Dr. Schwartz heavily focuses on inconsistencies in Claimant's pulmonary function tests and raises concerns about malingering, he dismisses other relevant findings.

46. For instance, other physicians, including Dr. Pacheco and Dr. Hua, concluded Claimant's exposure to welding fumes likely exacerbated his respiratory condition, contributing to symptoms like shortness of breath and cough. Dr. Schwartz, however, discounts these assessments by emphasizing perceived flaws in the diagnostic process, such as invalid spirometry tests and the supposed failure of Claimant to follow testing instructions. By doing so, Dr. Schwartz effectively ignored potential objective evidence, including radiological findings of bronchial wall thickening and air trapping, which other experts connected to work exposure.

47. Moreover, Dr. Schwartz's reports reveal a consistent tendency to prioritize data that fits his narrative of malingering while downplaying or dismissing conflicting evidence, such as the reports of significant respiratory improvement with inhaled medications and physical findings of airway inflammation. His reports often critique the methodology of other experts without fully considering the context in which those evaluations were made, leading to a selective interpretation of the data.

48. This approach undermines the credibility of Dr. Schwartz's opinions and conclusions, as it appears he is arbitrarily disregarding potentially relevant information rather than providing a balanced evaluation of all available data. Consequently, his opinions and conclusions do not convincingly refute the likelihood that Claimant's respiratory conditions

were exacerbated by his work environment and suggests a level of bias in his interpretation of the medical evidence.

49. On June 3, 2024, Dr. Orent was deposed. His deposition testimony is consistent with his report. In his deposition, Dr. Orent attributes Claimant's lung condition and vocal cord dysfunction to his workplace exposure to welding fumes. He notes that the fumes contained a mix of metal oxide particles, gases, and heavy metals, including carcinogens, which can be particularly harmful. Dr. Orent explained that inhaling these fumes significantly exacerbated Claimant's preexisting mild asthma (reactive airway disease), causing a "marked continuing worsening" of his condition. Additionally, he believes that Claimant's vocal cord dysfunction, swelling, and inflammation of the supraglottic structures are partially caused by this exposure, with reflux being a secondary issue triggered by medications prescribed post-exposure.

50. Dr. Orent also highlights that people with preexisting asthma, like Claimant, are at a higher risk of adverse reactions to welding fumes. He vehemently disputes Dr. Schwartz's opinion that attributes Claimant's condition to malingering, instead pointing to objective findings like reactive airway disease, pneumonitis, and small airway disease in Claimant's tests, which he believes were caused or exacerbated by his workplace exposure.

51. Overall, the ALJ finds Dr. Orent's opinions and conclusions in his report and deposition testimony to be credible and highly persuasive. Dr. Orent is a board-certified expert in both occupational and environmental medicine as well as internal medicine, with decades of experience in diagnosing and treating inhalation injuries and work-related respiratory conditions. His extensive knowledge of the health risks associated with welding fumes and his practical experience interpreting thousands of spirometry tests make him highly qualified to assess the impact of workplace exposures like those in Claimant's case. This expertise, combined with his familiarity with medical literature on welding-related lung issues, supports the credibility of his analysis and conclusions. Plus, his opinions are consistent with the opinions of the doctors at National Jewish Health, which Dr. Orent states are some of the best physicians in the world in dealing with lung issues.

52. On July 26, 2024, SZ[Redacted] testified by deposition. SZ[Redacted] works for Employer as an Equipment Superintendent, and he was in that role from about April 2022 through August 2023. Thus, he was in that role when Claimant was exposed to a yellow plume of smoke in March 2023 and when the other incident occurred in April 2023. His job duties included overseeing work planning for three-week increments, assessing upcoming work, and managing quality control. He was also responsible for supervising the safety and working conditions at the shop. He testified that the shop did not need to keep the doors open for ventilation because the shop had a system that automatically monitored the air and would turn a fan on and open one of the garage doors if the air became unsafe based on OSHA regulations. SZ[Redacted] first testified that the system was never triggered – thus the fan was never automatically activated and turned on and the door was never opened due to poor air quality. But later in his testimony, he testified that the system was triggered and that the employees wondered why the door would randomly open and that the employees had to be told about the system. He also testified that did not recall whether Claimant complained to him about excessive amounts of smoke in the shop. He also denied that Claimant ever wrote on a start card that there was excessive smoke in the shop. Moreover, he said that no one else recollected any

yellow smoke. On the other hand, the video submitted by Claimant shows a plume of yellow smoke rising in the shop and is the type of cloud that Claimant says he was exposed to in March 2023. Based on these inconsistencies, the ALJ does not find all of SZ[Redacted] testimony to be credible and persuasive regarding the working environment, or the amount of smoke and fumes in the shop, and the ability of the fan system to automatically detect all of the dangerous types fumes put off by welding and ventilate the shop.

53. In assessing the testimony of Claimant and SZ[Redacted], the ALJ has compared their testimony. In doing so, the ALJ considered the consistency, detail and specificity, as well as the motive or bias of each witness. In this case:

- Claimant described specific incidents, such as exposure to yellow smoke and the subsequent physical symptoms, like vomiting. He also provided details about the lack of safety measures, particularly the use of smoke eaters, and his claim that he raised concerns with SZ[Redacted]. His testimony is relatively detailed about the impact of the fumes and the timeline. Plus, there is a video that documents the release of yellow smoke from welding.
- SZ[Redacted], on the other hand, presents a more generalized account, maintaining that he did not witness or hear about any specific issues with smoke or complaints from Claimant. His testimony focuses on the standard procedures in the shop, including the use of smoke eaters, and asserts that there were no reported problems. Plus, he says he was not aware of the yellow smoke – but yet the video clearly shows a plume of yellow smoke – and rises in a manner that demonstrates no smoke eaters were being used – or if they were being used, they were ineffective.
- Claimant's account is more specific in terms of the exact date (March 7, 2023), the nature of the yellow smoke, and his personal health effects. However, his testimony could be seen as self-serving since it directly supports his claim of injury.
- SZ[Redacted] testimony, while less specific, reflects a broader perspective as a supervisor. He acknowledged that safety equipment, like smoke eaters, were in place, but does not recall any significant safety or health issues being reported, which could suggest a lack of oversight or detachment from day-to-day concerns.
- Claimant has a potential motive to emphasize or exaggerate the harmful conditions in the workplace since he is seeking compensation for his inhalation injuries.
- SZ[Redacted] may have an incentive to downplay or dismiss concerns about safety issues, as his testimony reflects on the workplace environment he supervised. For example, the failure to use smoke eaters on a regular basis, which the ALJ finds is true, diminishes his reliability as a witness regarding the air quality in the shop and the alleged lack of complaints about the air quality in the shop.

54. Overall, the ALJ finds Claimant's testimony to be more credible than SZ[Redacted]. Claimant's detailed and specific account of the March 7, 2023, incident, including his exposure to yellow smoke, his subsequent health issues, and the lack of proper use of smoke eaters, is bolstered by the corroboration demonstrated by the video that yellow smoke was indeed present in the shop. This validation strengthens his claims of unsafe working conditions and supports his assertion that he reported the incident, even if SZ[Redacted] denies knowledge of it. In contrast, SZ[Redacted] generalized and dismissive account, where he failed to acknowledge or address the presence of smoke or health complaints, calls into question his attentiveness as a supervisor or concern about the working conditions. His focus on safety protocols without recognizing the actual presence of hazardous smoke undermines his credibility, suggesting a failure to properly oversee the work environment. The consistency of Claimant's testimony, combined with the established fact of yellow smoke as well as the inconsistencies in SZ[Redacted] testimony, leads the ALJ to conclude that Claimant's account is more reliable than SZ[Redacted].

55. On July 31, 2024, Dr. Schwartz was deposed. Dr. Schwartz specializes in pulmonary and critical care medicine – and he is board certified. Dr. Schwartz's deposition testimony was consistent with the opinions and conclusions presented in his reports, as he continues to emphasize malingering, suboptimal spirometry performance, and the lack of objective evidence linking Claimant's symptoms to workplace exposure. He repeatedly dismisses the findings of other medical experts and maintains that non-work-related factors, such as GERD, better explain Claimant's symptoms. However, his testimony is not persuasive, as it reflects a tendency to selectively focus on evidence that supports his conclusions while disregarding or minimizing the opinions of other physicians and objective findings that could indicate a work-related injury. This selective approach and failure to fully address opposing viewpoints weakened the credibility of his conclusions and therefore the ALJ does not find his opinions to be persuasive.

56. After March 7, 2023, Claimant's use of an inhaler, or inhalers, increased significantly. The increase in the use of an inhaler was caused by his exposure to fumes at work

57. Claimant's average weekly wage, pursuant to the stipulation between the parties, is $3,559.50.

58. Based on the totality of the evidence, the ALJ finds that Claimant's exposure to welding smoke and fumes during his employment, combined with the March 2023 incident, and exposure thereafter, proximately caused the significant aggravation of his asthma and proximately caused his vocal cord dysfunction. The ALJ further finds that Claimant's GERD, and related symptoms, were proximately caused by a combination of his exposure to welding smoke and fumes at work and the use of his inhalers that were prescribed to treat the effects of his workplace exposure that occurred in March of 2023.

59. The ALJ finds the conditions caused by his exposure at work and the inhalers prescribed to treat those conditions proximately caused the need for medical treatment on April 12, 2023, and thereafter.

60. Due to the effects of his exposure at work to welding fumes and smoke, which caused his respiratory problems, Claimant became disabled and unable to perform his regular job duties as of April 12, 2023. Claimant did try to return to work a couple of months before

the hearing in this matter, as an on-call worker for a staging company. However, he was only able to work three short shifts due to breathing problems. Thus, Claimant remains disabled and unable to perform his regular job duties.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury within the course and scope of his employment.

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

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

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

Claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The “rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability.” *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo.App. 1991). The standard for determining the onset of disability is when “the occupational disease impairs the claimant’s ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity.” *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005).

Claimant began working for the Employer as a mechanic in March 2022, primarily working inside an enclosed shop. Welders were also employed in the same shop, working in close proximity to Claimant. As a result, Claimant was regularly exposed to welding fumes

and smoke during working hours, with no such exposure outside of work. Therefore, the Claimant's exposure to welding fumes and smoke was specific to his employment.

