OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-210-260-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the surgical procedure requested by Dr. Rumley, including a three-level fusion, is reasonable and necessary?

FINDINGS OF FACT

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

1. Claimant was employed by Employer, when he was injured in the course and scope of his employment on June 29, 2022. *Hrg. Trans. pg. 11 lns. 16-22*.
2. While lifting objects from low shelves, Claimant felt immediate pain in his lower back. Over time, Claimant began experiencing numbness and shooting pains in his lower extremities, as well as bouts of incontinence. Claimant also began experiencing weakness in his left leg, drop foot, and needing assistive devices to walk. *Hrg. Trans. pg. 12 lns. 1-25, pg. 13 lns. 1-5*.
3. At the time of hearing, Claimant's body mass index (BMI) was 39 and he had been continuing to lose weight since his injury. *See Hrg. Trans. pg. 13 lns. 6-17*.
4. Having failed all prior conservative treatment measures, Dr. Jacob Rumley, Claimant's authorized treating orthopedic specialist, has recommended a transforaminal lumbar interbody fusion (TLIF) procedure for L2-L5. *See Ex. 5, Bates 34.*
5. Claimant has discussed the pros/cons, and risks/potential benefits of the proposed TLIF procedure. Having engaged in thorough shared decision making with Dr. Rumley, Claimant has accepted the surgical risks and wishes to proceed with Dr. Rumley TLIF surgical recommendation. *See Hrg. Trans. pg. 14 lns. 1-10*.
6. Dr. Rumley is a fellow in the American Academy of Orthopedic Surgeons, is a member of the North American Spine Society and AO Spine, and he is board-certified in orthopedic surgery. His training includes a spine fellowship at Augusta University which was a level 1 trauma and deformity center. Moreover, he currently trains fellows in spine surgery and therefore maintains an academic role. Dr. Rumley is also level II accredited. *See Rumley Depo. pgs. 7-8.*
7. Dr. Rumley explained that a patient's signs are objective findings that support a patient's reported subjective symptoms. *See Rumley Depo. pg. 9 lns. 14-20*.
8. Claimant suffers from claudication-type symptoms. "Claudication is progressive symptoms with inactivity either being ambulation or upright posture." Typical examples include increased leg pain, leg symptoms, and urinary incontinence. *Rumley Depo. pg. 10 lns. 10-21*.

9. Claimant underwent a lumbar MRI on July 14, 2022. The findings show that Claimant had significant stenosis of his foramen, lateral recess, and central canal. There was also significant lumbar disc degeneration. *Rumley Depo. pg. 11 lns. 1-10; Rspndt. Ex. H, Bates 51.*

10. Claimant also underwent an EMG nerve conduction study and it revealed that Claimant was experiencing radiculopathy as a result of nerve compression at multiple levels of his lower back.

11. The TLIF procedure recommended by Dr. Rumley includes decompression of Claimant's nerves by way of a laminectomy. A laminectomy is the removal of bone from the lumbar spine, which results in the foramen being opened and relieving the nerve compression. *See Rumley Depo. pg. 12 lns. 14-17*.

12. Claimant also has sagittal malalignment. This means that Claimant's spine is outside of normal alignment ranges when compared to the position of his pelvis. The positional difference is significant as a person of Claimant's young age (54), should be at or near 0 but Claimant is at a difference of 13. *See Rumley Depo. pgs. 14-16*.

13. The purpose of the recommended TLIF procedure is to decompress the nerves in Claimant's lumbar spine to allow the nerves to function properly—thereby resolving Claimant's claudication symptoms. *Rumley Depo. pg. 17 lns. 4-8, pg. 33 lns. 17-19, pg. 34 lns. 14-16*.

14. As a result of bone removal from laminectomies, instability of the lumbar spine is anticipated. The expected instability is one reason for Claimant to undergo fusion as part of the decompression procedure. *Rumley Depo. pg. 18 lns. 6-19*.

15. Dr. Brown is Respondents retained expert. While Dr. Brown is board certified, he is board certified in neurology, and not orthopedic surgery. Moreover, Dr. Brown is not fellowship trained as is Dr. Rumley. As a result, Dr. Brown's skillset might be different than Dr. Rumley's and not as innovative or advanced – since he is not fellowship trained.

16. Dr. Brown indicated that he believes Claimant may have untreated NIDDM—otherwise known as Type 2 diabetes. *Ex. A, Bates 13; Rumley Depo. pg. 19 lns. 5-10.*

17. Claimant's symptoms are more likely related to his lumbar injury then they are to polyneuropathy potentially caused by diabetes. *See Rumley Depo. pg. 19 lns. 15-17, pg. 20 lns. 1-18.*

18. At the time of hearing, Claimant's BMI was 39 and Dr. Rumley explained that it is an acceptable BMI to proceed with the recommended surgery because it is under 40. Rumley Depo. pg. 21 lns. 10-23. When a patient has a BMI of 40 or more, the risks of surgery are increased and include higher rates of infection, deep vein thrombosis, and perioperative complications. *Rumley Depo. pg. 22 lns. 1-13*.

19. Dr. Brown agrees that Claimant needs to undergo decompression surgery, but he suggests an alternative procedure using tubes to decompress three levels of the spine. *Ex. A, Bates 14*.

20. Dr. Rumley strongly disagrees with Dr. Brown that tubular decompression is the superior procedure for Claimant to undergo for several reasons. First, the TLIF

procedure is far more likely to result in a better decompression of Claimant's lumbar nerves (especially related foraminal stenosis such as Claimant's), which is the main goal of both possible surgeries. Second, Claimant has an underlying structural deformity (*i.e.*, the sagittal imbalance). The tubular decompression surgery would not address this deformity, while the TLIF procedure recommended by Dr. Rumley will. To not address the deformity in conjunction with decompression will set Claimant up for a worse long-term outcome and increase the likelihood he would need to undergo another lumbar surgery in the future because the structure will worsen over time. As a result addressing the deformity is a necessary component of the overall surgical procedure recommended by Dr. Rumley. *Rumley Depo. pgs. 23-24, pg. 34 lns. 10-22, pg. 35 lns. 16-18.*

21. Dr. Brown has indicated the tubular decompression procedure he has proposed does not guarantee that Claimant will be without lumbar instability. *Brown Depo. pg. 16 lns. 4-5.*

22. Dr. Rumley has performed tubular decompression surgeries. Dr. Rumley noted that those patients do not tend to do as well post-operatively as patients that undergo TLIF. *Rumley Depo. pg. 28 lns. 21-25, pg. 29 lns. 1-2*.

23. Dr. Rumley is routinely referred patients that have previously undergone spine surgery by others. When he sees patients that have previously undergone tubular decompression, those patients commonly have structural instability, or the decompressions were incomplete in the first place. This is yet another reason why the TLIF procedure is superior to tubular decompression. The revision surgery for those patients is TLIF and carries with it increased risks and complications as a revision surgery. *See Rumley Depo. pg. 29 lns. 3-25, pg. 30 lns. 1-2*.

24. Generally, Dr. Brown avoids operating on anyone that is morbidly obese. *See Brown Depo. pg. 11 lns. 6-8*.

25. Dr. Brown concedes that TLIF, as recommended by Dr. Rumley, "is certainly an option." *Brown Depo. pg. 12 lns. 1-2*. He also concedes that TLIF "provides a good decompression." *Id. at pg 12 lns. 7-12*.

26. In support of his recommended tubular decompression procedure, Dr. Brown referenced a publication indicating "that a decompression, a simple decompression, versus a fusion Improved back pain . . . ." *Brown Depo. pg. 17 lns. 21-24*. As noted above, however, the primary focus and need for Claimant's surgery is decompression of the nerves to address his claudication symptoms—not generalized back pain.

27. Dr. Brown also expressed concern about future adjacent level degeneration. This concern, however, was based on unverified cited statistics related to the cervical spine—not the lumbar spine. *Brown Depo. pg. 20 lns. 2-10*.

28. When asked if Dr. Rumley's recommended TLIF procedure was unreasonable, Dr. Brown said that it was aggressive and not within the *Guidelines*[1] and normal standards. *See Brown Depo. pg. 20 lns. 18-21.*

[1] Workers' Compensation Rules of Procedure, 17, Ex. 1, Low Back Pain Medical Treatment Guidelines.

29. Based on his qualifications, training, experience, and analysis set forth in his testimony, the ALJ finds Dr. Rumley's opinions to be credible and highly persuasive.

30. On the other hand, Dr. Brown was retained to perform an independent medical examination. He came to Colorado from Florida for a single examination for the sole purpose of litigation as he does routinely once per month. Dr. Brown does not treat patients in Colorado. *Brown Depo. pg. 23 lns. 19-22, pgs. 24-25, pg. 26 lns. 4-7*. Moreover, as specifically stated in his report, Dr. Brown advised Claimant that merely performing the IME does not create a physician patient relationship between Claimant and Dr. Brown. Moreover, and most importantly, Dr. Brown does not have as much training as Dr. Rumley. As found, Dr. Rumley is fellowship trained and Dr. Brown is not. Thus, the ALJ does not find Dr. Brown's opinions to be as persuasive as Dr. Rumley's.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that the surgical procedure requested by Dr. Rumley, including a three-level fusion, is reasonable and necessary?

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

When determining whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines (*Guidelines*) because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the *Guidelines* is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather, the ALJ may give evidence regarding compliance with the *Guidelines* such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., WC* 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). See also: Section 8-43-201(3), C.R.S.

There is no dispute that Claimant needs lumbar surgery and that such surgery is causally related to his work injury. The dispute that exists is which procedure is the most appropriate for Claimant.

Dr. Rumley, as a treating physician, has concluded that the TLIF procedure is not only the superior procedure, but it is also reasonable and necessary. When asked directly, Dr. Brown did not specifically say the TLIF procedure was unreasonable—but yet he did say that it was aggressive and not within normal standards. Thus, he believes the procedure is not reasonable.

Dr. Brown's belief that the TLIF procedure is not reasonable, is based on three primary arguments—all of which are unpersuasive.

The first is that the TLIF procedure is for three levels and the *Guidelines* indicate that no more than two levels should be done in the case of fusion surgeries.

As pointed out by Dr. Rumley, the *Guidelines* are just that—guidelines. They are not absolutes. So while the *Guidelines* do provide guidance as to when certain procedures should or should not be done, there is the ability to deviate from the *Guidelines* in appropriate circumstances and the Court finds that such circumstances exist here.

Both Dr. Rumley and Dr. Brown recognize that Claimant has objective findings by way of MRI, EMG, and diagnostic injections confirming that Claimant has claudication symptomatology stemming from three levels of his lumbar spine. While the procedure is different, even Dr. Brown's recommended tubular procedure is for three levels. Both physicians appear to agree that if three levels are symptomatic, they should all be addressed.

Dr. Rumley has convincingly shown that TLIF involving laminectomy is likely to lead to better results for decompressing Claimant's lumbar nerves and resolve his claudication symptoms which is the primary goal of both surgical recommendations. As Dr. Rumley pointed out, it does not make sense to address two levels with fusion only to leave out a third that is symptomatic to satisfy a general guideline.

Risks coincide with any type of surgery. The issue becomes whether the risks are outweighed by the benefits. Here, Dr. Rumley and Claimant have engaged in a shared decision-making process and decided that TLIF is most likely to result in the most benefit to Claimant.

Dr. Brown's second basis of recommending tubular decompression over TLIF is that Claimant does not currently have lumbar instability. Recommendation 153 of WCRP 17, Ex. 1, Sec. 8.b.iii, in the *Guidelines*, states that one of the diagnostic indications for fusion includes "surgically induced segmental instability." This means that one need not necessarily have instability to undergo fusion surgery, but such instability may be a likely result as part of another surgery—like decompression by laminectomy. Even tubular decompression as recommended by Dr. Brown may result in segmental instability which would require fusion. The fusion needed from tubular decompression would be a later, second surgery, only serving to place additional risks the chance for complications on Claimant.

Further reason exists here for Claimant to undergo TLIF involving three-level fusion and that is to address his structural deformity. Even though Claimant's work injury did not cause the deformity, it nevertheless interplays with his nerve compression and claudication. By correcting the deformity, Claimant is likely to experience far better decompression of the nerves. Moreover, correcting the deformity will greatly reduce the chances for the need of future lumbar surgery as the condition progressively deteriorates. Plus, correcting the deformity also improves the overall outcome of the surgery to treat Claimant's work injury. As a result, fixing the deformity is inextricably intertwined with treating Claimant's work injury and is therefore reasonably necessary to cure and relieve Claimant from the effects of his injury.

Finally, Dr. Brown consistently stresses that Claimant's BMI is high, and it invites increased risk for TLIF, thereby making the TLIF surgery unreasonable. Dr. Rumley convincingly explained that Claimant's BMI of 39 is within acceptable range for the TLIF procedure. It is worth noting that, as demonstrated by the medical records, Claimant's BMI was 39 as of the hearing date down from more than 42 in January 2023, when he first saw Dr. Rumley, and it was continuing to trend downward due to continued weight loss.

Morbid obesity is a relative contraindication to fusion per WCRP 17, Ex. 1, Sec. 8.b.ii. But it is not an absolute contraindication. The difference is that relative

contraindication only means that caution should be used when doing fusion procedure and the procedure is acceptable if the benefits outweigh the risk.

Table 52 of WCRP 17, Ex. 1, Sec. 8.b (Surgical Interventions) of the *Guidelines* indicates that there is good evidence to suggest functional improvement from most back surgery is similar between patients with BMI under 25 and those with a BMI between 25 and 35. As discussed, Claimant's last known BMI was 39, but it was declining due to continued weight loss. This means that Dr. Brown's concerns lessen regarding Claimant's BMI with each pound Claimant loses before surgery and the closer he gets to a BMI of 35.

Dr. Rumley explained that a BMI of 40 or more would remove Claimant as a surgical candidate until the BMI is again below 40. This is based on studies that indicate risks and complications are far less when the patient's BMI is under 40. The *Guidelines* do not have such an explicit line in the sand for fusions. The only area of the Guidelines where a BMI of 40 or more as a contraindication related to lumbar surgery is in WCRP 17, Ex. 1, and Sec. 8.b.iv of the *Guidelines* for total disc replacement surgery— which is not contemplated or recommended here.

Dr. Rumley is a board-certified expert in his field of orthopedic surgery. Plus, Dr. Rumley also trained via a spine fellowship at Augusta University which was a level 1 trauma and deformity center. Lastly, he currently trains fellows in spine surgery and therefore maintains an academic role. These additional qualifications adds to the persuasiveness of his opinion and conclusion for the recommended surgery. Plus, what might be considered aggressive to Dr. Brown, might not be considered aggressive by Dr. Rumley who is a fellow trained spinal surgery. As a result, the ALJ finds and concludes that Dr. Rumley has convincingly concluded that the TLIF is the most appropriate procedure for Claimant, and Claimant has indicated that he wishes to proceed with TLIF understanding the associated pros and cons as well as the risks and benefits.