The shop was equipped with large garage doors that could assist with ventilation. However, these doors were rarely opened, as management was concerned about dirt and dust entering the shop. The shop also had two smoke eaters to mitigate welding fumes and smoke, but like the inability to open doors for ventilation, these devices were seldom used. Additionally, the shop's welding setup allowed up to three welders to work simultaneously, meaning that even if both smoke eaters were in use, one welder might still be producing smoke and fumes without any mitigation. The shop also had exhaust fans that would apparently turn on automatically based on the quality of the air in the shop. However, the effectiveness of this system is questioned by the ALJ. Plus, a switch to turn the fan on manually was installed after OSHA evaluated the air in the shop and after Claimant was taken off work. This further mitigates the alleged effectiveness of this automatic fan system.

Claimant complained about the excessive smoke and fumes in the shop. Most of these complaints received no response. On one occasion, the shop superintendent responded sarcastically, stating, "As soon as we get $10 million dollars, we will build the welders a new shop." No significant actions were taken to address the issue until after the Claimant was removed from work in April 2023.

Claimant had been diagnosed with asthma at around age 15, though it was mild and rarely required treatment. He was prescribed an inhaler approximately every two years, and cold air would occasionally trigger coughing. Before starting work with the Employer, the Claimant’s asthma did not cause frequent or significant problems.

In February 2023, Claimant began experiencing breathing difficulties at work. On March 7, 2023, while working on top of a crane, several welders nearby began welding, producing a large plume of yellow smoke that rose to where the Claimant was located. The Claimant developed shortness of breath, nausea, and eventually vomited in the restroom. There were 5 to 6 welders working that day, although not all were welding. Despite this event, Claimant did not seek medical treatment and continued working until April 12, 2023.

On April 12, 2023, Claimant experienced severe shortness of breath while working in the shop. He collapsed near his toolbox, prompting a co-worker to call Claimant’s wife, who took him to the emergency room at Parker Adventist Hospital. The treatment notes indicate Claimant had a history of asthma and presented with shortness of breath, which had worsened over the past two months and became severe in the last three days. The Claimant attributed his symptoms to breathing in welding fumes and smoke at work.

At the hospital, Claimant underwent a physical examination, which showed normal pulmonary effort and breath sounds, with no signs of wheezing or other abnormalities. His oxygen levels were normal, ranging from 95% to 100%. However, a chest X-ray revealed possible signs of pneumonitis. The healthcare provider suspected inhalation exposure as the cause of the Claimant's symptoms and prescribed steroids and an albuterol inhaler. The Claimant was also advised to follow up with his primary care provider and was taken off work from April 12 through April 17, 2023.

On April 27, 2023, the Claimant saw Dr. Klein at SCL Cherry Creek Family Medicine, who took him completely off work due to concerns that environmental exposure at work was causing his shortness of breath and reactive airway disease.

The Claimant later sought care at National Jewish, where Drs. Hua and Pacheco issued a report concluding that:

- The Claimant's preexisting mild asthma was significantly aggravated by occupational exposure to welding fumes, vapors, and irritant dusts, particularly the exposure in March 2023.
- The Claimant developed vocal cord dysfunction, also caused by the hazardous occupational exposure.
- The Claimant's gastroesophageal reflux disease (GERD) was aggravated by his use of bronchodilators and/or exposure to particulates at work.

Based on the totality of the evidence, the ALJ finds the medical opinions from the doctors at National Jewish to be credible and persuasive. Additionally, the ALJ has considered the opinions of Dr. Orent, who similarly concluded that Claimant's asthma and vocal cord dysfunction were caused by exposure to welding fumes at work, and that the Claimant's GERD was linked to the use of inhalers prescribed for his asthma. Like the doctors at National Jewish, the ALJ also finds Dr. Orent's opinions and conclusions to be credible and persuasive. On the other hand, the ALJ has considered the opinions offered by Dr. Schwartz and as set forth above, the ALJ does not find his opinions to be credible or persuasive.

Based on the totality of the evidence, the ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that the significant aggravation of his asthma and his vocal cord dysfunction were proximately caused by his occupational exposure to welding fumes and smoke at work. The ALJ further finds that Claimant's GERD was caused by his exposure at work combined with the inhalers prescribed to treat his work-related respiratory conditions.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to a general award of reasonable, necessary, and related medical benefits.

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

Based on the findings that Claimant's exposure to welding smoke and fumes proximately caused the aggravation of his preexisting asthma and caused his vocal cord dysfunction, and that his GERD was proximately caused by a combination of his exposure to welding fumes and the use of inhalers prescribed to treat the aggravated asthma, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment for those conditions.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive temporary total disability (TTD) and temporary partial disability (TPD) benefits.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). 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. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

In this case, Claimant's preexisting asthma was aggravated by exposure to welding smoke and fumes at work. Due to his respiratory condition that was caused by work, Claimant was taken off work by one of his physicians for 3 days-from April 12 to April 17, 2023. Then, on April 21, 2023, Dr. Klein took him off work indefinitely, due to concerns that his workplace exposure was causing his shortness of breath.

As found, since April 12, 2023, Claimant was disabled and unable to perform his regular job duties due to his respiratory conditions that were caused by his workplace exposure. Although he attempted to work as an on-call employee for a staging company a few months before the hearing, he was only able to complete a few short shifts before his breathing problems prevented him from continuing, and he was not called back for additional work. Thus, he remained disabled.

Based on the totality of the evidence, the ALJ finds and concludes that the Claimant established by a preponderance of the evidence that his breathing problems, which were caused by his work, prevented him from performing his regular job duties as of April 12, 2023, and that Claimant is entitled to temporary total disability benefits as of April 13, 2023, until terminated by law. The ALJ further finds that Claimant is entitled to TPD for the period of time in which he worked three shifts for a staging company.

ORDER

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

1. Claimant's claim is compensable.
2. Respondents shall provide Claimant reasonable and necessary medical treatment to treat him from the effects of his occupational disease-which includes the aggravation of his asthma, his vocal cord dysfunction, and GERD.
3. Claimant's AWW is $3,559.50, with a corresponding maximum TTD rate of $1,228.99.
4. Respondents shall pay Claimant temporary total disability benefits starting April 13, 2023, and continuing until terminated by law.
5. Respondents shall also pay Claimant temporary partial disability benefits for the period Claimant worked three partial shifts, until terminated by law.
6. Respondents shall pay Claimant statutory interest on all compensation not paid when due.
7. 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: September 19, 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. 5-266-382-001

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that in February 2024, he suffered an injury arising out of and in the course and scope of his employment with Employer?

2. If the claim is found compensable, have Respondents demonstrated, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment with employer, thereby severing his entitlement to temporary total disability (TTD) benefits?

FINDINGS OF FACT

1. Claimant worked in Employer's warehouse. Claimant's job duties included labeling and moving boxes.

2. On February 10, 2024, Claimant sought treatment in the emergency department (ED) at Denver Health. On that date, Claimant reported three days of progressively worsening low back pain due to lifting heavy boxes at work. Claimant was seen by Dr. Eric Bustos, Dr. Renee King, and Megan Greising, PA. Claimant was diagnosed with acute midline back pain with left-sided sciatica. Claimant was instructed to use pain medications. In addition, Claimant was provided with a "doctor's note" that stated that Claimant had received care at Denver Health on February 10, 2024, and he could return to work on February 24, 2024. This document did not state the reason for Claimant's treatment.

3. Thereafter, Claimant was provided with an additional note from Denver Health that addressed a visit date February 16, 2024, with instructions that Claimant could return to work on February 26, 2024. Again, no reason was indicated for the treatment.

4. [Redacted, hereinafter GO], is currently employed as a Station Manager with Employer. At the time of Claimant's employment, GO[Redacted] was the Operations Manager. GO[Redacted] credibly testified that in early February 2024, Employer believed that Claimant had abandoned his position and Employer intended to terminate his employment for job abandonment. However, on February 27, 2024, Claimant returned to work and presented a doctor's note that stated he could return to work on February 26, 2024.

5. GO[Redacted] testified that while Claimant was off of work between February 9, 2024 and February 27, 2024, Claimant did not communicate with Employer. GO[Redacted] also testified that when Claimant returned to work on February 27, 2024, he did not

report that his absences were due to a work injury. GO[Redacted] further testified that Claimant did not report that he had work restrictions when he returned to work on February 27, 2024.

6. Claimant continued to work and performed his regular job duties from February 27, 2024 to March 20, 2024.

7. On or about March 14, 2024, Claimant reported to Employer that he believed that he had injured his back at work.

8. On March 14, 2024, Employer completed an Employer's First Report of Injury. In that document the date of injury was identified as February 6, 2024. The mechanism of Claimant's injury was described as "[employee] states moving different items from a big truck to small truck, lifting and pushing packages cause injury on the lower back." The injury was identified as a lumbar/lumbosacral strain.

9. On March 25, 2024, Employer created a disciplinary document that provided that Claimant was suspended pending an investigation. The reason for the suspension was that on March 20, 2024. Claimant "got into a verbal altercation with a manager and supervisor". The document further stated that Claimant "refused to leave when asked and the police had to be called."

10. Claimant understood that as of March 25, 2024, his position with employer was terminated.

11. On March 25, 2024, Claimant sought treatment at Concentra Medical Center (Concentra). On that date, Claimant was seen by Dr. Cynthia Rubio. Claimant reported that on February 6, 2024 he spent "the entire day lifting boxes from 10 to 75 [pounds]." Claimant also reported that when he returned to work on February 26, 2024, he had a 25 pound lifting restriction, but continued to have persistent back pain. Claimant was diagnosed with a lumbar strain and Dr. Rubio ordered magnetic resonance imaging (MRI) of Claimant's lumbar spine. In addition, Claimant was referred to physical therapy.

12. On March 28, 2024, Claimant returned to Concentra and was seen by Dr. Eric Chau. At that time, Claimant reported that he was doing better, but he had some pain radiating down his left leg. Dr. Chau noted that Claimant had begun physical therapy and that an MRI was scheduled.

13. On April 2, 2024, Claimant underwent a lumbar spine MRI. The MRI showed a pars defect at the LS spinal level with anterolisthesis with moderate degenerative changes at the L5-S1 level.

14. On April 18, 2024, Claimant again returned to Concentra and was seen by Dr. Rubio. On that date, Claimant reported that when he underwent his immigration physical, he had low back pain and was given ibuprofen. Claimant further reported that since that physical he had experienced intermittent pain, but currently that pain was

more severe. Dr. Rubio reviewed the results of the MRI with Claimant, and explained that the lumbar changes shown on the MRI were chronic. Dr. Rubio further explained that the MRI results were not work related. Dr. Rubio indicated that Claimant's case would be closed and noted a date of maximum medical improvement (MMI) of April 18, 2024. In those same medical records Dr. Rubio continued to identify Claimant's diagnosis as a lumbar strain.

15. Claimant testified that his back began to hurt while he was working on February 4, 2024. Claimant further testified that on that date he worked for 18 hours. Also, during that shift he was operating a pallet jack that became stuck due to one of the wheels falling into a space between a truck and the warehouse building. Claimant explained that he had to pull the pallet jack with a great amount of force to release the pallet jack. Claimant testified that this resulted in pain in his lower back. Claimant also testified that on February 6, 2024, his back continued to hurt while he was performing his normal job duties.

16. At hearing, Claimant provided a copy of a February 20, 2024, document authored by PA Greising. In that document, PA Greising stated that Claimant suffers from "chronic back pain". This document also stated that Claimant could return to light duty work on February 26, 2024, but he was to "avoid lifting more than 25 pounds."

17. The ALJ is not persuaded by Claimant's description of the February 4, 2024 pallet jack incident. The ALJ credits the medical records and the opinions of Dr. Rubio. The ALJ also credits the testimony of GO[Redacted] and finds that upon his return to work on February 27, 2024, Claimant did not provide Employer with a doctor's note that indicated a lifting restriction.

18. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that in February 2024 he suffered an injury arising out of and in the course and scope of his employment with Employer. The ALJ also finds that Claimant has failed to demonstrate that it is more likely than not that his work duties aggravated or accelerated the preexisting and chronic condition of this low back to produce disability or necessitate treatment.

CONCLUSIONS OF LAW

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

of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

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

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

5. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing,* W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

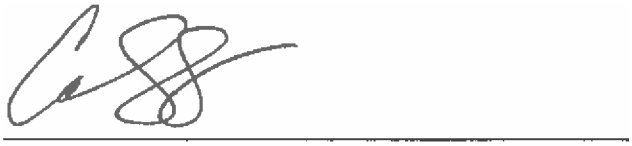
6. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that on February 6, 2024, he suffered an injury arising out of and in the course and scope of his employment with Employer. As found, the medical records and the opinions of Dr. Rubio are credible and persuasive on this issue.

7. The remaining endorsed issues are dismissed as moot.

ORDER

It is therefore ordered that Claimant's claim related to an alleged February 2024 work injury is denied and dismissed.

Dated September 23, 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.

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-185-172-002

ISSUES

1. Whether Respondents proved by clear and convincing evidence that DIME physician Dr. Shea erred in his determination regarding Claimant's permanent impairment;

2. Whether Respondents proved by clear and convincing evidence that DIME physician Dr. Shea erred in his determination regarding Claimant's date of maximum medical improvement (MMI);

3. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits;

4. Whether Respondents proved by a preponderance of the evidence that Claimant is responsible for his own termination and that temporary disability benefits should be terminated as of the date Claimant's employment was terminated;

5. Whether and in what amount Claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. On October 2, 2021, Claimant was working as an oil rig worker for Respondent-Employer. Part of his job duties included manual labor as well as connecting drilling pipes with large pipe wrenches. While another employee was operating heavy iron or steel tongs, a piece of the tongs weighing roughly eight pounds broke off, flew through the air, and struck Claimant in his right thigh and then his left thigh, knocking him to the ground. Due to Claimant having a set of keys in his right pocket, the projectile did not penetrate Claimant's right leg. However, the impact caused two deep puncture wounds in Claimant's left thigh reaching to the subcutaneous fat but not penetrating the muscles.

2. Claimant drove himself to the emergency room at Lincoln Health where his wounds were cleaned and sutured. X-rays showed no fractures of Claimant's thigh. The attending physician, Dr. Michael Sullivan, provided Claimant with temporary work restrictions of no lifting more than ten pounds for the next five days. Claimant was discharged with antibiotics and Percocet.

3. Claimant returned to Dr. Sullivan on October 9, 2021, with continued complaints of bilateral thigh pain and reporting that he had run out of Percocet. Dr. Sullivan observed that Claimant had significant ecchymosis over both thighs. Dr. Sullivan prescribed Claimant additional Percocet and kept him off work for the next two

weeks. Dr. Sullivan also prescribed Claimant ibuprofen and Flexeril with a recommendation that Claimant transition to those.

4. On October 11, 2021, Claimant saw Dr. Christina Pavelko at Colorado Plains Medical Group reporting fatigue concerns that his wounds might be infected. Dr. Pavelko prescribed Claimant Percocet and antibiotics.

5. Claimant returned to Dr. Sullivan at Lincoln Health on October 20, 2021, on crutches reporting difficulty ambulating. Claimant's wounds were observed to have healed well and his sutures were removed. Dr. Sullivan expressed some perplexity as to why Claimant had not returned to normal function by this point.

6. On November 10, 2021, Claimant saw Dr. Pavelko regarding some chronic issues, including urinary symptoms, as well as complaints of low back pain and pelvic pain extending down into the testicles.

7. Claimant saw Amanda Judd, NP, at Peak Vista Community Health on November 19, 2021. He complained of a tight neck and tingling and numbness of his right thigh, arms, and left leg. A left knee X-ray was performed. NP Judd prescribed physical therapy, ibuprofen, and diclofenac. Claimant was given temporary work restrictions of no work.

8. On December 16, 2021, Claimant saw Amanda Judd, NP, at Health Center at Limon. Claimant reported having continued pain and locking of his left knee on extension along with tingling in his leg. Claimant underwent a left knee X-ray which did not reveal any left knee injury.

9. Claimant followed up with NP Judd on January 13, 2022, with continued complaints of significant pain in his left thigh and knee and requesting an MRI.

10. Claimant underwent the left knee MRI on January 27, 2022. The MRI was negative for any acute meniscal or ligamentous injuries. An MRI was also performed on Claimant's left thigh, hip, and femur, which showed only some evidence of scarring and low-grade inflammation in the location of the injuries.

11. On February 16, 2022, Claimant returned to NP Judd with complaints of pain when exercising as he continued with physical therapy. Claimant also complained that his gabapentin caused him more pain and that he wished for oral pain medications rather than topical diclofenac. Claimant was referred to pain management, orthopedics, and physical therapy. His medications were continued as gabapentin and topical diclofenac.

12. At a physical therapy appointment on March 30, 2022, Claimant complained of cervical pain, left lumbosacral pain, bilateral knee pain, and quadriceps pain. He was seen for treatment of the cervical and lumbar spine, including treatment of the left sacroiliac joint for posterior rotation of the innominate including manual

manipulation. He was treated with cervical traction. The therapist noted his neck and back would be treated on separate appointments from his knees and thighs to keep his therapy on course.

13. On March 31, 2022, Claimant saw Dr. Nicholas Stockwell at Banner Health in Sterling. Claimant complained of some right leg weakness as well as difficulty putting full weight on his left leg without feeling as though his knee were giving way. Dr. Stockwell explained to Claimant that the MRIs did not reveal any structural deficits in Claimant's left thigh or knee, though there was some patellofemoral arthritis that Dr. Stockwell felt was unrelated to the injury. Dr. Stockwell offered corticosteroid injections for Claimant's knee, which Claimant declined. Claimant requested additional narcotics prescriptions, but Dr. Stockwell felt that pain management would be more appropriate given the nature of Claimant's now chronic pain.

14. On April 28, 2022, Claimant saw Christina Abbott, NP, at Colorado Pain Care. Claimant reported pain in his bilateral thighs and knees. Claimant described the injury as occurring when the equipment struck his thighs and caused Claimant to fall backwards landing on his left low back. NP Abbott noted that MRIs of the neck, left hip, and left shoulder were currently pending.

15. On June 24, 2022, Claimant underwent MRIs of both knees, his cervical spine, and his lumbar spine. The left knee MRI showed: mild patellofemoral chondromalacia involving the apex and lateral head of the patella; superficial erosions of the articular cartilage in the medical femoral condyle; intact ACL, PCL, MCL and lateral collateral ligament complex; and intact medial and lateral menisci. The MRI of right knee showed small joint effusion, grade I chondromalacia of the patella all ligaments intact and no meniscal tear. The cervical spine MRI showed: no cord signal abnormality; severe left foraminal narrowing at C5-C6 and C6-C7; moderately severe right foraminal narrowing C6-C7; and moderate right foraminal narrowing C5-C6. The MRI of lumbar spine showed: minimal endplate edema adjacent to possible tiny acute small Schmorl's nodes at the anterior superior endplate of L4-L5, which the interpreting physician suspected to be pain generators; no focal disc protrusion, central canal or foraminal narrowing; and a normal appearing conus medullaris.

16. On October 5, 2022, Dr. Carlos Cebrian performed an independent medical examination (IME) at Respondents' request. Dr. Cebrian examined Claimant, took his history, and reviewed Claimant's medical records. Dr. Cebrian noted that several conditions predated Claimant's work injury as documented in the records, including urinary flow abnormalities, ADHD, psoriasis, long-term opioid use, chronic pain disorder, and musculoskeletal issues like cervical and lumbar spine pain, and left shoulder pain. Dr. Cebrian opined that the bilateral thigh contusions and two lacerations on the left thigh were the only injuries directly related to the work injury. He noted that the left thigh injury resulted in quadriceps atrophy, which led to patellar tracking issues and patellofemoral syndrome in the left knee.

Though, he noted that diagnostic testing revealed no underlying quadriceps pathology such as tears or hematomas, attributing the atrophy to disuse and prolonged crutch use. Dr. Cebrian opined that the pain expansion to other areas like the lumbar spine, pelvis, neck, and shoulder was unrelated to the work injury, as the symptoms developed later and were inconsistent with the mechanism of injury. Dr. Cebrian felt that Claimant's pain complaints were disproportionate to the objective findings on the MRIs of the left thigh and knee and that Claimant's oxycodone dosage was inappropriate. Ultimately, Dr. Cebrian opined that Claimant reached MMI as of May 23, 2022, as no further treatment was reasonably necessary after that point, aside from a home exercise program. Dr. Cebrian assessed Claimant with no permanent impairment.

17. On October 26, 2022, Claimant saw Dr. Luke at Workwell. Dr. Luke documented that Claimant had developed posterior and right lateral neck pain, bilateral knee pain, low back pain, and bilateral upper leg weakness since the injury. Dr. Luke noted that the MRIs showed only minor abnormalities in the cervical and lumbar spines and chondromalacia in the knees. Dr. Luke recommended massage therapy and continued home exercises, as well as a urology referral due to Claimant's complaints of foamy and frequent urination. Dr. Luke felt that Claimant had reached MMI as of that date. He referred Claimant for a functional capacity evaluation.