As a result, the ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that the lumbar decompression and fusion surgery recommended by Jacob Rumley, D.O. as reasonable and necessary treatment related to his admitted June 29, 2022, industrial injury.

ORDER

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

I. Respondents shall pay for the lumbar decompression and fusion surgery recommended by Jacob Rumley, D.O. as reasonable and necessary treatment related to Claimant's industrial injury.

II. 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: December 1, 2023.

/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. 5-202-948-002

ISSUES

- Did Claimant prove she suffered a compensable injury to her right shoulder on March 7, 2022?
- Did Claimant prove medical treatment she received for the right shoulder was reasonably needed, authorized, and causally related to a compensable injury?
- Did Claimant prove entitlement to TTD benefits from April 6, 2022 through June 6, 2022?
- Did Respondents prove Claimant was responsible for termination of her employment?
- Did Claimant prove Respondents should be penalized for failure to timely admit or deny liability?
- Did Claimant prove Respondents should be penalized for failure to timely exchange the claim file and wage records as required by § 8-43-203(4) and WCRP 5-4(D)?
- The parties stipulated to an average weekly wage of $443.01.

FINDINGS OF FACT

1. Claimant worked for Employer as a housekeeper. Her primary duties included cleaning hotel rooms between guest stays. The job is physically demanding and requires lifting, pushing, and pulling heavy objects such as furniture and linens.

2. Claimant alleges any injury to her right shoulder on March 7, 2022, while lifting a mattress to change the sheets. Claimant testified she lifted one corner of the mattress and felt "a really hard pain" in her shoulder. Nevertheless, she kept working and finished her shift.

3. Claimant did not report an incident or injury to anyone on March 7, 2022. Claimant testified she did not report the injury because she was afraid she might lose her job. However, she had previously reported allergic skin reactions from cleaning chemicals, which her supervisor tried to remedy, with no adverse impact on her job.

4. Claimant worked her regular duties without limitation until she was suspended on April 6, 2022, for noninjury-related reasons. Although Claimant testified she had difficulty performing the job during that time, there is no persuasive evidence from any co-worker or supervisor to corroborate that her performance was limited in any way.

5. Claimant was suspended on April 6, 2022, for theft of guest property. Claimant took a pair of Apple AirPods from a guest room (Room 610) on March 6, 2022. Claimant had been responsible for cleaning Room 610 that day. The guest eventually tracked the location of the AirPods to Claimant's residence. On April 5, 2022, [Redacted, hereinafter SA] questioned Claimant about the AirPods, but Claimant denied having them or knowing where they were. However, the next day, Claimant returned to work and gave the AirPods to SA[Redacted]. Claimant alleged she had found the AirPods in a conference tote bag ("swag bag") she took from the room after the guests had checked out. Claimant claimed she did not realize the AirPods were in the bag until she checked after being questioned by SA[Redacted].

6. Claimant testified to the same story at hearing.

7. Respondents convincingly refuted Claimant's testimony about the AirPods. The tote bag in question was from a conference held at the hotel in mid-February. Given Employer's rigorous cleaning and inspection procedures, it is highly unlikely a tote bag from the conference would still have been in the room when the guest that owned the AirPods checked in several weeks later. It is far more likely that Claimant intentionally took the AirPods and fabricated a cover story after learning they had been tracked to her home.

8. Claimant was placed on administrative leave on April 6, 2022, pending completion of Employer's investigation. After determining Claimant's explanation was untrue and she had probably stolen the AirPods, Employer formally terminated her employment on May 14, 2022.

9. On April 18, 2022, Claimant filed a workers' compensation claim alleging a right shoulder injury.

10. Claimant sought no treatment for many weeks after the alleged injury.

11. Claimant was evaluated by Darielle Johnson, NP at Peak Vista Community Health Center on April 25, 2022. Claimant stated she injured her right shoulder and both knees at work. She said the shoulder injury occurred on April 6, 2022. Examination of the shoulder showed positive impingement signs and limited range of motion, but "no evidence" of a rotator cuff tear.

12. Claimant started working as a custodian at [Redacted, hereinafter DO] on June 7, 2022. The job involves customary institutional cleaning tasks such as trash removal, cleaning windows, and cleaning bathrooms. There is no persuasive evidence Claimant requested, received, or required any accommodations or limitations on the regular duties of the position.

13. Claimant underwent a right shoulder MRI on July 20, 2022. It showed a full-thickness supraspinatus tear, supraspinatus and infraspinatus tendinosis, a possible biceps tear, and a subtle SLAP tear.

14. On January 25, 2023, Claimant saw Kelsey Jackson, NP, at Kinetic Orthopedics. Claimant told Ms. Jackson her shoulder pain started when she was making a bed at work on March 7, 2022. Ms. Jackson recommended surgery.

15. Dr. Lawrence Lesnak performed an IME for Respondents on January 24, 2023. Dr. Lesnak noted numerous nonphysiologic findings on examination, including exaggerated pain response to light touch, give-way weakness throughout the right arm, and highly inconsistent shoulder range of motion depending on body position. Dr. Lesnak opined the MRI findings were likely degenerative in nature, with no indication of any acute injury or trauma-related pathology. Dr. Lesnak noted Claimant was still working full-time as a custodian "without any restrictions whatsoever." Claimant told Dr. Lesnak her shoulder pain severely worsened several months after she was terminated by Employer. Dr. Lesnak opined that Claimant suffered no work-related injury and any treatment she required for her shoulder was related to a purely personal medical condition.

16. Dr. Lesnak's opinions are credible and persuasive.

17. SA's[Redacted] testimony is credible and persuasive.

18. Claimant's testimony is not credible.

19. Claimant failed to prove a compensable injury to her right shoulder.

CONCLUSIONS OF LAW

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

As found, Claimant failed to prove she suffered a compensable injury to her right shoulder. SA's[Redacted] testimony is credible and persuasive. Dr. Lesnak's analysis and opinions are credible and persuasive. Claimant's testimony is not credible. Claimant abused a position of trust and stole property from a hotel guest. She compounded the dishonesty with a false explanation after being caught. She told the same story at hearing under oath. Considering Claimant's repeated untruthfulness, the ALJ is unwilling to credit her testimony with respect to any disputed material fact. There is no direct proof to support Claimant's alleged injury, such as witness statements or immediately contemporaneous medical records showing evidence of acute trauma. Nor does the circumstantial evidence support her claim. Claimant told no one about any injury until after she had been placed on administrative leave. She continued working her regular job for a month after March 7, 2022, with no persuasive evidence showing any functional limitations or reduced efficiency. Claimant sought no treatment for more than six weeks after the alleged injury. The initial evaluation by Ms. Johnson showed "no evidence" of a rotator cuff tear, and the

July 2022 MRI that showed a tear was not completed until after Claimant started working for a new employer as a custodian. Claimant told Dr. Lesnak her shoulder severely worsened after she was terminated, which further reduces the likelihood of a causal connection to her employment. The preponderance of persuasive evidence fails to establish that Claimant's right shoulder pathology and need for treatment were proximately caused by an injury at work on March 7, 2022.

ORDER

It is therefore ordered that:

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

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

DATED: December 1, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-938-002

ISSUES

1. Whether Respondent has proven by a preponderance of the evidence that Claimant's claim is barred by the statute of limitations in §8-43-103(2), C.R.S.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered an occupational disease in the form of bilateral Carpal Tunnel Syndrome (CTS) that began on October 24, 2022 during the course and scope of her employment with Employer.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment designed to cure and relieve the effects of her October 24, 2022 occupational disease.

FINDINGS OF FACT

1. Claimant worked for Employer as a Prevention Unit Manager. Her job responsibilities included data entry, data analysis, report development, investigation research and documentation, publications, process development, public health recommendation letters, email communications, grant development and reporting, position development, and evaluations. Claimant has worked continuously for Employer since September 1999.

2. The record reflects that Claimant has a long history of bilateral upper extremity symptoms. Initially, Claimant reported a work-related injury/condition on May 12, 2014. Employer completed a First Report of Injury on May 20, 2014. Respondent filed a Notice of Contest on May 22, 2014. Claimant did not file a Workers' Claim for Compensation or Application for Hearing seeking benefits related to the May 12, 2014 injury.

3. On May 12, 2014 Claimant sought treatment with Authorized Treating Provider (ATP) Concentra Medical Centers for her bilateral upper extremity symptoms. She associated her symptoms with "being on the computer." Claimant reported a sudden increase of pain that made her unable to use her left hand. Providers noted the "pain is so bothersome it wakes her up at night (numbness, tingling, electric shocks), she has to switch back and forth between her two hands while driving because they 'go dead on her'…pain 6/10 with pain to left greater than right." Claimant's symptoms included wrist and forearm pain, tingling, numbness in her fingers and loss of strength.

4. On October 28, 2014 Claimant visited orthopedic surgeon Edmund B. Rowland, M.D. for an examination. She reported numbness and tingling in both hands, as well as numbness in her thumb and fingers. Claimant noted that "activity modification and ergonomic changes to the workstation have been somewhat beneficial." She was

struggling to write and it was more difficult to use her keyboard. Dr. Rowland assessed Claimant with bilateral Carpal Tunnel Syndrome (CTS) from possible overuse. He noted "bilateral upper extremity complaints in a worker who feels typing has played a significant role in this."

5. On November 5, 2014 Claimant was evaluated by John J. Aschberger, M.D. He assessed "bilateral upper extremity pain localized predominantly at the wrists, paresthesias noted distally," and determined there "may be a component of tendinitis at the wrists as well."

6. On November 5, 2014 Claimant underwent EMG testing. Dr. Aschberger reviewed the EMG and concluded "there are very mild findings consistent with a diagnosis of [CTS] with indications of median neuropathy at the right wrist. No abnormalities suggested for the left upper extremity with nerve conduction testing and electromyographic testing shows no indications of nerve injury or irritation for either upper extremity."

7. Claimant's medical treatment and evaluation concluded in 2014. She received guidance to alleviate her symptoms that consisted of utilizing wristbands and performing home exercises. From 2014 until her October 24, 2022 Workers' Compensation claim, Claimant continued to experience flare-ups in her upper extremities that never completely resolved. Claimant followed the recommendations prescribed by her 2014 treating physicians for controlling her symptoms.

8. Claimant testified that when the COVID-19 pandemic began in March 2020 she was deployed for COVID-19 response and investigated outbreaks in healthcare settings. Her duties involved traveling throughout Colorado, participating in drive-up clinics, helping providers set up outdoor clinics, writing recommendations and providing guidance for health care workers.

9. Because of Respondent's office closure, Claimant began working remotely in late March 2020 and started experiencing flare-ups of her CTS symptoms in April 2020. Claimant noted her symptoms included increased pain at the wrist and numbness in the fingers that radiated up the arms. She explained that when a "flare-up" started, she implemented the suggestions and exercises she had learned including adjustments to her workstation. Notably, in June 2022 Claimant purchased her own workstation that included a desk and screen mount. Nevertheless, subsequent to beginning work from home, the combination of increased hours at her computer and changes to her workstation ergonomics exacerbated Claimant's symptoms.

10. On October 24, 2022 Claimant reported her symptoms and Employer completed a First Report of Injury. Claimant specifically noted symptoms including numbness, pain in fingers, elbow pain, cold hands, dexterity issues, shaking, twitching in the left hand, and left arm pain. She received a designated provider list and selected Concentra as her ATP.

11. On October 31, 2022 Claimant visited Cynthia Rubio, M.D. at Concentra for an examination. Dr. Rubio reviewed Claimant's medical history and conducted a physical examination. She commented that Claimant had been diagnosed with right CTS in 2014. Although Claimant's right wrist remained symptomatic, she was experiencing more left-sided symptoms. Because Claimant had suffered a flare-up of her condition, she underwent an ergonomic evaluation of her workstation in June 2022 but had not followed-up with the recommendations. Claimant remarked that she had been doing "fairly well" until mid-October 2022. Dr. Rubio diagnosed Claimant with bilateral CTS. However, she concluded that her objective findings were not consistent with a work-related mechanism of injury. Dr. Rubio noted that Claimant could immediately return to work with no restrictions.

12. On November 3, 2022 Claimant visited David Hnida, D.O. at Concentra. Dr. Hnida reviewed Claimant's medical history and conducted a physical examination. He considered Claimant's history of CTS and remarked that she had reached her functional goal but was not at the "end of healing." Dr. Hnida recorded that "since 2014 she has not had any periods of time when she was symptom free – she has waxed and waned since then, but things usually get better…Her symptoms, in sum, have been present for years, with this being a recent flare that has not subsided. It is noted she is hypothyroid." He assessed Claimant with bilateral wrist pain as well as numbness and tingling. Dr. Hnida concluded that objective findings were not consistent with a work-related mechanism of injury. He commented that Claimant could immediately return to work with no restrictions. Dr. Hnida noted that the "timeline of this bilat complaint presents causality challenges. I believe a worksite eval is warranted."

13. On November 28, 2022 Claimant returned to Dr. Hnida for an evaluation. Claimant's symptoms remained unchanged. Dr. Hnida reiterated that objective findings were not consistent with a work-related mechanism of injury. He referred Claimant for an EMG study.

14. On December 12, 2022 Claimant presented to Robert W. Kawasaki, M.D. for an evaluation. Dr. Kawasaki completed an EMG nerve conduction study and compared it to the previous study performed by Dr. Aschberger in 2014. The 2014 EMG demonstrated right mild CTS while the left upper extremity testing was normal. However, the December 12, 2022 EMG study revealed bilateral moderate CTS. Dr. Kawasaki diagnosed bilateral CTS and median neuropathy at the wrist. He recommended using splints at night. Dr. Kawasaki noted that steroid injections and surgical CTS releases could be considered.

15. On December 19, 2022 Claimant underwent a surgical evaluation with Rudy Kovachevich, M.D. Claimant reported she had been working in excess of 60-70 hours per week over the past few years because of the pandemic. She noted bilateral hand numbness and paresthesias that has waxed and waned over the past 10 years. Dr. Kovachevich diagnosed Claimant with bilateral CTS, left cubital tunnel syndrome, left lateral epicondylitis, and right lateral epicondylitis. He concluded that "it appears [Claimant] did sustain an injury to bilateral hands arising out of and caused by the

industrial exposure of 10/24/22." Dr. Kovachevich recommended surgical intervention including a left CTS release and left "UND" release at elbow with possible soft tissue rearrangement/transposition.

16. Contrary to Claimant's reports of working in excess of 60-70 hours each week because of the COVID-19 pandemic, the record reveals she has worked the following hours since 2020:

- 2020: average of 48.3 hours per week
- 2021: average of 48.0 hours per week
- 2022: average of 45.1 hours per week

17. A Job Demands Analysis (JDA) was initially scheduled to occur in this matter on December 28, 2022 with Joseph B. Blythe, MA, CRC. However, when Mr. Blythe arrived, Claimant advised that an evaluation would not provide him with an opportunity to observe her typical job duties. Claimant received alternate dates to complete the JDA and selected January 9, 2023.