18. Claimant underwent an IME with Dr. Sander Orent on November 1, 2022. Dr. Orent reviewed Claimant's medical records and took Claimant's subjective history. Dr. Orent opined that Claimant was not at MMI and still required a repeat cervical and lumbar MRIs and EMGs to rule out a cervical and lumbar disc herniation and nerve compression causing Claimant's upper and lower extremity symptoms. Regarding Claimant's left knee, Dr. Orent felt that Claimant required an orthopedic consultation to consider the possibility of viscosupplementation or cortisone injections to address Claimant's chondromalacia, as well as the possibility for a need for arthroscopic surgery to smooth out the cartilage underneath the patella. Dr. Orent also recommended that Claimant obtain a pain management and urology consultations.

19. Claimant presented to Dr. Gregory Reichhardt at Rehabilitation Associates of Colorado, P.C., on November 28, 2022. Claimant reported that at the time of the accident he lost consciousness briefly, resulting in significant neck, back, and leg pain, as well as bilateral knee injuries. Claimant complained of neck pain radiating to the left arm, low back pain, and bilateral leg pain, as well as bowel and bladder urgency, and left leg weakness and pain. Dr. Reichhardt reviewed Claimant's prior imaging as well. Dr. Reichhardt noted that Claimant's treatment history included forty sessions of physical therapy and referrals to various specialists. His physical exam revealed decreased range of motion in his left knee and lumbar spine, gait abnormalities, and tenderness in affected areas. Dr. Reichhardt felt that there was no clear etiology for Claimant's leg symptoms based on imaging. Dr. Reichhardt also noted that Claimant suffered from multiple non-work-related conditions,

including depression, shortness of breath, abdominal pain, and sleep apnea. Dr. Reichhardt recommended further diagnostic testing, including electrodiagnostic evaluation and a thoracic MRI, along with psychological support and community resources for his financial and healthcare needs.

20. Claimant returned to Dr. Luke on December 16, 2022. Dr. Luke reviewed the results of a functional capacity evaluation and assigned Claimant permanent work restrictions of no lifting, pushing, pulling, or carrying over twenty-five pounds. Dr. Luke felt that Claimant had no permanent medical impairment. He did recommend maintenance medical care going forward, including pain management.

21. On December 21, 2022, Claimant saw Dr. Reichhardt. Dr. Reichhardt reviewed the IME report of Dr. Cebrian. Dr. Reichhardt performed an EMG of Claimant's lower extremities. The EMG results were normal. Claimant also underwent a thoracic spine MRI that same date, which showed multilevel thoracic disc disease with small central protrusions but no stenosis. The Court finds that these diagnostic tests had a reasonable prospect of defining Claimant's condition and suggesting further treatment insofar as they were reasonably necessary to rule out a thoracic spine pathology as the source of Claimant's back and left leg pain.

22. Respondents filed a Final Admission of Liability (FAL) on January 31, 2023, admitting for no permanent impairment or permanent disability benefits. Claimant challenged the FAL and requested a DIME.

23. Claimant was seen on March 20, 2023, at Colorado Pain Center with a primary complaint of constant and aching lumbar pain with intermittent sharpness. The attending clinician addressed Claimant's opioid use and recommended NSAID usage instead.

24. On June 1, 2023, Claimant underwent a Division independent medical examination with Dr. Brian Shea. Dr. Shea reviewed Claimant's medical history and took Claimant's subjective history. Dr. Shea noted that the records described Claimant getting knocked to the ground and possibly losing consciousness for several seconds.

25. Dr. Shea felt that Claimant had reached MMI as of December 21, 2022, reasoning that Claimant reached MMI only once the thoracic MRI and the EMG of the lower extremity were completed. He noted that this MMI date differed from Dr. Luke's determined date of MMI.

26. Dr. Shea assigned Claimant a 15% whole-person permanent impairment for the low back, 10% of which was for loss of range of motion, and 5% of which was for specific disorders under Table 53, section 2b. Dr. Shea also assigned a 21% left lower extremity impairment based on 11% for loss of range of motion of the left knee and 10% for chondromalacia pursuant to Table 40, Section 5.

27. Dr. Shea's rationale for assigning impairment ratings for the left lower extremity and the low back, but not other body parts was as follows:

> No impairment was given to the right knee, left or right hip joint area, pelvicsacroiliac or thoracic spine. The workplace injury is well documented that a heavy metal piece flying at high speed hit the claimant in the mid thighs of both legs. After being struck, he fell onto his left back. The left thigh injury can be related to the left knee chondromalacia and falling onto his left side can be linked to a low back strain that has never resolved. All other areas cannot be directly linked to this accident or have normal ranges of motion at this time.

28. On September 22, 2023, Dr. Cebrian issued a supplemental IME report. In his report, he criticized the assignment of an impairment rating for the lumbar spine. He felt that none of the providers provided any explanation for the delay between Claimant's injury and his onset of low back complaints. He felt it was unreasonable that the providers accepted Claimant's "subjective report that it was related." Dr. Cebrian also noted the unremarkable diagnostic testing of Claimant's lumbar spine.

29. Dr. Cebrian also felt that the left knee impairment rating assigned by Dr. Shea was inappropriate. Dr. Cebrian pointed out that there had been documented prior instances where Claimant exhibited normal ranges of motion. Dr. Cebrian opined that Dr. Shea should have provided some explanation as to why he chose to assign an impairment rating for abnormal ranges of motion that were inconsistent with prior documented normal ranges of motion, and that Dr. Shea could have attempted to reconcile the disparity by retesting Claimant's ranges of motion on a different day. Dr. Cebrian cited section 1.2 of the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised), which reads in pertinent part:

> *If the current findings are consistent with the results of previous clinical evaluations, they may be compared with the appropriate tables of the Guides to determine the percentage of impairment If the findings of the impairment evaluation are not consistent with those in the record, the step of determining the percentage of impairment is meaningless and should not be carried out until communication between the involved physicians or further clinical investigation resolves the disparity.*

30. Last, regarding the date of MMI, Dr. Cebrian opined that Claimant had been at MMI since May 23, 2022, reasoning that Claimant's conditions had been stable for several months by that time and "the performance of unremarkable objective testing for non-claim related conditions does not affect the date of MMI."

31. On January 9, 2024, Dr. Orent performed a repeat IME with Claimant and issued a report. Claimant continued to complain of back pain radiating down his left leg into his foot. Claimant also continued to complain of urinary problems. Dr. Orent

noted that Claimant had a marked restriction in his range of motion of his cervical spine. Dr. Orent expressed confusion as to why Dr. Shea did not give Claimant an impairment rating for the cervical spine given that Claimant never had any issues with his cervical spine prior to the injury. Ultimately, Dr. Orent opined that Claimant was not at MMI and that Claimant required treatment under the claim for his urological symptoms. Dr. Orent also felt that Dr. Shea should have given Claimant a cervical spine impairment rating at the DIME.

32. On February 29, 2024, Dr. Cebrian issued another supplemental IME report. Dr. Cebrian addressed and criticized Dr. Orent's diagnosis of Claimant with a neurogenic bladder. He also expressed that Claimant did not have a cervical spine impairment and that Claimant's "ongoing elevated subjective complaints" were not consistent with the original mechanism of injury.

33. Respondents called Dr. Cebrian to testify at hearing. Dr. Cebrian testified consistently with his reports. Regarding Claimant's lumbar complaints, Dr. Cebrian testified that the initial emergency room records did not document a fall or any lumbar complaints, which led Dr. Cebrian to feel that Claimant's lumbar complaints were not related to the work injury. Dr. Cebrian also expressed some concern about Claimant's reliance on opioid medications to manage pain and opined that Claimant's pain complaints were disproportionate to the objective findings from diagnostic imaging. Based on this, Dr. Cebrian felt that Claimant had reached MMI as of May 23, 2022, with no permanent impairment related to Claimant's thighs or left knee.

34. The Court finds Dr. Cebrian's testimony to be credible, even if not persuasive.

35. Respondents also called [Redacted, hereinafter GL] to testify. GL[Redacted] testified that he was the vice president of Respondent-Employer at the time of Claimant's injury, and that his duties included overseeing safety protocols and investigating injuries. GL[Redacted] investigated Claimant's injury and noted that the full set of tongs weighed between 1200 and 1500 pounds, though the steel piece that had broken off weighed less than eight pounds.

36. GL[Redacted] testified that he was notified via text message by Claimant regarding the injury and expressed concern that Claimant drove himself to the emergency room, which violated company policy. He testified that subsequent communications with Claimant via text message were spotty at best and that Claimant would not return GL[Redacted] voice messages. GL[Redacted] testified that he was able to eventually get Claimant on the phone by calling a coworker that was with Claimant and having him put Claimant on the phone. As GL[Redacted] requested that Claimant return some items, including a statement about the injury, tensions escalated and Claimant threatened to kill GL[Redacted]. At that point, GL[Redacted] terminated Claimant's employment over the phone and told Claimant to vacate the hotel room that Respondent-Employer had provided

him. GL[Redacted] testified that Respondent-Employer never offered Claimant any modified duty work.

37. The Court finds GL[Redacted] testimony to be credible.

38. Claimant testified at hearing as well on his own behalf. Claimant described the mechanism of injury as the piece of tong breaking off and shooting as if out of a cannon and striking him from approximately twenty-five feet away. The piece of iron first struck his right leg, where his house key in his pocket absorbed some of the impact, then struck his left leg, causing two deep lacerations in his left thigh. Claimant described the immediate aftermath as feeling numb in his legs and being unable to stand. After regaining sensation, he crawled but could not move effectively due to the intense pain. He testified that he also briefly lost consciousness.

39. Claimant testified that at the time of the accident, no one at the worksite offered him assistance to go to the hospital, so he drove himself to Hugo Hospital in his underwear, as no ambulance was called. He testified that Dr. Sullivan treated his left leg lacerations, stitching the wounds but, according to Claimant, not addressing his right leg, back, or other injuries he mentioned. Claimant also felt that his follow-up care was minimal, with no MRI or other imaging initially performed.

40. In his testimony, Claimant described attempts to get treatment for ongoing pain in his legs, neck, back, and shoulders. He testified that the initial focus was just on his left thigh, despite him complaining of pain in other locations, as the emergency room staff were focused on treating the most obvious and severe injury.

41. Claimant testified that he reported his full range of injuries when he saw Amanda Judd for the first time in November 2021. However, Claimant testified that Judd told him that he could be treated for only one body part at a time.

42. Claimant testified regarding his communications with GL[Redacted] as well. Claimant testified that his first communication with GL[Redacted] was on the date of injury when he sent GL[Redacted] a photo of his injury. Claimant preferred to keep communications via text message for documentation purposes.

43. The Court finds Claimant's testimony credible. However, to the extent that his testimony conflicts with that of GL[Redacted], the Court finds GL[Redacted] testimony more credible.

44. Claimant also called Dr. Orent to testify in his case. Dr. Orent testified consistently with his reports. Additionally, he opined that the long-term effects of Claimant's injury included leg weakness and the possibility of a herniated disc in Claimant's lumbar spine, which he felt might explain a foot drop that Claimant developed. He recommended further diagnostic testing, such as an EMG, to assess the extent of the nerve damage and clarify the cause of the weakness.

45. Regarding the initial documentation of Claimant's injuries in the emergency room, Dr. Orent testified that it appeared that the emergency room physicians tend to focus on the most apparent and serious injuries at the time of the treatment. Dr. Orent also testified that he believed the chondromalacia patella was most likely related to the work injury. He explained:

> *When he got whacked like that, it probably took the patella and impacted it into the tibia and the fibula . . . . If that cap of cartilage becomes damaged, fissured, cracked, then -- and starts to soften, we call that chondromalacia patella. . . . [I]n my opinion, this was a traumatic injury to the patella that induced this chondromalacia type of abnormalities.*

46. The Court finds Dr. Orent's testimony credible and persuasive.

47. To the extent that Dr. Cebrian opines that impairments for Claimant's low back and left knee would not be related to the October 2, 2021 injury, the Court is not persuaded. Claimant credibly testified that when he was struck by the projectile, he was knocked to the ground, landing on his left low back. And, although Dr. Cebrian correctly points out that the medical records for the first several weeks after the injury did not document a low back injury or left knee complaints specifically, Claimant has put forth a probable explanation. That is, the initial focus was just on his left thigh, despite him complaining of pain in other locations, as the emergency room staff were focused on treating the most obvious and severe injury. This was supported by Dr. Orent's testimony as well. The Court finds that Claimant likely did complain of low back and left knee problems early on, but those complaints were not documented in the medical records initially and likely masked by Claimant's more immediate problems involving his left leg puncture wounds.

48. Additionally, regarding Dr. Cebrian's critique of Dr. Shea's assignment of impairment ratings for the left knee because there had been prior instances documenting normal range of motion for the left knee, the Court is not persuaded. While Dr. Cebrian is correct that there were documented instances of clinicians noting normal range of motion or the left knee, there were also documented instances of clinicians noting limited range of motion, including Dr. Reichhardt's November 28, 2022 examination of Claimant. Furthermore, there is no credible evidence that any of the documented ranges of motion on physical examination prior to the DIME were performed with a goniometer or other accurate measuring device in accordance with the *AMA Guides*. Therefore, because there was documented examinations prior to the DIME demonstrating both full and limited ranges of motion in the left knee, the Court finds that Dr. Shea did not err in not conducting further testing to resolve the apparent discrepancy.

49. Therefore, the Court finds that Respondents failed to prove by clear and convincing evidence that Dr. Shea erred in assigning Claimant permanent impairments for the lumbar spine and the left knee.

50. The Court finds that Respondents have not overcome DIME Dr. Shea's opinion by clear and convincing evidence regarding the date of MMI. Claimant was originally placed at MMI as of October 26, 2022. However, Dr. Reichhardt reasonably recommended further imaging and electrodiagnostic testing to rule out a thoracic spine pathology as the source of Claimant's back and left leg symptoms. The results of the diagnostic tests ultimately ruled out a thoracic spine pathology as the source of Claimant's symptoms. However, the tests had a reasonable prospect of defining Claimant's condition and his recommended course of treatment. Therefore, Dr. Shea's decision to determine that Claimant did not reach MMI until December 21, 2022, when Claimant completed the diagnostic tests, was well justified.

51. Claimant was taken off of work initially by the emergency room physician and was kept off work for several weeks following his injury. At no time prior to his December 21, 2022, date of MMI was Claimant released to full duty without restrictions. Therefore, Claimant has proved by a preponderance of the evidence that he is entitled to temporary total disability benefits from his date of injury until his date of MMI, December 21, 2022. Based on the admitted average weekly wage of $690.00, Claimant's temporary total disability rate would be $460.00 per week. From Claimant's date of injury to his date of MMI is 63 and 4/7 weeks. This would correspond with temporary total disability benefits of $29,242.86.

52. Regarding Claimant's termination, the Court finds that Claimant was responsible for his own termination. Claimant's initial refusal to speak with GL[Redacted] except by text message, Claimant's verbal threats toward GL[Redacted], and Claimant's unreasonable refusal to vacate the hotel room for several days despite Respondent-Employer's request establish that Claimant was at fault for his termination. However, Claimant was temporarily and totally disabled at the time of his termination and was not receiving wages. Therefore, the Court finds that Claimant's ongoing temporary total disability following his termination was due to his work-related disability rather than his termination.

53. At hearing, Claimant presented permanent disfigurements on his left leg resulting from the injury. Claimant showed a left leg scar on his quadriceps, three inches by one-half inch with discoloration. He also showed a second disfigurement on the more lateral portion of his leg is an area where there is no muscle and the skin can be pushed down to his bone. Claimant had less muscle definition on his left leg than his right. When Claimant bends over, he bends over to the right due to weakness in his left quadriceps muscles. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. The Court finds that $1,549.00 would fairly compensate Claimant for his disfigurements given their severity and the degree to which they are visible to the public.

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).

Overcoming the DIME as to Impairment and MMI

A party seeking to challenge a DIME physician's opinions regarding MMI or permanent impairment bears the burden of overcoming the DIME decision by clear and convincing evidence. *Braun v. Vista Mesa*, W.C. No. 4-637-254 (April 15, 2010). Thus, Respondents must prove that it is "highly probable" that Dr. Shea erred with regard to his determination of Claimant's date of MMI and impairment rating. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo.App.1995). The DIME physician's opinions regarding the causal relationship between the admitted injury and the body part or condition addressed as part of the analysis of MMI or permanent impairment is also afforded special weight and may be overcome only by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo.App.2002)(A DIME physician's determinations concerning causation are binding unless overcome by clear and convincing evidence.).

In *Villela v. Excel Corp.*, W.C. No 4-400-281 (2001), a claimant was placed at MMI by his authorized treating physician, but a DIME determined that the claimant was not at MMI because, in part, the DIME physician "observed other upper extremity symptoms which, in his opinion, warranted additional diagnostic consideration so as to rule out a brachial plexus injury or sympathetic reflex dystrophy resulting from the industrial injury." *Id*. The respondents in that case challenged the MMI determination on the basis that there was no "objective evidence" to support the DIME physician's opinion that the claimant's "constellation of symptoms" was related to the industrial injury. The ALJ upheld the DIME's opinion and the respondents appealed. On appeal, the ICAO panel upheld the ALJ's finding, noting that, "even if it is ultimately determined that some or most of the claimant's current symptoms are not caused by the industrial injury, such a determination would not nullify the DIME physician's opinion that, in August 1998, the claimant had not reached MMI. This is true because the DIME physician decided that an additional referral was necessary to determine the full range of pathology resulting from the industrial injury, and to prescribe treatment if necessary." *Id*.

As found above, the Court concludes that Respondents failed to prove by clear and convincing evidence that Dr. Shea erred in assigning Claimant permanent impairments for the lumbar spine and the left knee. While Dr. Cebrian is correct that there were documented instances of clinicians noting normal range of motion or the left knee, there were also documented instances of clinicians noting limited range of motion, including Dr. Reichhardt's November 28, 2022 examination of Claimant. Furthermore, there is no credible evidence that any of the documented ranges of motion on physical examination prior to the DIME were performed with a goniometer or other accurate measuring device in accordance with the *AMA Guides*. Therefore, because there was documented examinations prior to the DIME demonstrating both full and limited ranges of motion in the left knee, Dr. Shea did not err in not conducting further testing to resolve the apparent discrepancy.

As found above, the Court concludes that Respondents have not overcome DIME Dr. Shea's opinion by clear and convincing evidence regarding the date of MMI. Claimant

was originally placed at MMI as of October 26, 2022. However, Dr. Reichhardt reasonably recommended further imaging and electrodiagnostic testing to rule out a thoracic spine pathology as the source of Claimant's back and left leg symptoms. The results of the diagnostic tests ultimately ruled out a thoracic spine pathology as the source of Claimant's symptoms. However, the tests had a reasonable prospect of defining Claimant's condition and his recommended course of treatment. Therefore, Dr. Shea's decision to determine that Claimant did not reach MMI until December 21, 2022, when Claimant completed the diagnostic tests, was well justified.

TTD Benefits and Responsible for Termination

Temporary total disability benefits are designed to compensate an injured worker for wage loss while employee is recovering from work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson,* 938 P.2d 504 (Colo. 1997). Claimant bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and last more than three working days. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo.App.1997).

As found above, Claimant was taken off work by the emergency room physician and remained off work thereafter. At no time prior to his December 21, 2022, date of MMI was Claimant released to full duty without restrictions. Therefore, Claimant has proved by a preponderance of the evidence that he is entitled to temporary total disability benefits from his date of injury until his date of MMI, December 21, 2022. Based on the admitted average weekly wage of $690.00, Claimant's temporary total disability rate would be $460.00 per week. From Claimant's date of injury to his date of MMI is 63 and 4/7 weeks. This would correspond with temporary total disability benefits of $29,242.86.

Respondents assert the responsible-for-termination defense to TTD. "[I]n cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S. That is, where a claimant is responsible for termination, that portion of the wage loss attributable to the termination may not be the basis for temporary disability benefits, whereas any wage loss which the claimant would have sustained as a result of the injury regardless of the termination would be the basis for ongoing temporary disability benefits. *Lucero v. City of Durango*, W.C. No. 5-195-588 (Mar. 21, 2024).

As found above, Claimant was responsible for his termination. However, because he was temporarily and totally disabled at the time of his termination, the Court finds and concludes that there does not exist a causal relationship between Claimant's termination and his lost wages. Therefore, there is no wage loss resulting from Claimant's termination, and Respondents have not proved by a preponderance of the evidence that the temporary total disability benefits should be terminated or reduced as of the date of Claimant's termination.

Disfigurement

A claimant who suffers a permanent disfigurement is entitled to a monetary award under the statute. Section 8-42-108, C.R.S. A disfigurement, for workers' compensation purposes, is an observable impairment of natural appearance of person. *Arkin v. Industrial Com'n of Colo.*, 358 P.2d 879 (Colo. 1961).

As found, Claimant showed a left leg scar on his quadriceps, three inches by one-half inch with discoloration. He also showed a second disfigurement on the more lateral portion of his leg is an area where there is no muscle and the skin can be pushed down to his bone. Claimant had less muscle definition on his left leg than his right. When Claimant bends over, he bends over to the right due to weakness in his left quadriceps muscles. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. The Court finds and concludes that $1,549.00 would fairly compensate Claimant for his disfigurements given their severity and the degree to which they are visible to the public.