18. On January 9, 2023 Mr. Blythe performed a JDA for the position of Prevention Unit Manager. He noted the Prevention Unit Manager is responsible for oversight of the services, staff, and partnerships within the agency. Claimant also was responsible for planning, developing, and implementing policies, procedures, goals, and objectives to ensure the provision of quality services. Mr. Blythe remarked that Claimant had been diagnosed with bilateral CTS. Relying on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (MTGs), Mr. Blythe did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties for Employer.

19. Mr. Blythe conducted time studies while observing Claimant over a 4.5-hour period to ascertain her Primary and Secondary Risk Factors pursuant to the MTGs. Based on a 10-hour workday, he specifically found the following:

- no force and repetition of Claimant's left upper extremity and 30 minutes/day or 15% of the secondary threshold of pinch force for the right upper extremity;
- regarding "awkward posture and repetition," 1.7 hours per day or 57% of the secondary threshold for left elbow flexion and 1.6 hours per day or 54% of the secondary threshold for right elbow flexion;
- no supination/pronation of 45 degrees with power grip or lifting;
- mouse use of 2.7 hours or 66% of the 4.0 hours per day threshold;
- keyboarding of 2.5 hours per day;
- no vibratory hand tools or cold work environment; and
- regarding the additional study of bilateral elbow and forearm contact, 1.7 hours per day of the left upper extremity and 1.1 hours per day of the

right upper extremity.

20. Mr. Blythe subsequently reviewed Claimant's daily timesheets from January 2022 through December 2022. He issued a revised JDA on August 6, 2023. Mr. Blythe documented work days that lasted between four and 15 or more hours. Notably, 47% of the time, or much larger than any other hour interval, Claimant worked for eight hours each day. The second most common length of a workday was nine hours or 13% of the total. Although Claimant worked 14 hours each day only 1% of the time, Mr. Blythe issued a revised JDA on August 6, 2023 in which he considered Claimant's Primary and Secondary Risk Factors over the course of 11-14 hour workdays. He again did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties.

21. Claimant testified that just before Mr. Blythe was going to leave after observing her for 4.5 hours, she stated his observations did not represent her typical job duties. Although she was about to begin her regular job tasks, Mr. Blythe left. In contrast, Mr. Blythe remarked that Claimant never mentioned he was not observing her typical job duties. He explained that, if she had advised that he had not observed her regular duties, he would have rescheduled the JDA just as he had done on December 28, 2022. Similarly, if Claimant had stated she was about to begin her typical activities he would have stayed longer.

22. On January 10, 2023 Dr. Kovachevich submitted a request for surgical authorization. Respondent subsequently denied the request.

23. On January 10, 2023 Claimant visited ATP Thomas Corson, D.O. at Concentra for an examination. Dr. Corson assessed Claimant with bilateral wrist pain, CTS, numbness and tingling. He concluded that his objective findings were not consistent with a work-related mechanism of injury. Dr. Corson noted that Claimant could immediately return to work with no restrictions.

24. On February 24, 2023 and October 5, 2023 Carlos Cebrian, M.D. conducted records reviews of Claimant's claim. He also testified at the hearing in this matter. After reviewing Claimant's medical records and considering Mr. Blythe's JDA, Dr. Cebrian conducted a causation analysis pursuant to the MTGs. Dr. Cebrian explained that, in order to perform a medical causation analysis for a cumulative trauma condition, the first step is to make a diagnosis, the next step is to clearly define the job duties and the third step is to compare the job duties with the delineated Primary Risk Factors. He initially noted that Claimant had been diagnosed with bilateral CTS. Notably, none of Claimant's treating physicians performed a causation analysis pursuant to the MTGs to determine whether her symptoms were related to her work activities.

25. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the MTGs. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. An additional Primary Risk Factor category is Awkward Posture and

Repetition/Duration. The category requires four hours of wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees. Other risk factors in the category are six hours of elbow flexion > 90 degrees or six hours of supination/pronation with task cycles 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Dr. Cebrian also noted that computer work can be a Primary Risk Factor, but up to seven hours per day at an ergonomically correct workstation is not a risk factor. Continuous mouse use of greater than four hours each day is also a risk factor. Dr. Cebrian concluded Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the MTGs.

26. When there are no Primary Risk Factors, step four of a causation analysis involves a review of Secondary Risk Factors. Any Secondary Risk Factor must be physiologically related to the diagnosis. Force and Repetition/Duration must be for three hours using two-pounds pinch force or 10 pounds of hand force three times or more per minute. Additional Secondary Risk Factors for Force and Repetition/Duration are three hours of lifting 10 pounds > 60X per hour or three hours of use of hand held tools weighing two pounds or greater. Another Secondary Risk Factor category is Awkward Posture and Repetition/Duration. The preceding Factor requires three hours of elbow flexion > 90 degrees or three hours of Supination/pronation of 45° with power grip or lifting. Computer Work and mouse use are not Secondary Risk Factors. Handheld vibratory power tools can be a Secondary Risk Factor if used for two hours when combined with other risk factors. After evaluating Claimant's job duties, Dr. Cebrian concluded she does not have Secondary Risk Factors for the development of a cumulative trauma condition. Because Claimant did not have a Secondary Risk Factor, the Diagnosis-based risk factor table is not used.

27. Dr. Cebrian explained that the MTGs show an association of cumulative trauma conditions, including cubital tunnel syndrome or ulnar neuritis and CTS, with certain medical conditions. The conditions include hypothyroidism, increasing age, and the female sex. Based on the medical records, Dr. Cebrian remarked that Claimant is a 45-year-old female who was diagnosed with hypothyroidism. Moreover, Dr. Cebrian stated that, pursuant to the MTGs, conditions must be physiologically related to job activities. The Diagnosis-based risk factor table for lateral epicondylitis and cubital tunnel syndrome or ulnar neuritis reflects they are not physiologically related to keyboarding and mouse use. In fact, the MTGs specify there is good evidence that keyboarding is not related to the preceding conditions.

28. Relying on the MTGs, Dr. Cebrian concluded that it is "not medically probable that [Claimant's] bilateral upper extremity complaints were directly or indirectly causally related to her work activities for [Employer] nor were they the proximate result of her work activities." He explained that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the MTGs. Dr. Cebrian commented that further evaluation, diagnosis, and treatment under the Workers' Compensation system was not medically reasonable, necessary, or causally related to Claimant's symptoms. Claimant thus did not suffer an occupational disease in the form of a cumulative trauma condition as a result of her work activities for Employer.

29. Respondent has failed to prove it is more probably true than not that Claimant's claim is barred by the statute of limitations in §8-43-103(2), C.R.S. The record reveals that Claimant has a long history of bilateral upper extremity symptoms. Initially, Claimant reported a work-related injury/condition to her upper extremities on May 12, 2014 and obtained medical care with ATP Concentra. After undergoing conservative treatment, Claimant's medical care and evaluation concluded later in 2014. Nevertheless, Claimant's flare-ups of numbness in her upper extremities never completely resolved. Because of the COVID-19 pandemic, Claimant began working remotely in late March 2020 and started experiencing flare-ups of her CTS symptoms in April 2020. The combination of increased hours at her computer and changes to workstation ergonomics exacerbated Claimant's symptoms. On October 24, 2022 Claimant reported her symptoms, Employer completed a First Report of Injury, and she again received treatment with ATP Concentra. In her first visit with ATP Dr. Rubio, Claimant specifically reported that she had been doing "fairly well" until mid-October, 2022. On November 3, 2022 Claimant reported to ATP Dr. Hnida that she suffered a recent flare-up that had not subsided.

30. The preceding chronology reflects that Claimant has experienced upper extremity symptoms sporadically since at least 2014. However, Claimant's present claim is predicated on a request for compensation from October 24, 2022. Although Respondent asserts that Claimant's current claim is barred by the two-year statute of limitations in §8-43-103(2), C.R.S., the record reflects that Claimant did not recognize the nature, seriousness, and probable compensable character of her injury until October 2022. Claimant's occasional flare-ups prior to the date of reporting were not disabling, and Claimant continued to perform her job duties. After Claimant began working from home and suffering increased pain, she attempted to alleviate her symptoms and made adjustments to her workstation. However, she was ultimately unsuccessful and reported her claim for compensation in a timely fashion. The record reflects that, although Claimant's upper extremity pain waxed and waned over the years, she was doing fairly well until she suffered a flare-up of symptoms in October 2022. Notably, she developed left-sided symptoms and was no longer able to alleviate her pain. Because Claimant filed a notice claiming compensation within two years of discovering the work-related nature of her injury, Respondent has not demonstrated that her October 24, 2022 claim is barred by the statute of limitations in §8-43-103(2), C.R.S.

31. Claimant has failed to demonstrate it is more probably true than not that she suffered an occupational disease in the form of bilateral CTS that began on October 24, 2022 during the course and scope of her employment with Employer. Initially, the record reflects that Claimant has suffered a long-history or upper extremity symptoms since at least 2014. Claimant commented that the combination of increased hours at her computer and changes to workstation ergonomics exacerbated her upper extremity symptoms. On October 24, 2022 she reported her symptoms and began receiving treatment with ATP Concentra. She was diagnosed with bilateral CTS. After undergoing conservative treatment, Dr. Kovachevich concluded that Claimant suffered industrial injuries to her bilateral upper extremities as a result of her work activities and recommended surgical

intervention.

32. Despite Claimant's testimony and Dr. Kovachevich's opinion, the record reflects that Claimant's bilateral CTS symptoms are not causally related to her work activities for Employer. Importantly, ATPs Drs. Rubio, Hnida and Corson concluded that their objective findings were not consistent with a work-related mechanism of injury. The doctors also noted that Claimant could immediately return to work with no restrictions. Moreover, on January 9, 2023 a JDA performed by Mr. Blythe did not find evidence of any Primary or Secondary Risk Factors for the development of Claimant's symptoms. Specifically, relying on the MTGs and conducting time studies, Mr. Blythe determined that Claimant's job activities did not reach the minimum thresholds for either the Primary or Secondary Risk Factors for a cumulative trauma condition. Although Claimant explained that the 4.5 hour JDA did not constitute an accurate representation of her typical job duties, the record reflects she was aware Mr. Blythe sought to observe her typical work activities and the JDA could be rescheduled if she was not performing her regular job duties. Nevertheless, Claimant chose to proceed with the evaluation. Thus, based on the credible testimony of Mr. Blythe, the JDA constituted an accurate portrayal of Claimant's typical work activities.

33. The persuasive testimony of Dr. Cebrian demonstrates that Claimant did not likely suffer a cumulative trauma condition as a result of her work activities for Employer. Initially, Dr. Cebrian is the only physician in the present matter who conducted a formal causation assessment pursuant to the MTGs. He persuasively determined that Claimant's bilateral upper extremity complaints are not causally related to her work activities. Dr. Cebrian reasoned that it is "not medically probable that [Claimant's] bilateral upper extremity complaints were directly or indirectly causally related to her work activities for [Employer] nor were they the proximate result of her work activities." He explained that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the MTGs. Dr. Cebrian commented that further evaluation, diagnosis, and treatment under the Workers' Compensation system was not medically reasonable, necessary, or causally related to Claimant's symptoms. Claimant thus did not suffer an occupational disease in the form of a cumulative trauma condition as a result of her work activities for Employer.

34. Based on Mr. Blythe's JDA, a review of Claimant's job duties and the persuasive opinion of Dr. Cebrian, Claimant did not engage in forceful and repetitive activities for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Claimant has failed to demonstrate it is more probably true than not that she suffered an occupational disease in the form of bilateral CTS that began on October 24, 2022 during the course and scope of her employment with Employer. Her claim for Workers' Compensation benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of 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).

Statute of Limitations

4. Section 8-43-103(2), C.R.S. requires a claimant to file a notice claiming compensation within two years of discovery of the work-related nature of an injury or within three years if a reasonable excuse exists and no prejudice results to respondents. The notice must apprise the Division and respondents of the claimant's intent to seek compensation. The preceding requirement is not satisfied by the employer filing a first report of injury, the Division's assignment of a claim number, claimant's counsel's entry of appearance or the claimant's service of interrogatories. *Packard v. Indus. Claim Appeals Off. and City and County of Denver,* 456 P.3d 473 (Colo. App. 2019). The limitation period commences when "the claimant, as a reasonable [person], should recognize the nature, seriousness, and probable compensable character of [the] injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *City of Colorado Springs v. Indus. Claim Appeals Off.*, 89 P.3d 504 (Colo. App. 2004). For a claimant to appreciate an injury's seriousness and probable compensable nature, the injury must be "to some extent" disabling. *City of Colorado Springs*, 89 P.3d at 506. The "seriousness" of the injury refers to the claimant's recognition of the "gravity of the medical condition." *Burnes v. United Airlines*, WC 4-725-046 (ICAO. Apr. 17, 2008). The claimant must recognize all three of the preceding factors to trigger the running of the statute of limitations. *Id.* The question of when the claimant recognized the nature, seriousness, and probable compensable character of the injury is one of fact for determination by the ALJ. *Id.*

5. As found, Respondent has failed to prove by a preponderance of the evidence that Claimant's claim is barred by the statute of limitations in §8-43-103(2), C.R.S. The record reveals that Claimant has a long history of bilateral upper extremity symptoms. Initially, Claimant reported a work-related injury/condition to her upper extremities on May 12, 2014 and obtained medical care with ATP Concentra. After undergoing conservative treatment, Claimant's medical care and evaluation concluded later in 2014. Nevertheless, Claimant's flare-ups of numbness in her upper extremities never completely resolved. Because of the COVID-19 pandemic, Claimant began working remotely in late March 2020 and started experiencing flare-ups of her CTS symptoms in April 2020. The combination of increased hours at her computer and changes to workstation ergonomics exacerbated Claimant's symptoms. On October 24, 2022 Claimant reported her symptoms, Employer completed a First Report of Injury, and she again received treatment with ATP Concentra. In her first visit with ATP Dr. Rubio, Claimant specifically reported that she had been doing "fairly well" until mid-October, 2022. On November 3, 2022 Claimant reported to ATP Dr. Hnida that she suffered a recent flare-up that had not subsided.

6. As found, the preceding chronology reflects that Claimant has experienced upper extremity symptoms sporadically since at least 2014. However, Claimant's present claim is predicated on a request for compensation from October 24, 2022. Although Respondent asserts that Claimant's current claim is barred by the two-year statute of limitations in §8-43-103(2), C.R.S., the record reflects that Claimant did not recognize the nature, seriousness, and probable compensable character of her injury until October 2022. Claimant's occasional flare-ups prior to the date of reporting were not disabling, and Claimant continued to perform her job duties. After Claimant began working from home and suffering increased pain, she attempted to alleviate her symptoms and made adjustments to her workstation. However, she was ultimately unsuccessful and reported her claim for compensation in a timely fashion. The record reflects that, although Claimant's upper extremity pain waxed and waned over the years, she was doing fairly well until she suffered a flare-up of symptoms in October 2022. Notably, she developed left-sided symptoms and was no longer able to alleviate her pain. Because Claimant filed a notice claiming compensation within two years of discovering the work-related nature of her injury, Respondent has not demonstrated that her October 24, 2022 claim is barred by the statute of limitations in §8-43-103(2), C.R.S.

Compensability

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

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

9. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (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.

10. The Colorado Division of Workers' Compensation has developed specific MTGs for Cumulative Treatment Conditions in Rule 17, Exhibit 5. The MTGs provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p. 20.

11. The MTGs include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three

hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing at least two pounds. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the MTGs provide that "the case is probably not job related." W.C.R.P. Rule 17, Exhibit 5, pp. 24-26.

12. Rule 17, Exhibit 5 instructs physicians about using risk factors for assessing causation of a cumulative trauma condition. After determining a diagnosis and defining the job duties of the worker, physicians should compare the worker's duties with the Primary Risk Factor Definition Table. The MTGs specify that "[h]ours are calculated by adding the total number of hours per day during which the worker is exposed to the defined risk. Breaks, time performing other activities, and inactive times are not included in the total time. W.C.R.P. Rule 17, Exhibit 5, p. 21.

13. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease in the form of bilateral CTS that began on October 24, 2022 during the course and scope of her employment with Employer. Initially, the record reflects that Claimant has suffered a long-history or upper extremity symptoms since at least 2014. Claimant commented that the combination of increased hours at her computer and changes to workstation ergonomics exacerbated her upper extremity symptoms. On October 24, 2022 she reported her symptoms and began receiving treatment with ATP Concentra. She was diagnosed with bilateral CTS. After undergoing conservative treatment, Dr. Kovachevich concluded that Claimant suffered industrial injuries to her bilateral upper extremities as a result of her work activities and recommended surgical intervention.

14. As found, despite Claimant's testimony and Dr. Kovachevich's opinion, the record reflects that Claimant's bilateral CTS symptoms are not causally related to her work activities for Employer. Importantly, ATPs Drs. Rubio, Hnida and Corson concluded that their objective findings were not consistent with a work-related mechanism of injury. The doctors also noted that Claimant could immediately return to work with no restrictions. Moreover, on January 9, 2023 a JDA performed by Mr. Blythe did not find evidence of any Primary or Secondary Risk Factors for the development of Claimant's symptoms. Specifically, relying on the MTGs and conducting time studies, Mr. Blythe determined that Claimant's job activities did not reach the minimum thresholds for either the Primary or Secondary Risk Factors for a cumulative trauma condition. Although Claimant explained that the 4.5 hour JDA did not constitute an accurate representation of her typical job duties, the record reflects she was aware Mr. Blythe sought to observe her typical work activities and the JDA could be rescheduled if she was not performing her regular job duties. Nevertheless, Claimant chose to proceed with the evaluation. Thus, based on the credible testimony of Mr. Blythe, the JDA constituted an accurate portrayal of Claimant's typical work activities.

15. As found, the persuasive testimony of Dr. Cebrian demonstrates that Claimant did not likely suffer a cumulative trauma condition as a result of her work activities for Employer. Initially, Dr. Cebrian is the only physician in the present matter who conducted a formal causation assessment pursuant to the MTGs. He persuasively determined that Claimant's bilateral upper extremity complaints are not causally related to her work activities. Dr. Cebrian reasoned that it is "not medically probable that [Claimant's] bilateral upper extremity complaints were directly or indirectly causally related to her work activities for [Employer] nor were they the proximate result of her work activities." He explained that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum thresholds in the MTGs. Dr. Cebrian commented that further evaluation, diagnosis, and treatment under the Workers' Compensation system was not medically reasonable, necessary, or causally related to Claimant's symptoms. Claimant thus did not suffer an occupational disease in the form of a cumulative trauma condition as a result of her work activities for Employer.

16. As found, based on Mr. Blythe's JDA, a review of Claimant's job duties and the persuasive opinion of Dr. Cebrian, Claimant did not engage in forceful and repetitive activities for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Claimant has failed to demonstrate it is more probably true than not that she suffered an occupational disease in the form of bilateral CTS that began on October 24, 2022 during the course and scope of her employment with Employer. Her claim for Workers' Compensation benefits is thus denied and dismissed.

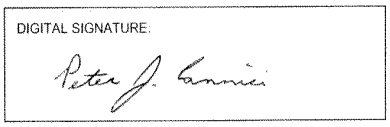
ORDER

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

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 1, 2023.



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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she sustained a work related injury within the course and scope of her employment on March 6, 2023.

IF THE CLAIM IS DEEMED COMPENSABLE:

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

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

IV. Whether Claimant has proven by a preponderance of the evidence that she was entitled to temporary total disability benefits from March 7, 2023 until terminated by law.

V. Whether Respondents have proven by a preponderance of the evidence that Claimant was terminated for cause.

STIPULATIONS

The parties stipulated that, if the claim was found compensable, Claimant's average weekly wage was $720.00, not including the costs of replacing health insurance benefits or other benefits.

FINDINGS OF FACT

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

A. Generally

1. Claimant was a housekeeper for Employer, working full time in the critical care unit (CCU) for approximately thirty (30) years and was 55 years old at the time of the hearing. She was 5' 5" tall. Claimant was responsible for cleaning her assigned floor which included sixteen (16) rooms, the waiting area, the public bathrooms and the nurses' station, including lifting trash, wet linens, mopping and sweeping. She worked the 5:30 a.m. to 2:00 p.m. shift. Claimant considered this very heavy and hard work.

2. Claimant was assigned a housekeeping closet where she kept her cart and the supplies needed to perform her job. The closet also had a sink, a floor sink or drain and a mobile wire rack or cart where the supplies were kept. The room was just big enough to fit her cart, her supplies and herself. When she arrive at work first thing in the

morning, she would enter her housekeeping closet, though it was a tight fit. She would typically stand between her cart, that reached right below her chest[1] and the supply cart, which was lined up against the wall next to the sink.

3. Prior to her work related accident, she had no problems with either her low back or her right shoulder.

B. The accident

4. Claimant was working her normal schedule and job on March 6, 2023. She was injured when, the door of her closet closed shut and when she tried to exit the housekeeping closet, the door handle and the cart stuck together, effectively locking her in the closet with her cart. Claimant contacted the housekeeping office and asked the individual that answered to help her get out. After waiting approximately 15 minutes, Claimant was worried that she had to start work and that her time was counting.

5. On March 6, 2023, Claimant lifted the cart from the bottom to disentangle it from the door handle and while she was doing that, she twisted, injuring her right shoulder and low back going into the buttock area, though she was able to exit the closet. Claimant felt a stabbing sensation, like a nail had stabbed her in the low back.

6. It was not until after she was out of the housekeeping closet that the night team lead arrived to help. They removed the cart and Claimant proceeded to begin working.

7. Claimant's supervisor contacted Claimant to request she clean a specific room and Claimant reported that she had hurt herself. His response was "Dear, dear, dear, one clean, one discharge," explaining that the room where the patient was discharged needed to be done right away. Claimant continued her duties and when her supervisor approached her again, Claimant again explained that she was hurt that morning. Her supervisor did not send her to a provider. He insisted she continue cleaning her floor and advised her he would not assign her any extra work. Claimant proceeded to complete her floor, though she had a lot of difficulty due to the pain, especially with the trash, the linens and mopping. Claimant then went to the office to punch out early, at approximately 11:30 a.m. or 12:00 p.m. The housekeeping Assistant Director provided her a patch to put on her back and an ice pack, advising her not to return to work the following day. The Assistant Director counselled her that she would be better with some rest, probably by the next day. That is why Claimant did not go to the emergency room that day.

8. On March 7, 2023, when she woke up, she continued to have pain in both her low back and her right shoulder. The housekeeping Assistant Director contacted Claimant that day and requested Claimant report to the office to complete and sign some paperwork. Her husband accompanied her. The Assistant Director did not speak Spanish, so the clerk helped with translation. The paperwork included a "write up." Claimant explained that she had not done anything wrong and what happened to her on March 6, 2023 was simply an accident. Claimant understood the Assistant Director to

[1] Claimant is 5' 5" tall so if her cart reached just below her chest, it would be at least 3 and one half (3 ½) foot tall.

say that if Claimant wished to have medical attention that she had to sign the document. She understood that it was a new company policy to issue write ups when an employee had an accident. Claimant declined to sign something that held her responsible for her accident. When she declined, Claimant understood the Assistant Director to advise Claimant that if she did not sign, that she was terminated. She was not provided a copy of the paperwork she needed to complete. Claimant left the office. At no time did anyone send her for medical care or provide her the name and address of a provider. Neither did anyone from her Employer contact her as she would have recognized the phone number. Claimant never contacted Employer as she believed she had been fired.

9. Claimant went immediately thereafter to the St. Anthony emergency room. At that time she was in pain, felt nausea, like she was about to vomit. They provided her with pain medications, which helped for a time but the pain returned.

10. She did not obtain any other medical care because she did not have the funds or insurance, but she continued to have pain in her right shoulder and low back. Claimant indicated that she wished to have medical care and has some urgency because of the pain.

11. She indicated that she could not work in the condition she was in at this time because the work was heavy and she did not have strength in her low back because of the pain.

C. Medical Records

12. Claimant was seen at the St. Anthony Hospital Emergency Department on March 7, 2023 by Erin Steins, R.N. and Scott Wesley Branney, M.D. They documented that Claimant had been lifting something heavy “at work starting yesterday while working”, and twisted while doing so, and felt a “pop” in her low back which caused persistent pain, greater on the left side than the right side. She rated her pain upon arrival at 9, then after she was given medications in the hospital including a Toradol injection for the pain, at a 6 out of 10, with radiation into the posterior left buttocks and posterior left leg. Dr. Branney gave a differential diagnosis of cauda equine syndrome, acute disc herniation, sciatica and muscle strain. He noted that examination was consistent with muscle strain with left sided sciatica, recommended medications including anti-inflammatories, oxycodone-acetaminophen, Methocarbamol as well as Lidoderm patches. She was instructed to follow up with another provider for further care. The CT was simply read as “normal” by Dr. Blaze Cook.

13. Dr. John J. Aschberger conducted an Independent Medical Examination pursuant to Respondents’ request. Dr. Aschberger took a history of the mechanism of the injury, which included a lifting and twisting motion, injuring her low back and right shoulder. He reviewed the emergency room records. He noted that he questioned Claimant regarding her treatment and Claimant indicated that she was dissatisfied with the care they provided and that they were focused on her low back so did not address the right shoulder.

14. Claimant reported that she continued with pain in the lower lumbar area and "waist" with radiation to the gluteal musculature and into the groins. She had "numbness" in both legs, predominantly on the left with electrical shock sensation occurring

intermittently, again bilaterally, but predominantly on the left. She reported pain at the right shoulder anteriorly and laterally, like "a nail going in." She indicated the onset began with the initial injury. She had difficulty with motion at the shoulder with no radiation.

15. On exam, Dr. Aschberger noted tenderness in the sacral sulcus on the left, limited range of motion of the lumbar spine, extension being restricted with increased pain in the lower back, lateral flexion was tight bilaterally, with pulling at the lumbosacral areas, the left SI joint was locked with forward flexion, Claimant was positive for facet loading, and a markedly positive Patrick's test on the left. Dr. Aschberger specifically noted that pain behaviors were not excessive. Dr. Aschberger remarked that exam of the right shoulder showed a negative impingement test, Spurling's and full range of motion, but noted that Claimant had anterior tenderness, weakness with supraspinatus testing and external rotation, and had tight trapezial musculature. He specifically noted that there were objective limitations with a consistent examination.

16. Dr. Aschberger provided a provisional impairment of 20% whole person (WPI) that included a 12% right upper extremity impairment which converted to a 7% WPI, a Table 53IIB 5% for the lumbar spine and a 9% loss of range of motion of the spine. He recommended further medical care for the lumbar spine including medication management with anti-inflammatories, muscle relaxants, and sleep medication, as well as intervention with physical therapy and/or chiropractic care. He also stated that, if Claimant continued to fail to improve, that further imaging might be warranted. He also recommended further diagnostic evaluation for the right shoulder.

D. Employment Records

17. The Floor Tech Position, initialed by Claimant in 2016, which is the description of Claimant's job, noted that Claimant was required to be able to lift up to 40 lbs. frequently with lifting of equipment and other items up to 100 lbs., being able to stand, walk, squat, bend, twist, kneel, and reaching continuously, pushing and pulling a maids' cart, linen cart, or various equipment on tile or carpeted floors continuously, handle and interact with chemicals, dust, vacuum, mop and use the wringer for the mop as well as clean and detail bathrooms, among other duties.

18. The Employer's First Report of Injury (FROI) was completed by Claimant's supervisor on March 10, 2023. He reported that Claimant had injured her shoulder on March 6, 2023 and that Claimant had "notified" Employer of it on March 6, 2023. The report stated that Claimant "reported to manager on duty that she had been stuck in her housekeeping closet which claims she was in before clocking in. In the process of being stick/trapped (sic.) inside her initial chief complaint was of soreness in the shoulder. The TM[2] insisted on comp." This ALJ infers from this statement that Claimant had other complaints other than those initially reported. It is further deduced that Employer knew or should have known that Claimant was claiming a work injury and required care as she insisted on having compensation benefits.

19. Claimant filed a Worker's Claim for Compensation on March 27, 2023. Claimant reported that she had been in the process of taking mops to the janitor closet,

[2] This ALJ infers that TM means team member.

when she had to lift the cleaning cart to move it, hurting her low back and hip on March 6, 2023.

20. Claimant's wage records, pay check stubs, and compensation summary all indicate that Claimant's rate of pay was $18.00 per hour and $720.00 per week. They further showed Claimant was unlikely to have had any benefits such as medical insurance which would increase her average weekly wage.

E. Housekeeping Assistant Director Testimony

21. The Assistant Director for Employer had been working for them for approximately seven years, and had been the Director of Housekeeping but, at the time of Claimant's work injury, she was the Assistant Director. She was familiar with Claimant. She stated that the paperwork for work-related injuries was completed by the Director or Assistant Director. She stated

> When an injury is reported there is paperwork that needs to be filled out by both the injured party and then the management team. And then it is up to the injured if they want to be treated for their injury. They could accept or they can decline. And then there is a form that needs to be signed, which is a verbal coaching.
> …
> So there are a couple of forms that need to be filled out. It is just the injured party stating and acknowledging that, yes, she was injured, or, no, she was not injured. Or, yes, she was injured but she declined medical treatment. And then there is a form that needs to be filled out, which is a verbal coaching, saying that, you know, this is going to go into your record. You acknowledge that a policy was violated, so not practicing work safe mechanics while on the job.