ORDER

It is therefore ordered that:

1. Respondents have not proved by clear and convincing evidence that DIME physician Dr. Shea erred in his determinations regarding impairment or MMI.
2. Claimant is entitled to TTD benefits from the date of injury to the date of MMI in the amount of $29,242.86.
3. Claimant is entitled to disfigurement benefits in the amount of $1,549.00.
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 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 23, 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 5-227-784-001

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that left hip surgery in the form of an arthroscopy, labral repair, and femoral neck osteochondroplasty as recommended by Joshua T. Snyder, M.D. Is reasonable, necessary and causally related to her July 23, 2022 admitted industrial injury.

FINDINGS OF FACT

1. Claimant works as a Director at Employer's private facility for the developmentally disabled. On Saturday, July 23, 2022 she was directly involved with client care because of short-staffing.

2. Claimant remarked that a wheelchair-bound resident of the facility slid to the floor. Claimant contacted another staff member for assistance. They used a gait belt to lift the client off the floor and transfer him back to a wheelchair.

3. Claimant testified that when she arrived home she experienced increasing lower back pain that radiated down her right leg. She also felt right buttock discomfort.

4. On July 25, 2022 Claimant reported a work-related lower back injury to Employer. Insurer subsequently filed a General Admission of Liability (GAL) for Claimant's injury.

5. Claimant's initial treatment occurred on July 25, 2022 in the emergency department at Sterling Regional Medical Center. She reported the sudden onset of sharp, right-sided lower back pain after trying to pick a resident up off the floor two days earlier. X-rays of the lower back were negative. Providers assessed Claimant with a lumbar strain including radiculopathy. Claimant was placed on light duty for five days and directed to follow-up with a Workers' Compensation provider.

6. Claimant's July 23, 2022 injury is similar to a prior injury she suffered in 2019. On April 20, 2019 Claimant visited the emergency department at Sterling Regional Medical Center and reported hurting her back one week earlier. She complained of pain radiating to her right hip that made it hard to walk. Providers assessed Claimant with acute back pain and sciatica. The record does not include a mechanism of injury, and Claimant testified that she did not recall what caused her symptoms.

7. On August 4, 2022 Claimant visited Authorized Treating Provider (ATP) Banner Health. She described her mechanism of injury and detailed that her "hip feels very loose, especially when I'm walking 20-30 minutes or at the end of the day, and last night I rolled over and my foot went numb." The worst location of pain was in Claimant's right buttocks. Providers diagnosed Claimant with a lower back injury.

8. On August 25, 2022 Claimant returned to Banner Health. Claimant reported a pain level of 0/10, but she still had days where everything felt “loose” with a Charlie-horse type ache in her right leg. She described weakness, numbness, and tingling. Providers continued to diagnose Claimant with “injury of low back” and referred her to physical therapy.

9. On October 7, 2022 Claimant returned to Banner Health and noted she was doing “pretty well.” Physical therapy was helping. Her radiating pain down her leg had largely resolved. However, Claimant noted that on the prior Wednesday night at home she twisted her hip. It made a loud pop and felt like it dislocated. Claimant’s occupational diagnosis continued to be “injury of low back.”

10. On November 4, 2022 at Banner Health Claimant’s main complaints were occasional numbness in her heel and pinching above her right buttocks. An October 18, 2022 MRI had revealed disc protrusions at L4-5 and L5-S1 without significant stenosis or neural impingement.

11. On December 20, 2022 Claimant underwent a neurosurgery evaluation. Claimant reported right lower back symptoms that radiated down her posterior thigh to her knee. She also noted numbness and weakness in her right buttock, hip, groin, and hip flexors. Nurse Practitioner Audrey Kramer assessed lower back pain, lumbar radiculopathy, and right leg weakness. She referred Claimant for an EMG.

12. On January 13, 2023 Claimant underwent an EMG. She returned to the neurosurgery office on February 6, 2023 and was diagnosed with chronic sacroiliac pain including lumbosacral radiculopathy.

13. By June 9, 2023 Claimant reported she was “doing really well.” She was allowed to slowly progress to regular lifting and work hours. Providers anticipated Maximum Medical Improvement (MMI) in one month.

14. On September 14, 2023 Claimant sustained another alleged work-related injury. Claimant specified she was sitting on a bench that collapsed in her office. Claimant fell on her right buttock and back, and experienced pain when she stood up. The pain was located in her lower back and both hips, but greater on the right than the left.

15. Claimant began receiving treatment for her new injury at Banner Health on September 19, 2023. She was diagnosed with left hip pain.

16. On October 10, 2023 Claimant was referred to Gregory Reichhardt, M.D. for a consultation. Claimant described her current symptoms as aching pain in the lower back and right gluteal area. Dr. Reichhardt assessed lower back pain and depression. He determined Claimant’s symptoms were consistent with an L4 radiculopathy.

17. On October 19, 2023 Claimant visited Banner Health for bilateral hip pain, buttock pain, and lower back pain. Claimant remarked that seven days earlier she had a “massive” back spasm and went to the emergency room. She complained of continued lower back pain and right hip pain. Providers ordered a right hip MRI.

18. Claimant underwent her second lumbar MRI on November 6, 2023. The radiologist’s impression was mild degenerative spondylosis at L4-5 and L5-S1, with mild neural foraminal narrowing on the right at L4-5. The findings were mildly worse than in the prior study.

19. On November 22, 2023 Claimant underwent a right hip MRI without contrast. The imaging revealed focal fraying or partial tearing of the anterosuperior aspect of the right acetabular labrum. There was no full-thickness labral tear or detachment.

20. On January 22, 2024 Claimant visited orthopedic surgeon Joshua T. Snyder, M.D. for an examination of her right hip. Dr. Snyder recounted that Claimant presented with right hip pain including a labral tear and impingement. He noted that Claimant has been experiencing chronic hip pain since her July 23, 2022 work incident. Dr. Snyder remarked that Claimant has suffered decreased function and increased pain while performing activities of daily living because of her right hip pain. He summarized that Claimant has been experiencing right hip pain with evidence of femoroacetabular impingement and labral tearing affecting daily activities. Because Claimant had failed conservative treatment, Dr. Snyder recommended surgery in the form of a right hip arthroscopy, labral repair and femoral neck osteochondroplasty.

21. On January 25, 2024 Claimant returned to Dr. Reichhardt for a follow-up examination. Dr. Snyder had noted Claimant suffered a 50% tear of the labrum and recommended arthroscopic surgery. Dr. Reichhardt concluded that the activity of lifting a client off the floor at work on July 23, 2022 was consistent with a work-related mechanism of injury.

22. On February 2, 2024 orthopedic surgeon William Ciccone II, M.D. performed a records review of Claimant claim. After reviewing Claimant’s medical records, Dr. Ciccone explained that the November 22, 2023 MRI did not reveal an acute hip injury. Notably, orthopedic studies have shown that 69% of patients have labral tears in their hips. Dr. Ciccone commented that the tears occur unrelated to any trauma. He thus explained that Claimant had not reported a work-related event that would be associated with a hip joint injury. Therefore, it is unlikely that the proposed hip surgery was causally related to a work accident.

23. On March 4, 2024 Dr. Ciccone issued a supplemental report addressing whether the request for a right hip labral repair was medically reasonable and necessary as a result of her September 14, 2022 industrial injury. He acknowledged that Claimant suffered an initial injury at work on July 23, 2022 while trying to pick up a resident off the floor. She complained of lower back pain with symptoms running down the right leg.

However, he did not believe Claimant suffered a right hip injury. Dr. Ciccone commented that Claimant did not report right hip pain until Dr. Snyder's orthopedic note from January 22, 2024. Specifically, Claimant did not mention hip pain during medical evaluations following the work events on July 23, 2022 and September 14, 2023. Furthermore, the pathology on the hip MRI from November 22, 2023 was degenerative and unrelated to any work injury. Dr. Ciccone thus maintained that the indications for a right hip arthroscopy were not likely causally related to a work injury and the request for surgery under Workers' Compensation should be denied.

24. On March 14, 2024 Claimant had a telehealth visit with Dr. Reichhardt. Claimant reported buttock, hip, and groin pain since the July 23, 2022 accident. Dr. Reichhardt concluded that Claimant's labral tear was likely related or at least aggravated by her work activities.

25. On June 11, 2024 Dr. Reichhardt considered whether Claimant's right hip MRI findings were degenerative. He commented that, because the MRI was performed about one and one-half years after her July 23, 2022 injury, some degenerative component could have developed during the intervening period. Moreover, even if Claimant had underlying degenerative changes in her right hip, they were likely aggravated by her work injury. Dr. Reichhardt summarized that Claimant's work injury changed her condition from asymptomatic to symptomatic and required treatment.

26. On June 26, 2024 Claimant underwent an Independent Medical Examination (IME) with Mark S. Failinger, M.D. Dr. Failinger reviewed Claimant's medical records and conducted a physical examination. He concluded that Claimant's right hip complaints are not causally related to the admitted work-related incident of July 23, 2022. Dr. Failinger recounted that Claimant and a coworker assisted a client into a chair after he slid to the ground. Importantly, there were no suggestions in the medical records, including Claimant's emergency room visit on July 25, 2022, that she sustained any type of a twist or torque of her weight-bearing hip. A twist of the hip would constitute the most reasonable mechanism to cause an acute labral tear. Furthermore, most cases of labral tears are due to degeneration. Dr. Failinger thus summarized that, although Claimant may have suffered a mild strain to the right hip, the reported mechanism of injury could not have reasonably caused a labral tear or any other pathology of the hip.

27. Dr. Failinger also considered whether the recommended right hip arthroscopy, labral repair and femoral neck osteochondroplasty constituted reasonable, necessary and causally related medical treatment. He remarked that Claimant likely had pre-existing labral hip degenerative tearing due to impingement. Dr. Failinger explained that a right hip arthroscopy might be reasonable under the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*), but the procedure is not causally related to the July 23, 2022 work incident. Moreover, surgery would not be reasonable unless an intraarticular injection immediately relieved most of Claimant's right hip pain. Dr. Failinger finally commented that, even if Claimant obtained greater than 70% pain relief from the injection, a hip arthroscopy still would not be causally related to the July 23, 2022 work incident based on the mechanism

of injury.

28. On August 6, 2024 Dr. Failinger prepared an addendum to his initial IME. After reviewing additional medical records, Dr. Failinger maintained that there was no mechanism of injury on July 23, 2022 that would likely have caused a labral tear. He also reasoned that it is not medically probable that Claimant suffered right hip pathology as a result of the bench incident on September 14, 2023.