22. She described the housekeeping closets as a six foot by four foot room, though they varied in size depending on the floor. She stated that the Claimant's cart was approximately three feet wide by four feet long, weighing approximately 60 lbs. if it was fully stocked. The Assistant Director disagreed that Claimant would be able to fit in her closet between her cart and the wire rack of supplies.

23. The Assistant Director believed Claimant first reported the injury to her supervisor. She reported that Claimant had gone into the office to speak with her and when asked if Claimant required medical care, Claimant answered that she did. Her admin assistant interpreted for them. When presented with the write-up, Claimant became upset, was speaking Spanish to her husband and declined to sign the paperwork, after which they left.

24. The Assistant Director indicated she had not conveyed to Claimant that she would be fired for not signing the warning and that Claimant did not complete any of the paperwork. She stated Claimant never re-contacted Employer or provided any doctor's note.

25. She stated that she did not know when Claimant was finally terminated from her employment with Employer but that she was not longer an employee. She believed there was an employee file that had not been produced to Claimant's counsel but that she did not have access to the file or the write-up form, Form 230. The Assistant Director did not believe that Claimant was written-up for failure to show to work. She did not mail

a designated provider list (DPL) to Claimant, stating that it was “in her file if we still have it.”

F. Conclusory Findings

26. As found, Claimant was injured in the course and scope of her employment with Employer on March 6, 2023. She was in her housekeeping closet. When she went to leave the closet, she noted that the handle of her cart was entangled with the closet door handle. She was unable to move it so she lifted the cart to get out. While doing so, she twisted and injured her right shoulder and low back. As found, this likely was to be anticipated as the closet was very small and there was little room to move in order to lift her cart.

27. As found, Claimant reported her injuries to her supervisor, though he did not send her to a provider and required that she complete the floor before she could go home to rest. She left approximately two hours before the end of her normal schedule. As found, Claimant went to clock out early in the housekeeping office and she was provided with an ice pack and a patch to put on her back and instructed not to show the next day in order to recuperate. As found, Claimant was credible and persuasive.

28. As found, Claimant was called in the following day and she, again, reported her injuries, this time to the Assistant Director of Housekeeping. She advised she required a medical provider but was advised that she needed to sign the “write-up” before she would be given any documentation or referral. As found, Claimant declined to state that she had violated any company safety policy. Claimant was never sent a designated list of providers. Claimant was appropriately attended at the emergency room on March 7, 2023. Further, as found, the right of selection of an authorized provider passed to Claimant when Respondents failed to send Claimant the DPL despite Claimant having reported her injury on multiple occasions, including to her supervisor, the Assistant Director and by filing a WCC.

29. As found, Claimant requires medical attention as recommended by Dr. Branney and Dr. Aschberger. Claimant continues to have symptoms and complaints that have not been addressed and she is requesting further medical care. Claimant is credible and persuasive.

30. As found, Claimant has been unable to return to work due to her ongoing physical limitations related to the injuries which were caused by the March 6, 2023 accident.

31. As found, the Assistant Director of Housekeeping was not persuasive in her arguments that Claimant elected to be terminated. As found, Claimant believed that the clerk interpreting for her on March 7, 2023 stated that Claimant had to sign the admission of guilt (write-up) to obtain medical care and Claimant reasonably declined to sign a statement that she did not believe was correct. As found, Claimant’s understanding was supported by the fact that Employer took no further steps to provide Claimant with a DPL by mail or contact Claimant to discuss the alleged misunderstanding. Respondents’ complete disregard for an employee that had been working for Employer for 30 years speaks for itself. As found, Claimant did not act in a volitional manner. Claimant is more credible and persuasive over the contrary testimony of the Assistant Director.

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

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or

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

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

A compensable industrial accident is one that resulted in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). To establish a compensable injury an employee must prove by a preponderance of the evidence that her injury arose out of the course and scope of employment with her employer. Section 8-41-301(1)(b), C.R.S. (2020); *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 her employment and during an activity that had some connection with her 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 had its "origin in an employee's work-related functions and was 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); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there was a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that 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).

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

As found, Claimant has shown that she was injured in the course and scope of her employment. Claimant was in the process of tending to work activities, including taking a mop into her housekeeping closet. Claimant would typically go into her closet while her housekeeping cart was in the closet to supply it, and it was a tight fit. Claimant's testimony

in this regard is more credible and persuasive than that of the Assistant Director of Housekeeping who stated that it was not possible for Claimant to be in her closet at the same time as her cart because they could not fit. Clearly, Claimant had been performing this job for 30 years and had a system or routine. Claimant has shown that it was more likely than not that she was within the course and scope of her work related activities when she injured her shoulder and low back, lifting the housekeeping cart, which was entangled with the doorknob, in order to exit the closet. This is supported by the medical records, the FROI and the Worker's Claim for Compensation.

Further, Claimant has shown by a preponderance of the evidence that she injured her shoulder and low back in the process of lifting her cart and required medical attention and continues to require medical attention. Claimant was attended at the emergency room at St. Anthony. Dr. Branney and Nurse Steins took roughly consistent histories of the mechanism of injury as credibly described by Claimant. Even Respondents' IME physician, Dr. Aschberger, described the mechanism consistently. These medical providers are credible and persuasive. It is particularly persuasive that, since the closet was so small, she had to twist in the limited space in order to manipulate the 60 lb. cart away from the door so she could get out, after been locked in the confined space for a quarter hour. As found and concluded, it is more likely than not that Claimant sustained injuries to her right shoulder and low back which were proximately caused by the accident at work on March 7, 2023.

C. Medical benefits

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

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Indus. Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance," in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006); *Loofbourrow v. Indus. Claim Appeals Office*, 321 P.2d 548 (Colo. App. 2011). If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury. *Brunch, supra*. An employer is deemed notified of an injury when it

has some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim. See Sec. 8-42-101(1)(a), C.R.S.; *Jones v. Adolph Coors Co.,* 689 P.2d 681, 684 (Colo. App. 1984); *Berends v. Town of Kiowa*, I.C.A.O., W.C. No. 5-162-468 (August 28, 2023).

The respondents are liable for emergency and authorized medical treatment reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777, 781 (Colo. App. 1990)("[I]in an emergency situation, an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical attention."). Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, *supra*; *see also* W.C.R.P. 8-3. The question whether medical treatment was reasonable and necessary to cure and relieve the effects of the injury is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The emergency exception is not necessarily limited to life-threatening situations, and whether a “bona fide emergency” existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). Since Claimant was not provided a list of providers, she was initially seen at St. Anthony Hospital where it was determined her condition was significant enough to inject her with Toradol and provide her with narcotic medications. Claimant requested medical care and Employer failed to provide her with any documentation of where she was to be attended. This information should not have been held hostage by Employer simply because Claimant declined to agree and sign a verbal coaching that required Claimant to admit that she was responsible for a policy violation in not working safely. Respondents failed to even allege that they had provided Claimant with any documentation they were alleging Claimant failed to complete. Claimant has shown that this was an emergent need for care and St. Anthony Hospital and its providers are authorized. Respondents are liable for payment of Claimant’s St. Anthony emergency room visit on March 7, 2023.

As further found, Employer knew of the injury. Claimant was credible and persuasive that she reported her injury right after it happened, was in instructed that she could go home after finishing her floor, which she did approximately two hours before her regularly scheduled time to leave, and was told that her condition might very well resolve overnight. Claimant met with the Assistant Director the day following the accident and again reported her accident. Respondents never referred Claimant to a medical provider to treat the injuries. Rule 8-2(1)(A) is very clear that, when an employer has notice of an on-the-job injury, the employer or insurer “shall provide” the injured worker with a verifiable written list of designated providers, which clearly did not take place here. Accordingly, the right of selection passed to Claimant and she may now see a doctor of her choice. In this case Claimant has designated Dr. Yamamoto, who is now an authorized treating physician.

Claimant has shown she is entitled to medical benefits that are reasonably necessary and related. Claimant was credible and persuasive that she needed further medical care and was asking for further medical care for her March 6, 2023 work related

injuries. Respondents' own IME physician, Dr. Aschberger, noted that Claimant needed medical care for the lumbar spine including medication management with anti-inflammatories, muscle relaxants, and sleep medication, as well as intervention with physical therapy and/or chiropractic care. He stated that, if Claimant continued to fail to improve, that further imaging might be warranted. He also recommended further diagnostic evaluation for the right shoulder. This ALJ infers from Dr. Aschberger's report that the imaging needed is an MRI of the right shoulder in order to determine if Claimant requires further medical care related to the shoulder. Dr. Branney also recommended that Claimant follow up with another provider. As found and concluded, Claimant requires medical attention that is reasonably necessary and related to the injuries to her right shoulder and lumbar spine as well as the sequelae of both injuries, which Claimant sustained as a consequence of the March 6, 2023 work related accident. Claimant has shown that the medical care in question are proximately caused by the March 6, 2023 accident and authorized medical treatment is reasonably necessary to cure and relieve Claimant from the effects of a work related injuries.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The parties stipulated that Claimant's average weekly wage was $720.00, which is also supported by the evidence. The parties' stipulation is approved and part of this order.

E. Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume 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 perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant's testimony and the medical records support Claimant's inability to return to her regular employment. Claimant credibly and persuasively testified that she was unable to perform the work in housekeeping after March 6, 2023 because it was very heavy for her and she would not be able to do what was required of her. While she

followed her supervisor's instructions to finish her floor on March 6, 2023, it is found that Claimant had a lot of difficulty doing so and left at least two hours before her scheduled time to leave, and she left due to her injuries. Claimant has continued to be off work since her work related injury of March 6, 2023, causing her wage loss. Further, she credibly testified that she was unable to work at this time due to the pain and lack of treatment. Nothing in the portions of Dr. Aschberger's report that was in evidence nor the emergency room records indicated that Claimant would be able to physically return to work at this time. In light of the lack of substantial medical records to the contrary, this ALJ is persuaded by the totality of the evidence that Claimant is unable to work at this time and is entitled to temporary total disability benefits beginning the day following her work injury on March 6, 2023 to the present until terminated by law. Claimant has proven by a preponderance of the evidence that she is owed TTD benefits.

Claimant is owed TTD at least to the date of the hearing, including interest pursuant to statute for benefits which were not paid when due. Benefits through the date of the hearing and interest are calculated below. Further, Respondents continue to owe benefits following this date, including interest, until terminated by law.

[Redacted, hereinafter BC]

F. Responsible for Termination and Termination for Cause

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide 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." The respondents must prove that a claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, it is clear that Claimant reasonably believed that she was terminated by Employer's representative, the Assistant Director. Employer communicated through the admin assistant of the Assistant Director, who was translating for Claimant. Claimant understood the Assistant Director to state that, if she did not sign the "write-up" or "verbal coaching" that she could not be attended by a medical provider and was terminated. The

admin assistant did not testify and this ALJ found the Claimant's testimony credible, especially in light of the Assistant Director's explanation that the verbal coaching noted that the write-up was going into Claimant's permanent record and that it was Claimant's acknowledgement that a policy was violated because Claimant was not practicing safe work mechanics while on the job. It is clear from the Employer's job description that Claimant would, at the very least, be required to lift items of up to 100 lbs. on an occasional basis. The cart was no more than 60 lbs. as stated by the Assistant Director. Further, Claimant called the office and was locked in the closet, for what clearly seemed a long time to Claimant, without assistance. As found, Claimant acted reasonably in extricating herself from a situation that was not in any way volitional and it was unreasonable of Employer to require that Claimant sign a document requiring her to admit to being guilty of a policy violation when there was no policy violation in the acts Claimant exercised in moving her cart. As found, the act of refusing to sign such a document also is found not to be a policy violation. Respondents failed to provide persuasive evidence that there was a policy in place at the time of Claimant's work related injury that required Claimant to sign a document admitting to some kind of responsibility for the accident that occurred. Of course, there was no documentation in evidence of what the policy was other than testimony of the Assistant Director, who was not credible. There were no further write-ups of policy violations following Employer's termination of Claimant, no employment file showing the documentation that Employer was asking Claimant to sign nor any other documents or other actions by Employer following the termination. From the totality of the evidence, as found, Claimant was found credible and persuasive that Employer terminated Claimant on March 7, 2023 and Claimant was not at fault for the termination.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant proved by a preponderance of the evidence that she sustained work related injuries to her right shoulder and low back on March 6, 2023.

2. Respondents shall pay for reasonably necessary and related medical benefits for the treatment of Claimant's right shoulder, low back and any sequelae of the injuries in this matter, including the emergency visit to St. Anthony Hospital.

3. The right to select an authorized treating physician passed to Claimant and Claimant selected Dr. David Yamamoto who is now an authorized treating physician.

4. The parties stipulation is accepted and ordered, noting that Claimant's average weekly wage was $720.00 per week and her TTD rate is $480.00.

5. Respondents shall pay for TTD from March 7, 2023 until terminated by law.

6. Respondents shall pay interest on all benefits not paid when due pursuant to Sec. 8-43-410(2), C.R.S.

7. Respondents shall pay the benefits due through the date of the hearing in the amount of $14,928.58. Respondents shall continue to pay until terminated by law.

8. Respondents failed to show by a preponderance of the evidence that Claimant was either responsible for her termination or was terminated for cause.

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

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

DATED this 4th day of December, 2023.

By: _____

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that Claimant's August 24 and 25, 2022 hospitalization was reasonably necessary to cure and relieve Claimant of the effects of his April 21, 2020 work injury, and whether Respondents are liable for the cost of that treatment.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on April 21, 2020, consisting of contraction of COVID-19. Respondents filed an admission of liability for the injury.

2. Claimant was admitted at Sky Ridge Medical Center beginning on April 24, 2020, where he was intubated until May 10, 2020, then transferred to Spaulding Rehabilitation Hospital on May 21, 2020, and then to the Medical Center of Aurora where he was treated for pulmonary embolism from May 23, 2020, through May 26, 2020, before he was readmitted to Spaulding Rehabilitation treating with Dr. Castro.

3. In June 2020, Claimant complained of severe, right sided flank and low back pain from kidney stones. Medical records document an acute kidney injury following his COVID diagnosis. Claimant testified that he is more susceptible to get kidney stones as a result of his work-related acute kidney injury. Symptoms related to his acute kidney condition included significant right flank and right lower back pain. Claimant also later testified that his authorized treating physician, Dr. Ramaswamy, advised him to go to the emergency room should he experience such pain because he had serious kidney problems requiring dialysis as a result of his COVID infection.

4. On August 24, 2022, more than two years after his initial hospitalization, Claimant sought unauthorized emergency care outside the chain of referral UC Health Emergency Department complaining of problems with his knee and his abdomen. Claimant believed he was suffering from work-related kidney stones, as his symptoms were consistent with those he experienced with the work-related kidney stones in 2020. The clinical impression was acute flank pain with right-sided low back pain without sciatica. Claimant underwent an ultrasound of his kidneys which was normal. There were no kidney stones. Claimant was treated with a lidocaine patch for his back pain and discharged on August 25, 2022, with a prescription for

physical therapy. Claimant was counseled on the need to follow up with his primary care provider.

5. Claimant underwent independent medical examinations with Dr. Scott Primack at Respondents' request on November 16, 2021, and February 16, 2023. In his report from the February 16, 2023, Dr. Primack addressed whether the August 24, 2022 hospital visit was related to Claimant's April 2020 COVID-19 hospitalization: "Based upon his history, clinical examination, knowing that this patient had work-related Covid, this most recent hospitalization, in no way shape or form would be considered work-related." He reasoned that Claimant's symptoms were more in line with sciatica, which he felt to be unrelated to Claimant's prior COVID-19 diagnosis.

6. Dr. Ramaswamy, after reviewing Dr. Primack's report, opined that Claimant's August 24 and 25, 2022 hospital stay was not work related and noted that "low back pain, sciatica, flank pain would not relate to this injury or to treatment related to this injury."

7. At hearing, Claimant testified that he felt compelled to go to the emergency room based on his weakened condition, pain levels, and Dr. Ramaswamy's advice to seek emergency treatment if he experienced kidney pain.

8. Dr. Primack testified that the cardiopulmonary issues caused by the COVID-19 results in acute kidney injuries. However, Dr. Primack testified that more than two years after his COVID-19 hospitalization any kidney stones would not be related to Claimant's COVID-19 diagnosis. Furthermore, Dr. Primack opined that Claimant's type-II diabetes, which Claimant had had for more than twenty years, doubled Claimant's risk for kidney stones. Therefore, in his opinion, the kidney stones were more likely due to Claimant's diabetes than his COVID-19.

9. The Court finds Claimant's testimony to be credible insofar as Claimant did subjectively believe that he had COVID-19-related kidney stones and sought treatment on August 24, 2022, based on Dr. Ramaswamy's prior advice to seek emergency treatment should he experience symptoms similar to those of kidney stones in the future. The Court also finds Dr. Primack's and Dr. Ramaswamy's opinions credible insofar as they opined that Claimant did not in fact have a kidney stone in August 2022, that his pain was related to sciatica, and that the sciatica was not related to Claimant's COVID-19 diagnosis.

10. The Court finds that the treatment Claimant received on August 24 and 25, 2022, was not reasonably necessary to cure and relieve Claimant of the effects of the work-related April 21, 2020 COVID-19 contraction.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Benefits – August 24 and 25, 2022 Hospitalization

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

In a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. *Snyder v. Indus. Claim Appeals Office of the State of Colo.*, 942 P.2d 1337, 1339 (Colo.App.1997).

Claimant argues that the emergency care obtained on August 24 and 25, 2022, was reasonably necessary to cure and relieve Claimant of the effects of his admitted injury. Specifically, he argues that his symptoms were identical to those he experienced in 2020 as a result of work-related kidney stones, and that he reasonably believed he was experiencing a new episode of work-related kidney stones and therefore sought treatment based on Dr. Ramaswamy's prior advice. In support thereof, Claimant cited *Sims v. Indus. Claim Appeals Off. of the State of Colo.*, 797 P.2d 777 (Colo.App.1990), for the proposition that an employee need not give notice to the employer prior to seeking medical care in an emergency situation.

Claimant argues that the fact that Claimant did not in fact have kidney stones is not relevant and that the investigation at the hospital was reasonably necessary to rule out work-related kidney stones. He reasons, "It is no different than an injured worker seeking further diagnostics sometime after the date of injury because of, for example, increased shoulder pain. If diagnostics of the hypothetical shoulder condition did not produce an explanation, it would not be later claimed unnecessary for purposes of establishing entitlement to medical benefits."

Respondents, in turn, argue that they are responsible only for that medical treatment that is reasonably necessary to cure and relieve Claimant of the effects of his work injury. Respondents contend that Claimant's subjective belief and actions, such as following advice from Dr. Ramaswamy, do not automatically render the treatment work-related, emphasizing the need for a proximate cause.

Regarding emergency medical care, Respondents argue that even if Claimant genuinely believed it to be a bona fide emergency, Respondents are not liable unless the need for treatment was caused by the work injury. Respondents cite *Madonna v. Walmart*, W.C. No. 4-997-641-02 (August 21, 2017), to support the assertion that liability for emergency medical treatment arises only when it is proximately caused by the work injury.

In *Sims*, 797 P.2d 777, a claimant obtained emergency treatment for an accident. The claimant's emergency physician then referred him to another physician, a physician not on the employer's designated provider list, with whom he sought treatment. An ALJ later determined that the treatment with the post-emergency doctor was not authorized by the employer. Although the ALJ in that case determined that the claimant did not sustain a compensable injury, the ALJ in that case did not address whether the employer was responsible for payment for the emergency treatment. *See Madonna* ("[T]he holding in *Sims* does not dictate the conclusion that the respondents may be held liable for emergency medical care for an injury that is not compensable.")

In the following years, various panels of the ICAO have reviewed cases implicating *Sims*. In *Mctaggart-Kerns v. Dell*, W.C. No. 4-915-218-02 (May 29, 2014), a claimant was involved in a motor vehicle accident arising out of and in the course of her employment. She sought treatment immediately at the emergency room with various pain complaints and due to a concern that a medication she had been taking made her particularly susceptible to a brain bleed. At the emergency room, all tests were negative. An ALJ later determined that the claimant did not sustain any injuries arising from the accident, and therefore there was no compensable claim, thus denying the claimant's request for the respondents to pay for the emergency room visit. The claimant appealed, arguing that the emergency room evaluation was necessary in order to evaluate her for a possible brain bleed or other injuries. The ICAO panel held that § 8-42-101(1)(a), C.R.S., does not provide for medical benefits where no injury in fact results from the accident.

Several years later, in *Madonna v. Walmart*, W.C. No. 4-997-641-02 (August 21, 2017), a panel of ICAO addressed a similar issue. In *Madonna*, an ALJ determined the claim was not compensable but nevertheless ordered the respondents to pay for the emergency medical treatment initially obtained by the claimant. The ICAO panel reversed the ALJ, holding that "since the ALJ did not find a causal relationship between the claimant's need for medical treatment and the work incident . . . the respondents may not be held liable for emergency medical treatment provided to the claimant."

In *Madera v. GCA Services Group*, W.C. No. 5-048-431 (May 6, 2020), an ICAO panel addressed a somewhat different, yet distinguishable set of facts. In *Madera*, an ALJ found that the claimant did not sustain a compensable injury and that concluded that the issue of medical benefits was therefore moot. The claimant appealed, arguing that where the respondents accepted and paid for medical treatment with designated providers while the claim was under a denial for further investigation, the claimant should not later be held liable for the medical expenses, citing § 8-42-101(6)(a), C.R.S., which provides in part, "An employer, insurer, carrier, or provider may not recover the cost of care from a claimant where the employer or carrier has furnished medical treatment except in the case of fraud." The respondents argued in turn that *Madonna* controlled insofar as it held that respondents are not liable for medical care that is not reasonably necessary to cure and relieve the effects of a compensable injury. The ICAO panel rejected the respondents' argument, noting that *Madonna* involved emergency care, not care furnished by the employer, and therefore was distinguishable. Therefore, the panel held that the issue of medical benefits was not moot, thus remanding the issue to the ALJ for further findings.

The facts of the present case are unique from those of *Sims*, *Madonna*, and *Madera*. Specifically, in this case, the injury involved an admitted claim in which Claimant had already selected an authorized treating physician. At least one of Claimant's authorized treating physicians, Dr. Ramaswamy, recommended that Claimant go to the ER should he experience such pain because he had serious kidney problems requiring dialysis as a result of his COVID infection. Claimant did in fact have serious pain that he reasonably believed to be related to his work injury and therefore sought medical

treatment based on Dr. Ramaswamy's past advice. However, it turned out that the pain and the treatment were wholly unrelated to Claimant's compensable condition.

However, despite Claimant having sustained a compensable injury in this case, the Court finds that Claimant's need for treatment on August 24 and 25, 2022, did not arise from his April 2020 work injury. Section 8-42-101(1)(a), C.R.S., provides that respondents are liable for costs of medical treatment only where the need for treatment arises from a compensable injury. In this case, the need for treatment does not.

Although Claimant argues that the emergency room visit was reasonably necessary to rule out the possibility of another kidney stone related to the injury and should therefore be compensable, the ICAO rejected a similar argument in *Mctaggart-Kerns*. Based on the rationale in *Mctaggart-Kerns*, this Court concludes that it may not order Respondents to pay for otherwise unauthorized emergency medical treatment obtained only to rule out the involvement of a compensable condition.

While § 8-42-101(6)(a), C.R.S., provides that an employer may not recover the costs of medical treatments furnished by the employer, the Court finds that Respondents did not furnish the treatment for the episode of care on August 24 and 25, 2022. Therefore, because Respondents did not furnish the August 24 and 25, 2022 treatment, and because that treatment was not reasonably necessary to cure and relieve Claimant of the effects of the April 21, 2020 injury, Respondents are not liable for the cost of medical treatment for the episode of care of August 24 and 25, 2022.

ORDER

It is therefore ordered that:

1. Claimant's request for compensation for the August 24 and 25, 2022 episode of medical care is denied.

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: December 4, 2023.

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

ISSUES

1. Whether Claimant has proved by a preponderance of the evidence that the sacroiliac joint injection and chiropractic care recommended by Dr. Miller on April 4, 2023, are reasonable, necessary, and related to the industrial injury.

2. Whether Respondent has proved by a preponderance of the evidence that maintenance medical care is no longer reasonably necessary to maintain Claimant's status at maximum medical improvement.

FINDINGS OF FACT

1. Claimant was a parts clerk for Respondent who sustained an admitted injury on August 29, 2019, when he developed low back and neck pain while bending over to reposition a heavy metal frame onto a rack.

2. The following day, Claimant obtained treatment with his authorized treating physician, Dr. Kirk Holmboe, at Midtown Occupational Health Services. Claimant complained of tenderness over his left sacroiliac area. Dr. Holmboe performed a physical examination and noted left low back pain. He diagnosed Claimant with a left sacroiliac strain and a cervical strain.

3. Claimant began undergoing physical therapy and chiropractic care. At Claimant's September 12, 2019 visit with chiropractor Dr. Jason Gridley, Dr. Gridley performed a Patrick's test and sacroiliac joint loading maneuvers with positive reproduction of symptoms in Claimant's left sacroiliac joint.

4. On October 10, 2019, Dr. Marc Steinmetz, one of Claimant's authorized treating physicians referred Claimant for a lumbar MRI. Claimant underwent the MRI on November 5, 2019. The MRI showed multilevel degeneration at the L4-L5, L5-S1, broad based left paracentral disc protrusion at L4-L5, and disc herniation at L5-S1 impinging the left L5 nerve root in the foramen.

5. Claimant was referred for psychological counseling with Ms. Susie Love, M.A., L.P.C, under the supervision of Dr. Timothy Shea, Psy. D. Claimant was diagnosed with adjustment disorder, anxiety, and insomnia. Notably, Claimant complained of intermittent left sacroiliac joint pain.

6. On January 21, 2020, Claimant underwent left L4-L5 and L5-S1 transforaminal epidural steroid injections. Several weeks later, on February 5, 2020, Claimant saw Dr. Miller and reported substantial improvement in his pain. Claimant also saw Dr. Steinmetz that day who assigned Claimant temporary work restrictions of maximum lifting of 40 pounds.

7. Claimant again had increased pain at his May 11, 2020 appointment and underwent additional epidural steroid injections two days later.

8. At Claimant's June 3, 2020 appointment with Dr. Steinmetz, Claimant reported improvements in his pain with his therapy and chiropractic treatment. Dr. Steinmetz released Claimant to full duty.

9. On June 30, 2020, Claimant complained to Dr. Steinmetz of increased back pain after having returned to full duty.

10. At Claimant's October 8, 2020 visit with Ms. Love, Ms. Love observed that Claimant's coping skills and mood management had improved. She recommended additional sessions to help Claimant with his continued anxiety.

11. Claimant was ultimately placed at maximum medical improvement by Drs. Steinmetz and Miller on December 2, 2020. Claimant was still experiencing left low back pain and lateral upper left thigh discomfort at that time. Dr. Steinmetz recommended maintenance medical treatment consisting of continued visits with Dr. Miller. He also provided Claimant with permanent work restrictions of lifting up to twenty pounds.

12. Claimant requested a Division independent medical examination, which took place with Dr. John Douthit on April 12, 2021. Dr. Douthit concurred with Drs. Steinmetz and Miller regarding Claimant's date of MMI. Respondent consequently filed a Final Admission of Liability consistent with Dr. Douthit's report and admitted for open medical maintenance benefits.

13. Claimant continued with chiropractic care under his maintenance medical care. On April 13, 2021, Claimant reported to Dr. Gridley that he was experiencing pain across the lower lumbar region and left upper sacroiliac joint region. Dr. Gridley's evaluation was consistent with mild sacroiliac joint restriction on the left.

14. On May 1, 2021, Claimant saw Dr. Steinmetz. Claimant continued to complain of back pain and discomfort. However, he was also concerned that he would not be able to find employment within his permanent work restrictions. Claimant requested that Dr. Steinmetz loosen his restrictions. However, Dr. Steinmetz was not comfortable doing so and referred Claimant to Dr. Miller.

15. Claimant followed up with Dr. Miller. At that appointment, he complained of tenderness over his sacroiliac joint. Claimant requested Dr. Miller loosen his

restrictions. Dr. Miller agreed to have Claimant undergo a functional capacity evaluation to determine what loosened restrictions would be appropriate.

16. Claimant underwent an independent medical examination with Dr. Carlos Cebrian at Respondent's request on July 9, 2021. Dr. Cebrian concurred with the date of MMI and found that the recommended maintenance care was reasonable and necessary.

17. On August 6, 2021, Dr. Miller assigned Claimant loosened permanent work restrictions of below-waist lifting maximum of sixty pounds occasionally and forty pounds frequently, above-waist lifting to sixty pounds occasionally and fifty pounds frequently, sitting maximum of forty minutes per hour, standing maximum of one hour, maximum pushing of sixty-five pounds, and maximum pulling of seventy-five pounds.

18. Claimant returned to Dr. Miller on November 5, 2021, complaining of a flare up in back pain. On physical examination, Dr. Miller noted tenderness of the left sacroiliac joint with a positive Yeomans and Patrick's tests. Dr. Miller recommended a repeat rhizotomy.

19. Claimant saw Dr. Gridley on November 23, 2021, and complained of diffuse back pain, primarily in the lumbosacral junction and sacroiliac joint.