29. On August 10, 2024 Dr. Failinger prepared a second addendum. Based on additional records, Dr. Failinger concluded it is not medically probable that the right hip sustained any pathology in the bench-breaking incident of September 14, 2023. He attributed Claimant's right hip symptoms to ongoing degeneration, rather than any acute injury to the labrum that occurred in the July 23, 2022 or September 14, 2023 incidents. Therefore, Dr. Failinger agreed with Dr. Ciccone's record review that Claimant's symptoms were not causally related to her work activities.

30. Dr. Failinger also testified at the hearing in the present matter. He maintained that Claimant's right hip symptoms and the proposed surgery are not causally related to her work activities. Dr. Failinger explained that Claimant's mechanism of injury could not have caused an anterior labral tear. For over 18 months, no clinician had documented a fall or a twisting injury. Dr. Failinger testified that it is not possible to tear the anterior labrum by bending over and lifting. There are only two ways to tear the anterior labrum. One of the ways is to dislocate the hip out the front, and the other occurs when the labrum is worn down over time by friction from the hip bone. He remarked that hip impingement is either genetic or developmental, but not a traumatic condition. Dr. Failinger agreed with Dr. Snyder's assessment that Claimant has femoroacetabular impingement in her right hip. However, Claimant's mechanism of injury could not have aggravated or accelerated her right hip impingement. Dr. Failinger summarized that, if Claimant has an anterior labral tear due to hip impingement, it constitutes a degenerative, pre-existing condition that has likely progressed naturally over time.

31. Claimant has failed to demonstrate it is more probably true than not that left hip surgery in the form of an arthroscopy, labral repair, and femoral neck osteochondroplasty as recommended by Dr. Snyder is reasonable, necessary and causally related to her July 23, 2022 admitted industrial injury. Initially, on July 23, 2022 Claimant and a coworker assisted a client into a wheelchair after he slid to the ground. Claimant developed increasing lower back pain that radiated down her right leg. Providers subsequently diagnosed Claimant with a lower back injury. An October 18, 2022 MRI revealed disc protrusions at L4-5 and L5-S1 without significant stenosis or neural impingement. Claimant's condition improved with conservative treatment. However, on September 14, 2023 Claimant sustained another alleged work-related injury while sitting on a bench that collapsed in her office. A November 19, 2023 right hip MRI revealed focal fraying or partial tearing of the anterosuperior aspect of the right acetabular labrum. There was no full-thickness labral tear or detachment.

32. On January 22, 2024 orthopedic surgeon Dr, Snyder recounted that

Claimant presented with right hip pain including a labral tear and impingement. He noted that Claimant has been experiencing chronic hip pain since her July 23, 2022 work incident. Dr. Snyder detailed that Claimant has been suffering right hip symptoms with evidence of femoroacetabular impingement and labral tearing affecting daily activities. He reasoned that Claimant has failed conservative treatment. Dr. Snyder thus recommended surgery in the form of a right hip arthroscopy, labral repair and femoral neck osteochondroplasty. Dr. Reichhardt subsequently agreed that Claimant's labral tear was likely causally related, or at least aggravated, by her work activities.

33. Despite Dr. Snyder's surgical recommendation, Claimant's presentation over the ensuing 18 months evidenced the aggravation of her chronic lower back condition and not an anterior labral tear. After reviewing Claimant's medical records, Dr. Ciccone explained that Claimant did not report right hip pain until Dr. Snyder's orthopedic note from January 22, 2024. Specifically, Claimant did not mention hip pain during medical evaluations following the work events on July 23, 2022 and September 14, 2023. Furthermore, the pathology on the right hip MRI from November 22, 2023 was degenerative and unrelated to any acute work injury. Dr. Ciccone thus maintained that the indications for a right hip arthroscopy are not likely causally related to a work injury and the request for surgery under Workers' Compensation should be denied. Dr. Failinger also persuasively maintained that Claimant's right hip complaints are not causally related to the admitted work-related incident of July 23, 2022. Importantly, there were no suggestions in the medical records, including Claimant's emergency room visit on July 25, 2022, that she sustained any type of a twist or a torque of her weight-bearing hip. A twist of the hip would constitute the most reasonable mechanism to cause an acute labral tear. Furthermore, most cases of labral tears are due to degeneration. Dr. Failinger thus summarized that, although Claimant may have suffered a mild strain to the right hip, the reported mechanism of injury could not have reasonably caused a labral tear or any other pathology of the hip. He testified it is not possible to tear the anterior labrum by bending over and lifting. Importantly, Claimant's mechanism of injury could not have aggravated or accelerated her right hip condition.

34. Dr. Failinger summarized that, if Claimant has an anterior labral tear due to hip impingement, it constitutes a degenerative, pre-existing condition that has likely progressed naturally over time. The persuasive medical records reveal that the work incidents did not cause a labral tear. Based on the medical records and persuasive opinion of Dr. Failinger, Claimant's work activities on July 23, 2022 did not cause, aggravate or accelerate her need for right hip surgery in the form of an arthroscopy, labral repair, and femoral neck osteochondroplasty The proposed surgery was designed to address the natural progression of Claimant's pre-existing right hip degenerative condition. Accordingly, Claimant's request for right hip surgery as proposed by Dr. Snyder is denied and dismissed.

CONCLUSIONS OF LAW

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

C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. 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). However, the occurrence of the symptoms may be the result of the natural progression of a pre-existing condition that is unrelated to the employment or attributable to some intervening cause. *See Owens v. Indus. Claim Appeals Off.,* 49 P.3d 1187 (Colo. App. 2002); *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995). 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).

5. 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).

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that left hip surgery in the form of an arthroscopy, labral repair, and femoral neck osteochondroplasty as recommended by Dr. Snyder is reasonable, necessary and causally related to her July 23, 2022 admitted industrial injury. Initially, on July 23, 2022 Claimant and a coworker assisted a client into a wheelchair after he slid to the ground. Claimant developed increasing lower back pain that radiated down her right leg. Providers subsequently diagnosed Claimant with a lower back injury. An October 18, 2022 MRI revealed disc protrusions at L4-5 and L5-S1 without significant stenosis or neural impingement. Claimant's condition improved with conservative treatment. However, on September 14, 2023 Claimant sustained another alleged work-related injury while sitting on a bench that collapsed in her office. A November 19, 2023 right hip MRI revealed focal fraying or partial tearing of the anterosuperior aspect of the right acetabular labrum. There was no full-thickness labral tear or detachment.

7. As found, on January 22, 2024 orthopedic surgeon Dr, Snyder recounted that Claimant presented with right hip pain including a labral tear and impingement. He noted that Claimant has been experiencing chronic hip pain since her July 23, 2022 work incident. Dr. Snyder detailed that Claimant has been suffering right hip symptoms with evidence of femoroacetabular impingement and labral tearing affecting daily activities. He reasoned that Claimant has failed conservative treatment. Dr. Snyder thus recommended surgery in the form of a right hip arthroscopy, labral repair and femoral neck osteochondroplasty. Dr. Reichhardt subsequently agreed that Claimant's labral tear was likely causally related, or at least aggravated, by her work activities.

8. As found, despite Dr. Snyder's surgical recommendation, Claimant's presentation over the ensuing 18 months evidenced the aggravation of her chronic lower back condition and not an anterior labral tear. After reviewing Claimant's medical records, Dr. Ciccone explained that Claimant did not report right hip pain until Dr. Snyder's orthopedic note from January 22, 2024. Specifically, Claimant did not mention hip pain during medical evaluations following the work events on July 23, 2022 and September 14, 2023. Furthermore, the pathology on the right hip MRI from November 22, 2023 was degenerative and unrelated to any acute work injury. Dr. Ciccone thus maintained that the indications for a right hip arthroscopy are not likely causally related to a work injury and the request for surgery under Workers' Compensation should be denied. Dr. Failinger also persuasively maintained that Claimant's right hip complaints are not causally related to the admitted work-related incident of July 23, 2022. Importantly, there were no suggestions in the medical records, including Claimant's emergency room visit on July 25, 2022, that she sustained any type of a twist or a torque of her weight-bearing hip. A twist of the hip would constitute the most reasonable mechanism to cause an acute labral tear. Furthermore, most cases of labral tears are due to degeneration. Dr. Failinger thus summarized that, although Claimant may have suffered a mild strain to the right hip, the reported mechanism of injury could not have reasonably caused a labral tear or any other pathology of the hip. He testified it is not possible to tear the anterior labrum by bending over and lifting. Importantly, Claimant's

mechanism of injury could not have aggravated or accelerated her right hip condition.

9. As found, Dr. Failinger summarized that, if Claimant has an anterior labral tear due to hip impingement, it constitutes a degenerative, pre-existing condition that has likely progressed naturally over time. The persuasive medical records reveal that the work incidents did not cause a labral tear. Based on the medical records and persuasive opinion of Dr. Failinger, Claimant's work activities on July 23, 2022 did not cause, aggravate or accelerate her need for right hip surgery in the form of an arthroscopy, labral repair, and femoral neck osteochondroplasty The proposed surgery was designed to address the natural progression of Claimant's pre-existing right hip degenerative condition. Accordingly, Claimant's request for right hip surgery as proposed by Dr. Snyder is denied and dismissed.

ORDER

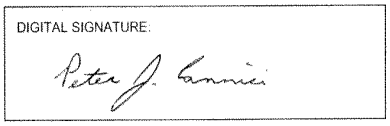
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for right hip surgery as proposed by Dr. Snyder is denied and dismissed.

2. 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: September 26, 2024.



Peter J. Cannici
Administrative Law Judge

Office of Administrative Courts
1525 Sherman Street, 4th Floor

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-248-266-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability benefits for the period of July 24, 2023 through November 2, 2023.

2. Whether Claimant established by a preponderance of the evidence an entitlement to temporary partial disability benefits beginning November 3, 2023, and continuing until terminated by statute.

STIPULATIONS

1. The parties stipulated that Claimant's average weekly wage at the time of injury was $593.47.

FINDINGS OF FACT

1. Claimant, a 24-year-old Spanish-speaking woman, began working as a line cook for Employer in October 2022. On July 2, 2023, she sustained an admitted injury to her right hip, lower back, and cervical spine arising out of the course of her employment. Claimant testified that she informed her immediate supervisor, [Redacted, hereinafter DS], of her injury, but that nothing was done. She continued to work for several weeks after the incident, until she decided to seek treatment.

2. Claimant initially sought treatment outside the workers' compensation system at 100% Chiropractic on July 17, 2023. The only documentary evidence from this visit is a "Health History" form, indicating hip pain after a fall at work on June 26, 2023, and a prior x-ray two years before. At the hearing, Claimant testified the form was completed by a clinic staff member (who spoke limited Spanish), was not in Claimant's handwriting, and that the reported injury date and prior x-rays were incorrect. (Ex. C).

3. At some point after July 17, 2023, Claimant apparently reported her injury to her employer and was referred to Concentra. Employer's general manager, [Redacted, hereinafter KT], testified he was not informed of Claimant's alleged injuries until several weeks after the incident. The evidence was insufficient to determine the exact date Claimant reported the incident to Employer.

4. On July 24, 2023, Claimant began treatment at Concentra with Dr. Wendy Carle, within the workers' compensation system. Claimant reported twisting her low back and falling onto her right arm and hip while attempting to stop a kitchen cart from tipping. She experienced pain in her right lower back, hip, and posterior neck. Dr. Carle noted Claimant's right iliac crest was misaligned, with tenderness in the gluteus, greater trochanter, iliotibial band, and lumbar paraspinal muscles. Claimant walked with an antalgic gait, had full range of motion but reported pain and a "pop" in her right SI joint.

Cervical and trapezius tenderness were also noted. Dr. Carle diagnosed right hip, lumbar, and cervical strains, and indicated Claimant may also have a right SI dysfunction with some pelvic tilt. She attributed Claimant's condition to her work injury. She prescribed cyclobenzaprine, and recommended physical therapy. Dr. Carle opined that Claimant's injuries were work-related, and assigned work restrictions, including limiting Claimant's lifting to ten pounds, and avoiding twisting and bending of the spine. (Ex. 1). Claimant returned to Dr. Carle the following day (July 25, 2023), and Dr. Carle increased her work restrictions, limiting Claimant to sitting 50% of the time. (Ex. 1). Mr. Kuchyt testified that employer could not accommodate the work restrictions Claimant received from Dr. Carle.

5. Claimant continued to see Dr. Carle over the following six months, until at least November 15, 2023. During that time, Dr. Carle referred Claimant for an MRI, physical therapy, chiropractic treatment and evaluations with physical medicine and rehabilitation physicians, including Nicholas Olsen, D.O., and John Sacha, M.D. Records from these providers were not offered or admitted into evidence, although they are referenced and summarized in the reports of Dr. Carle and Respondents' expert witness, Timothy O'Brien, M.D.

6. On September 21, 2023, Claimant underwent a right hip MRI, which showed a normal hip joint, no fractures, minimal edema at the gluteus maximus musculotendinous junction at the greater trochanter attachment, right side slightly greater than left. (Ex. 1, p. 76).

7. Dr. Carle's treatment notes reflect essentially identical examination results for Claimant's right shoulder, right hip, cervical spine, and lumbar spine. Claimant's right shoulder and cervical symptoms resolved by Claimant's September 8, 2024 visit, and her lumbar symptoms resolved by September 29, 2024. Claimant continued to report right hip symptoms throughout. (Ex. 1).

8. Claimant saw Dr. Olsen on November 1, 2023, reporting pain over the greater trochanteric area, and was diagnosed with right hip greater trochanteric bursitis. Dr. Olsen performed a steroid injection at the right trochanteric bursa hip, which provided temporary relief. (Ex. 1, p. 76, and Ex. A).

9. Dr. Carle continued to assign Claimant work restrictions through November 15, 2023, which included lifting restrictions of 20 pounds, pushing/pulling restrictions of 50 pounds, and limiting Claimant's walking/standing to 50% of the time (increasing to 75% of the time in September 2023). No credible evidence was admitted indicating a change in Claimant's work restrictions after November 15, 2023, or indicating that Claimant has been placed at maximum medical improvement (MMI). (Ex. 1).

10. Although she remained under restrictions, Claimant returned to work, informing Dr. Carle on November 3, 2023 that she had been working modified duty. Claimant's payroll records reflect that she worked 11.99 hours the week ending November 5, 2023. (Ex. B, p. 16). Claimant testified that since returning to work, she worked evening shifts, beginning at either 4:00 p.m. or 5:30 p.m. (Claimant's appointment with Dr. Carle was at 3:30 p.m., demonstrating that she returned to work before November 3, 2023). Claimant's

payroll records do not indicate the exact date Claimant returned to work in November 2023. (Exs. 2 & B). Based on the totality of the evidence, including Claimant's report to Dr. Carle that she had been working modified duty, Claimant's testimony that she returned to work in November 2023, and Claimant's payroll records, the ALJ finds that more likely than not Claimant returned to work on November 1, 2023.

11. On November 15, 2023, Dr. Carle modified Claimant's work restrictions to lifting, pushing and pulling 20 pounds (progressing to 30 pounds), and relaxing her sitting standing requirements to being allowed to sit for ten minutes per hour. Claimant reported a return of lumbar symptoms and a new onset of thoracic symptoms after returning to work on in November 2024. No credible evidence was admitted indicating that the Claimant's thoracic symptoms were causally related to her June 2, 2023 work injury, or that the return of symptoms prevented Claimant from continuing working.

12. In March 2024, Claimant saw physiatrist John Sacha, M.D. Like Dr. Olsen, Dr. Sacha diagnosed Claimant with greater trochanteric bursitis, and he recommended a platelet rich plasma (PRP) injection. (Ex. A). No medical records were admitted indicating whether the PRP injection has been performed.

13. Between November 1, 2023 and February 11, 2024, Claimant worked an average of 11.5 hours per week, and earned an average of $217.90 per week. Prior to her injuries, Claimant worked an average of 33.8 hours per week and earned a stipulated average weekly wage of $593.47 per week. (Exs. 2 & B).

14. KT[Redacted] testified that Employer received notice of Claimant alleged injury a few weeks after it occurred. He testified that Employer could not accommodate Claimant's initial work restrictions from Dr. Carle, and that as a result, Claimant was completely off work from July until November 2023. After Claimant returned to work in November 2023, KT[Redacted] testified she was scheduled based on business volume, and the restaurant's staffing needs. He testified that Claimant's work restrictions did not prevent her from working more hours from the Employer's perspective. No credible evidence was admitted that Claimant was scheduled less hours as the result of her work injury.

15. Claimant testified since returning to work, she has primarily worked preparing bread and appetizers , which requires less bending and twisting than a line cook position and that she is able to perform those tasks, albeit not at one-hundred percent. The credible evidence does not establish that Claimant is unable to perform the duties of a line cook, or that she is limited to working less hours or less days due to her injuries.

16. On June 29, 2024, Claimant underwent an independent medical examination (IME) with Dr. Timothy O'Brien, at Respondents' request. Dr. O'Brien, who was admitted as an expert in orthopedic surgery, concluded that Claimant had fully recovered from what he described as "very minor, self-limited, self-healing injuries" to the cervical spine, lower back, and right hip. He opined that Claimant's reported pain was non-organic and attributed it to "secondary gain issues inherent to her workers' compensation claim."{ Dr. O'Brien further stated that additional treatment would only serve to "inappropriately validate" her complaints. He indicated that Claimant reached maximum medical

improvement (MMI) on September 21, 2023, the date of her right hip MRI, and required no further medical attention or activity restrictions. He also stated that the MRI showed normal findings for her age and no signs of injury.

17. Dr. O'Brien referenced that Claimant had been discharged by Drs. Sacha and Olsen, with both concluding her pain was "untreatable" and that no follow-up was needed except on an elective basis. However, the record lacks credible evidence that Dr. Sacha discharged Claimant. In fact, Dr. O'Brien summarized Dr. Sacha's most-recent record (i.e. March 2024) as including a recommendation for a PRP injection and a four-week follow-up. Due to the absence of records from Dr. Olsen, the ALJ cannot verify Dr. O'Brien's statement regarding Dr. Olsen's purported discharge of Claimant.

18. Dr. O'Brien, despite not reviewing Claimant's MRI films, opined that the MRI showed no signs of injury and disagreed with several findings by the reading radiologist. For example, he disputed the finding of "mild edema at the greater trochanter attachment at the gluteus maximus," testifying that, based on his surgical experience, radiologists' descriptions of edema are incorrect. He also disagreed with the finding of "joint effusion," claiming it was normal physiological fluid produced for lubrication, merely observed by the radiologist. Because Dr. O'Brien did not review the MRI films, the ALJ finds his testimony regarding the MRI's findings and his interpretation of the radiologist's conclusions to lack credibility. Dr. O'Brien also disagreed with Dr. Carle's findings and work restrictions but provided no credible rationale for these opinions.

19. In part, Dr. O'Brien's opinions regarding Claimant's alleged injuries are based on his personal assessment of Claimant's credibility and reliability, his assessment that Claimant's complaints are driven by "secondary gain issues" related to her workers' compensation case, and his fundamental disagreements with Claimant's treating providers. The ALJ does not find Dr. O'Brien's opinions persuasive or credible.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *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).

TEMPORARY DISABILITY BENEFITS

To prove entitlement to temporary total disability (TTD), a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she 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 temporary disability 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 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.

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

Claimant seeks both TTD benefits for the period of July, 24 2023 until November 3, 2023, and TPD benefits beginning from November 3, 2023 until terminated by law. Claimant has established an entitlement to TTD benefits from July 24, 2023 until October 31, 2023, but has failed to establish an entitlement to TPD benefits after October 31, 2023.

With respect to TTD, on July 24, 2023, Claimant was assigned work restrictions which prevented her from performing her full job duties, and which Employer could not accommodate. Although these restrictions remained in place in various forms through November 18, 2023, Claimant returned to work on November 1, 2023. O'Brien's opinions that Claimant fully recovered by September 21, 2023, and required no work restrictions are not persuasive, and primarily reflect his skepticism as to Claimant's injuries and claims, and his belief that Claimant's injuries are "self-healing." The ALJ finds more persuasive the opinions of Dr. Carle, who examined Claimant multiple times, opined that her condition was work-related, and recommended work restrictions. No credible evidence was admitted indicating that Claimant has been placed at MMI, which would terminate TTD benefits.

With respect to TPD benefits, Claimant has failed to establish that her decreased workload and decreased earnings are causally related to her June 2023 work injury. Claimant's post-November 3, 2023 work restrictions do not limit her to a certain number of hours, and do not prevent her from performing the tasks associated with her employment. Claimant offered no cogent explanation for her decrease in hours, or how that decrease is causally-related to her work injury. As such, Claimant has failed to meet her burden of proof to establish that her loss of earnings is causally-related to her work injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant temporary total disability benefits for the period of July 23, 2023 through October 31, 2023.

2. Claimant's request for temporary partial disability benefits after October 31, 2023 is denied and dismissed.

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

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

DATED: September 26, 2024

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