20. On December 6, 2021, Dr. Miller performed the rhizotomy. Claimant reported that the procedure was very helpful and resulted in a 70 percent improvement of his symptoms.

21. Claimant returned to Dr. Miller on March 20, 2022. At that appointment, Claimant requested that Dr. Miller release him to full duty, which Dr. Miller did. Claimant later testified that he had not been allowed to work for Respondent due to his work restrictions. However, after his work restrictions were lifted, he was able to return to working for Respondent.

22. Claimant saw Dr. Miller again on September 28, 2022, complaining of increased stiffness and diminished range of motion in his back after having returned to work for Respondent. Dr. Miller noted that Claimant continued to use lidocaine patches for his low back pain. Dr. Miller ordered another rhizotomy procedure, which Claimant underwent on November 14, 2022.

23. When Claimant next saw Dr. Miller on November 29, 2022, Claimant reported only minimal relief from the rhizotomy. Dr. Miller performed Yeomans and Patrick's tests, both of which were positive on the left, suggesting sacroiliac joint pain. Dr. Miller recommended continued use of lidocaine patches, chiropractic care, medications, and his home exercise program. Dr. Miller indicated he would consider a left sacroiliac joint injection if Claimant did not experience pain relief in the coming weeks.

24. At an appointment on January 5, 2023, Claimant stated that he did not experience an obvious benefit from the ablation. Dr. Miller opined that Claimant's symptoms were now more consistent with an SI joint condition. However, because Claimant felt better overall, Dr. Miller deferred a recommendation for a SI injection.

25. Claimant returned to Dr. Miller on April 4, 2023, with continued pain. Dr. Miller again performed Yeomans and Patrick's tests, both of which were positive, suggesting sacroiliac joint pain. Dr. Miller recommended left sacroiliac joint injections and additional chiropractic care.

26. Respondent obtained a medical record review performed by Dr. Joseph Fillmore to address whether the requests for the SI injection and further chiropractic care was reasonable, necessary, and related to the original workplace injury on behalf of Respondent. Dr. Fillmore determined that the SI joint injection did not relate to his claim, noting that the SI joint was not an initial pain generator.

27. Based on Dr. Fillmore's record review, Respondent denied Dr. Miller's request for prior authorization for left sacroiliac joint injections and additional chiropractic care. Consequently, Claimant filed an Application for Hearing to challenge the denials. Respondent in turn endorsed the issue of withdrawing its admission for medical maintenance.

28. Claimant underwent an independent medical examination with Dr. Robert Kleinman on June 16, 2023. Dr. Kleinman noted that Claimant had initially been diagnosed with adjustment disorder and that Dr. Shea had recommended six sessions of psychotherapy. However, Dr. Kleinman noted that Claimant had undergone eighty-five sessions and continued to receive treatment despite returning to work and managing stress. Noting [Redacted, hereinafter JC] progress, Dr. Kleinman suggested terminating psychotherapy, asserting that it was no longer reasonable or necessary under workers' compensation. He recommended a maximum of two additional sessions over four weeks for consolidation and termination of treatment, leaving the option for further therapy outside workers' compensation if desired.

29. On July 12, 2023, Claimant underwent an independent medical examination with Dr. Cebrian. Dr. Cebrian noted Claimant's initial diagnoses included "lumbar strain with facet-mediated disease and lumbar radiculopathy, and cervical strain." Notably, Dr. Cebrian left out Claimant's "left sacroiliac strain" that was also included in his initial, August 30, 2019, diagnoses. Dr. Cebrian stated "there has been no consistent SI joint complaints as part of his claim." He opined that Claimant's sacroiliac joint pain was unrelated to his work claim and no further maintenance treatment was necessary.

30. Claimant testified at hearing that he rarely lifts heavy things at work—at most ten to twenty-five pounds. Claimant testified that he continued to go to the gym even

after he was placed at maximum medical improvement. He testified that his pain is normally about a two out of ten. However, it will increase to five or seven out of ten on days when he works. Claimant testified that after a five-day workweek, his pain would be miserable. He testified that his pain was much less when he was still receiving maintenance medical treatment. Nevertheless, Claimant testified that he was still able to perform his work, albeit with pain.

31. The Court finds Claimant's testimony credible.

32. Dr. Cebrian testified as an expert in occupational medicine. Dr. Cebrian testified about the relatedness of the sacroiliac joint injection recommended by Dr. Miller, which he felt would not be related to Claimant's injury. He reasoned that when Claimant was injured it was the facet joints on the left side that were determined at that time to be the pain generator, as determined by the outcome of the medial branch blocks. Specifically, he clarified that Claimant would not have had the diagnostic response to the medial branch blocks that he did had it not been the facet joints that were the pain generator, as the blocks were directed at Claimant's facet joints. Dr. Cebrian testified that it was only the facet joints that were addressed with regard to Claimant's pain from 2019 through 2023. Dr. Cebrian's understanding was that it was not until Claimant had the most recent unsuccessful rhizotomy that Dr. Miller began to suspect the sacroiliac joint as the source of Claimant's symptoms.

33. Regarding Claimant's chiropractic care, Dr. Cebrian testified that the chiropractic care would have been reasonable before and shortly after Claimant reached MMI, but he felt it was no longer necessary. He explained that chiropractic care might be reasonable when there is an increase in activity, but that it should not be used for long-term care, and what Claimant had exceeded what was recommended by the Medical Treatment Guidelines.

34. The Court does not find Dr. Cebrian's testimony credible or persuasive. Dr. Cebrian's opinions rely in significant part on the premise that the pain generator of Claimant's early symptoms was not the sacroiliac joint and that treatment for that region was not recommended until later in his treatment. However, the records clearly document complaints of sacroiliac joint pain throughout Claimant's treatment. Although Dr. Cebrian noted a negative Patrick's maneuver on physical examination, Claimant's treating providers documented positive Patrick's maneuvers, including Dr. Gridley on September 12, 2019, and Dr. Miller on November 5, 2021, November 29, 2022, and April 4, 2023.

35. The Medical Treatment Guidelines recommend a sacroiliac joint injection only if the patient exhibits "at least 3 positive physical exam maneuvers (e.g. Patrick's sign, Faber's test, Ganslen, distraction or gapping, or compression test.)." Rule 17, WCRP, Exhibit 1 (8)(a)(iii), p. 52. While it appears that Dr. Miller performed only the Patrick's test, he repeated the test several times over the course of several

years, obtaining a positive response each time, which was consistent with the positive result obtained by Dr. Gridley.

36. Dr. Kleinman also testified at hearing as an expert in psychology and psychiatry. Dr. Kleinman testified that Claimant had more than eighty therapy appointments with Ms. Love, which is well beyond what is recommended by the medical treatment guidelines. He testified that the objective of the therapy was to help Claimant with getting back to work and managing his anxiety in the process. He felt that Claimant had developed an emotional dependence on his psychotherapy sessions. Since Claimant had not seen Ms. Love in nine or ten months, Dr. Kleinman felt that Claimant may not need any closing appointments, though a couple of closing sessions might be reasonable.

37. The Court finds Dr. Kleinman's testimony credible and his opinions persuasive.

38. Although Claimant has continued to work full duty for Respondent despite a cessation of his maintenance medical care, the Court finds that, based on the totality of the circumstances, Claimant's level of function is likely to diminish should his sacroiliac joint pain worsen.

39. The Court finds that the left sacroiliac joint injections and additional chiropractic care recommended by Dr. Miller on April 4, 2023, are reasonably necessary to relieve Claimant of the effects of his injury and prevent further deterioration of his condition. Therefore, the Court finds that Claimant continues to require maintenance medical treatment to maintain his status at maximum medical improvement.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Medical Benefits – sacroiliac joint injections and chiropractic care

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

It is well settled that even though a respondent is found liable to pay for ongoing maintenance medical benefits, either by order or by admitting in a final admission of liability, it is not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997). Further, when the respondent contests liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1998); *Snyder*, supra.

Even where an ATP makes a recommendation at maximum medical improvement for only a limited set of maintenance medical benefits, treatment beyond that recommendation "merely becomes an element of the claimant's burden to prove the disputed treatment is reasonable, necessary and causally related to the industrial injury." *Karathanasis v. Chili's Grill & Bar*, Claimant, W. C. No. 4-461-989 at *3 (Aug. 8, 2003).

Claimant argues that his sacroiliac joint pain is well documented in the record and that Dr. Miller is in the best position to determine what ongoing maintenance medical treatment is appropriate to maintain Claimant at maximum medical improvement. Respondent, in turn, argues that there is insufficient evidence that Claimant's pain originates at the sacroiliac joint and that, even if it does, it would not be related to

Claimant's work injury, as a sacroiliac joint injury was insufficiently documented over the course of Claimant's treatment for his injury. Furthermore, Respondent argues that chiropractic care is appropriate only for temporarily managing flare-ups in symptoms when patients increase their activity level.

As found above, Claimant's sacroiliac joint pain is well documented in the record from early on in his treatment through those most recent records documenting Claimant's maintenance medical treatment. Dr. Miller has performed sufficient testing such that sacroiliac injections are reasonably necessary to maintain Claimant's status at maximum medical improvement. Also, as found above, Claimant's chiropractic treatment is reasonably necessary to maintain Claimant's status at maximum medical improvement, as he has testified that his symptoms are much less when he is receiving maintenance care. Consequently, the Court finds and concludes that sacroiliac joint injections and continued chiropractic care are reasonably necessary to relieve Claimant of the effects of his work-related injury and prevent deterioration of his condition.

Medical Benefits – termination of maintenance

A claimant may receive medical treatment reasonably necessary to relieve the effects of a claimant's industrial injury or to prevent further deterioration of the claimant's condition. *See* § 8-42-101(1)(a), C.R.S.; *see also Grover v. Industrial Commission*, 759 P.2d 705 (Colo.1988) (authorizing receipt of reasonably necessary medical treatment after permanent disability award). However, the burden of proof is on the claimant to establish entitlement to Grover medical benefits. *Grover v. Industrial Commission, supra*; *Cordova v. Foundation Builders Inc.*, W.C. No. 4-296-404 (April 20, 2001). In order to receive such benefits, at the time permanent disability benefits are determined the claimant must present substantial evidence that future medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. *See Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo.App.2003*); Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995).

However, where, as here, respondents have admitted for maintenance medical benefits in a final admission of liability, the burden is on respondents to prove by a preponderance of the evidence that no further maintenance medical treatment is reasonably necessary. Under section 8–43–201(1), a party seeking to modify a general or final admission, a summary order, or a full order has the burden to prove by a preponderance of the evidence that such a modification should be made. *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014).

As found above, sacroiliac joint injections and continued chiropractic care are reasonably necessary to relieve Claimant of the effects of his work-related injury and prevent deterioration of his condition. Therefore, because there is maintenance medical treatment that remains appropriate under this claim, Respondent has not proved by a preponderance of the evidence that a withdrawal of the admission for maintenance medical benefits is appropriate.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the sacroiliac joint injections and chiropractic care recommended by Dr. Miller on April 4, 2023.

2. Respondent's request to withdraw its admission for maintenance medical benefits is denied.

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: December 4, 2023.

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

ISSUES

1. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his right eye arising out of the course of his employment with Employer on July 8, 2021. Claimant had worked for Employer for approximately four years. Claimant stopped working for Employer on June 28, 2023. At the time of his injury, Claimant was also employed by [Redacted, hereinafter BO], where he had worked for more than 20 years.

2. On November 7, 2022, Respondents filed a Final Admission of Liability admitting for temporary disability and permanent partial disability benefits. Respondents admitted to an average weekly wage (AWW) of $1,073.03, which was calculated based solely on his wages earned from Employer. (Ex. A). No credible evidence was admitted indicating Respondents calculation of Claimant's AWW earned from his work for Employer was incorrect. However, Respondents' AWW calculations did not account for Claimant's earnings from BO[Redacted].

3. Claimant's Exhibit 3 includes wage records from BO[Redacted] from January 2018 to April 2023, and show Claimant was paid bi-monthly. (Ex. 3). For the three months preceding his work injury (*i.e.*, April 1, 2021 to June 30, 2021, a period of 91 days), Claimant worked 260.5 hours (averaging 20.04 hours per week) at an hourly rate of $15.63, and earned $4,071.62. This corresponds to an AWW of $313.20, calculated as follows:

BO[Redacted] WAGES FROM 4/1/21 – 6/30/21	
Hourly Rate	$15.63
Days from 4/1 - 6/30/21	91
Total Hours for Period	260.5
Total Wages (Hr. Rate x Total Hrs.)	$4,071.62
Daily Wage (Total Wages/days)	$44.74
AWW (Daily Wage x 7)	$313.20

4. Claimant received an hourly wage increase on July 1, 2021 (seven days before his injury), to $15.87 per hour. (Ex. 3).

5. Claimant continued to work for BO[Redacted], and received periodic hourly wage increases. In March 2022, Claimant's hourly wage at BO[Redacted] was increased to $19.00. It was again increased in April 2022 to $19.95. (Ex. 3). Claimant testified at hearing that his current hourly wage is $21.00, although this is not reflected in Claimant's

employment or wage records. Claimant testified that these raises were given to all BO[Redacted] employees.

6. Following his injury, Claimant did not work for BO[Redacted] for approximately two months, and returned sometime during the first two weeks of September 2021, working periodically until the week of November 16, 2021. (Ex. 3). Claimant was released to work full-duty with no restrictions effective November 2, 2021. (Ex. A, p.23). Claimant then returned to working for BO[Redacted] on the week of November 16, 2021, working without interruption until at least April 30, 2023, averaging approximately 36.5 hours per week. (Ex. 3). Claimant testified he currently works for BO[Redacted] and another employer.

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 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).

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). "This discretionary authority permits the ALJ to calculate the average weekly wage based on earnings from concurrent employments which the claimant held at the time of the injury." *Contreras v. Chimr*, W.C. No. 4-399-293 (ICAO Jun. 20, 2007). However, there is no *ipso facto* rule requiring the inclusion of wages from concurrent employment. *Id*.

The objective of wage calculation is to determine a fair approximation of a claimant's wage loss and diminished earning capacity. *Avalanche Indus., Inc. v. Indus. Claim Appeals Office,* 166 P.3d 147, 153 (Colo. App. 2007), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008), as modified on denial of reh'g (Jan. 20, 2009). Thus, wages from current employment may be included in the calculation of AWW where appropriate. *Broadmoor Hotel & Cont'l Ins. Co. v. Indus. Claim Appeals Off. of State of Colo.*, 939 P.2d 460, 462 (Colo. App. 1996).

Claimant has established that his AWW should be increased to include his wages earned at BO[Redacted] at the time of his injury. Because Claimant was concurrently employed, a fair approximation of his hourly wage at the time of injury includes the income earned from all employment at the time of injury. Respondents' admitted AWW of $1,073.03, does not include the Claimant's wages earned from BO[Redacted] at the time of is injury. The ALJ finds that Claimant's AWW for his employment with BO[Redacted] should be calculated based on the hourly rate he was receiving at the time of his injury (*i.e.*, $15.87 per hour). Applying the same formula used in Finding of Fact 3, above, Claimant's AWW from BO[Redacted] at the time of injury was $318.01.

BO[Redacted] AWW CALCULATION		
Hourly Rate	$15.63	$15.87
Days from 4/1 - 6/30/21	91	91
Total Hours for Period	260.5	260.5
Total Wages (Hr. Rate x Total Hrs.)	$4,071.62	$4,134.14
Daily Wage (Total Wages/days)	$44.74	$45.43
AWW (Daily Wage x 7)	$313.20	$318.01

Claimant's AWW at the time of injury was therefore $1,391.04 (*i.e.*, $1,073.03 + $318.01).

Claimant asserts his AWW should be further increased to reflect his current hourly wage of $21.00, rather than his hourly rate at the time of injury. While an AWW

determination may consider post-injury wage increases, the inclusion of such increases is discretionary. *See Waalkes v. The Salvation Army*, W.C. No. 4-533-879 (Sep. 30, 2003); *Pizza Hut v. Indus. Claim Appeals Office,* 18 P.3d 867, 868 (Colo. App. 2001).

In his position statement, Claimant contends that including Claimant's wage increase is supported by both *Pizza Hutt, supra*, and *Waalkes, supra*. Claimant's case, however, is distinguishable from both *Waalkes* and *Pizza Hut*. Unlike *Pizza Hut*, Claimant did not change careers after his work injury, but remained in the same position with BO[Redacted]. Thus, the rationale for applying a higher AWW in *Pizza Hut* is not present. In *Waalkes*, the ICAO found that the ALJ could reasonably infer that the claimant's industrial injury resulted in permanent medical restrictions which may impair the claimant's ability to maintain employment at his hourly wage. Here, the record before the ALJ does not indicate Claimant has permanent work restrictions which may impact his future career, or his ability to earn wages. To the contrary, Claimant was released to work full duty, without work restrictions, on November 2, 2021, and earned more post-injury than before. Claimant has articulated no persuasive argument for including post-injury wage increases in the calculation of his AWW.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage at the time of injury was $1,391.04.

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: December 4, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-210-260-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the surgical procedure requested by Dr. Rumley, including a three-level fusion, is reasonable and necessary?

FINDINGS OF FACT

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

1. Claimant was employed by Employer, when he was injured in the course and scope of his employment on June 29, 2022. *Hrg. Trans. pg. 11 lns. 16-22*.
2. While lifting objects from low shelves, Claimant felt immediate pain in his lower back. Over time, Claimant began experiencing numbness and shooting pains in his lower extremities, as well as bouts of incontinence. Claimant also began experiencing weakness in his left leg, drop foot, and needing assistive devices to walk. *Hrg. Trans. pg. 12 lns. 1-25, pg. 13 lns. 1-5*.
3. At the time of hearing, Claimant's body mass index (BMI) was 39 and he had been continuing to lose weight since his injury. *See Hrg. Trans. pg. 13 lns. 6-17*.
4. Having failed all prior conservative treatment measures, Dr. Jacob Rumley, Claimant's authorized treating orthopedic specialist, has recommended a transforaminal lumbar interbody fusion (TLIF) procedure for L2-L5. *See Ex. 5, Bates 34.*
5. Claimant has discussed the pros/cons, and risks/potential benefits of the proposed TLIF procedure. Having engaged in thorough shared decision making with Dr. Rumley, Claimant has accepted the surgical risks and wishes to proceed with Dr. Rumley TLIF surgical recommendation. *See Hrg. Trans. pg. 14 lns. 1-10*.
6. Dr. Rumley is a fellow in the American Academy of Orthopedic Surgeons, is a member of the North American Spine Society and AO Spine, and he is board-certified in orthopedic surgery. His training includes a spine fellowship at Augusta University which was a level 1 trauma and deformity center. Moreover, he currently trains fellows in spine surgery and therefore maintains an academic role. Dr. Rumley is also level II accredited. *See Rumley Depo. pgs. 7-8.*
7. Dr. Rumley explained that a patient's signs are objective findings that support a patient's reported subjective symptoms. *See Rumley Depo. pg. 9 lns. 14-20*.
8. Claimant suffers from claudication-type symptoms. "Claudication is progressive symptoms with inactivity either being ambulation or upright posture." Typical examples include increased leg pain, leg symptoms, and urinary incontinence. *Rumley Depo. pg. 10 lns. 10-21*.

9. Claimant underwent a lumbar MRI on July 14, 2022. The findings show that Claimant had significant stenosis of his foramen, lateral recess, and central canal. There was also significant lumbar disc degeneration. *Rumley Depo. pg. 11 lns. 1-10; Rspndt. Ex. H, Bates 51.*

10. Claimant also underwent an EMG nerve conduction study and it revealed that Claimant was experiencing radiculopathy as a result of nerve compression at multiple levels of his lower back.

11. The TLIF procedure recommended by Dr. Rumley includes decompression of Claimant's nerves by way of a laminectomy. A laminectomy is the removal of bone from the lumbar spine, which results in the foramen being opened and relieving the nerve compression. *See Rumley Depo. pg. 12 lns. 14-17*.

12. Claimant also has sagittal malalignment. This means that Claimant's spine is outside of normal alignment ranges when compared to the position of his pelvis. The positional difference is significant as a person of Claimant's young age (54), should be at or near 0 but Claimant is at a difference of 13. *See Rumley Depo. pgs. 14-16*.

13. The purpose of the recommended TLIF procedure is to decompress the nerves in Claimant's lumbar spine to allow the nerves to function properly—thereby resolving Claimant's claudication symptoms. *Rumley Depo. pg. 17 lns. 4-8, pg. 33 lns. 17-19, pg. 34 lns. 14-16*.

14. As a result of bone removal from laminectomies, instability of the lumbar spine is anticipated. The expected instability is one reason for Claimant to undergo fusion as part of the decompression procedure. *Rumley Depo. pg. 18 lns. 6-19*.

15. Dr. Brown is Respondents retained expert. While Dr. Brown is a board-certified neurosurgeon, Dr. Brown is not fellowship trained as is Dr. Rumley. As a result, Dr. Brown's skillset might be different than Dr. Rumley's and not as innovative or advanced – since he is not fellowship trained.

16. Dr. Brown indicated that he believes Claimant may have untreated NIDDM—otherwise known as Type 2 diabetes. *Ex. A, Bates 13; Rumley Depo. pg. 19 lns. 5-10.*

17. Claimant's symptoms are more likely related to his lumbar injury then they are to polyneuropathy potentially caused by diabetes. *See Rumley Depo. pg. 19 lns. 15-17, pg. 20 lns. 1-18.*

18. At the time of hearing, Claimant's BMI was 39 and Dr. Rumley explained that it is an acceptable BMI to proceed with the recommended surgery because it is under 40. Rumley Depo. pg. 21 lns. 10-23. When a patient has a BMI of 40 or more, the risks of surgery are increased and include higher rates of infection, deep vein thrombosis, and perioperative complications. *Rumley Depo. pg. 22 lns. 1-13*.

19. Dr. Brown agrees that Claimant needs to undergo decompression surgery, but he suggests an alternative procedure using tubes to decompress three levels of the spine. *Ex. A, Bates 14*.

20. Dr. Rumley strongly disagrees with Dr. Brown that tubular decompression is the superior procedure for Claimant to undergo for several reasons. First, the TLIF procedure is far more likely to result in a better decompression of Claimant's lumbar

nerves (especially related foraminal stenosis such as Claimant's), which is the main goal of both possible surgeries. Second, Claimant has an underlying structural deformity (*i.e.*, the sagittal imbalance). The tubular decompression surgery would not address this deformity, while the TLIF procedure recommended by Dr. Rumley will. To not address the deformity in conjunction with decompression will set Claimant up for a worse long-term outcome and increase the likelihood he would need to undergo another lumbar surgery in the future because the structure will worsen over time. As a result addressing the deformity is a necessary component of the overall surgical procedure recommended by Dr. Rumley. *Rumley Depo. pgs. 23-24, pg. 34 lns. 10-22, pg. 35 lns. 16-18.*

21. Dr. Brown has indicated the tubular decompression procedure he has proposed does not guarantee that Claimant will be without lumbar instability. *Brown Depo. pg. 16 lns. 4-5.*

22. Dr. Rumley has performed tubular decompression surgeries. Dr. Rumley noted that those patients do not tend to do as well post-operatively as patients that undergo TLIF. *Rumley Depo. pg. 28 lns. 21-25, pg. 29 lns. 1-2*.

23. Dr. Rumley is routinely referred patients that have previously undergone spine surgery by others. When he sees patients that have previously undergone tubular decompression, those patients commonly have structural instability, or the decompressions were incomplete in the first place. This is yet another reason why the TLIF procedure is superior to tubular decompression. The revision surgery for those patients is TLIF and carries with it increased risks and complications as a revision surgery. *See Rumley Depo. pg. 29 lns. 3-25, pg. 30 lns. 1-2*.

24. Generally, Dr. Brown avoids operating on anyone that is morbidly obese. *See Brown Depo. pg. 11 lns. 6-8*.

25. Dr. Brown concedes that TLIF, as recommended by Dr. Rumley, "is certainly an option." *Brown Depo. pg. 12 lns. 1-2*. He also concedes that TLIF "provides a good decompression." *Id. at pg 12 lns. 7-12*.

26. In support of his recommended tubular decompression procedure, Dr. Brown referenced a publication indicating "that a decompression, a simple decompression, versus a fusion Improved back pain . . . ." *Brown Depo. pg. 17 lns. 21-24*. As noted above, however, the primary focus and need for Claimant's surgery is decompression of the nerves to address his claudication symptoms—not generalized back pain.

27. Dr. Brown also expressed concern about future adjacent level degeneration. This concern, however, was based on unverified cited statistics related to the cervical spine—not the lumbar spine. *Brown Depo. pg. 20 lns. 2-10*.

28. When asked if Dr. Rumley's recommended TLIF procedure was unreasonable, Dr. Brown said that it was aggressive and not within the *Guidelines*[1] and normal standards. *See Brown Depo. pg. 20 lns. 18-21.*

[1] Workers' Compensation Rules of Procedure, 17, Ex. 1, Low Back Pain Medical Treatment Guidelines.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant established by a preponderance of the evidence that the surgical procedure requested by Dr. Rumley, including a three-level fusion, is reasonable and necessary?

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

When determining whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines (*Guidelines*) because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the *Guidelines* is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather, the ALJ may give evidence regarding compliance with the *Guidelines* such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., WC* 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). See also: Section 8-43-201(3), C.R.S.

There is no dispute that Claimant needs lumbar surgery and that such surgery is causally related to his work injury. The dispute that exists is which procedure is the most appropriate for Claimant.

Dr. Rumley, as a treating physician, has concluded that the TLIF procedure is not only the superior procedure, but it is also reasonable and necessary. When asked directly, Dr. Brown did not specifically say the TLIF procedure was unreasonable—but yet he did say that it was aggressive and not within normal standards. Thus, he believes the procedure is not reasonable.

Dr. Brown's belief that the TLIF procedure is not reasonable, is based on three primary arguments—all of which are unpersuasive.

The first is that the TLIF procedure is for three levels and the *Guidelines* indicate that no more than two levels should be done in the case of fusion surgeries.

As pointed out by Dr. Rumley, the *Guidelines* are just that—guidelines. They are not absolutes. So while the *Guidelines* do provide guidance as to when certain procedures should or should not be done, there is the ability to deviate from the *Guidelines* in appropriate circumstances and the Court finds that such circumstances exist here.

Both Dr. Rumley and Dr. Brown recognize that Claimant has objective findings by way of MRI, EMG, and diagnostic injections confirming that Claimant has claudication symptomatology stemming from three levels of his lumbar spine. While the procedure is different, even Dr. Brown's recommended tubular procedure is for three levels. Both

physicians appear to agree that if three levels are symptomatic, they should all be addressed.

Dr. Rumley has convincingly shown that TLIF involving laminectomy is likely to lead to better results for decompressing Claimant's lumbar nerves and resolve his claudication symptoms which is the primary goal of both surgical recommendations. As Dr. Rumley pointed out, it does not make sense to address two levels with fusion only to leave out a third that is symptomatic to satisfy a general guideline.

Risks coincide with any type of surgery. The issue becomes whether the risks are outweighed by the benefits. Here, Dr. Rumley and Claimant have engaged in a shared decision-making process and decided that TLIF is most likely to result in the most benefit to Claimant.

Dr. Brown's second basis of recommending tubular decompression over TLIF is that Claimant does not currently have lumbar instability. Recommendation 153 of WCRP 17, Ex. 1, Sec. 8.b.iii, in the *Guidelines*, states that one of the diagnostic indications for fusion includes "surgically induced segmental instability." This means that one need not necessarily have instability to undergo fusion surgery, but such instability may be a likely result as part of another surgery—like decompression by laminectomy. Even tubular decompression as recommended by Dr. Brown may result in segmental instability which would require fusion. The fusion needed from tubular decompression would be a later, second surgery, only serving to place additional risks the chance for complications on Claimant.

Further reason exists here for Claimant to undergo TLIF involving three-level fusion and that is to address his structural deformity. Even though Claimant's work injury did not cause the deformity, it nevertheless interplays with his nerve compression and claudication. By correcting the deformity, Claimant is likely to experience far better decompression of the nerves. Moreover, correcting the deformity will greatly reduce the chances for the need of future lumbar surgery as the condition progressively deteriorates. Plus, correcting the deformity also improves the overall outcome of the surgery to treat Claimant's work injury. As a result, fixing the deformity is inextricably intertwined with treating Claimant's work injury and is therefore reasonably necessary to cure and relieve Claimant from the effects of his injury.

Finally, Dr. Brown consistently stresses that Claimant's BMI is high, and it invites increased risk for TLIF, thereby making the TLIF surgery unreasonable. Dr. Rumley convincingly explained that Claimant's BMI of 39 is within acceptable range for the TLIF procedure. It is worth noting that, as demonstrated by the medical records, Claimant's BMI was 39 as of the hearing date down from more than 42 in January 2023, when he first saw Dr. Rumley, and it was continuing to trend downward due to continued weight loss.

Morbid obesity is a relative contraindication to fusion per WCRP 17, Ex. 1, Sec. 8.b.ii. But it is not an absolute contraindication. The difference is that relative contraindication only means that caution should be used when doing fusion procedure and the procedure is acceptable if the benefits outweigh the risk.

Table 52 of WCRP 17, Ex. 1, Sec. 8.b (Surgical Interventions) of the *Guidelines* indicates that there is good evidence to suggest functional improvement from most back surgery is similar between patients with BMI under 25 and those with a BMI between 25 and 35. As discussed, Claimant's last known BMI was 39, but it was declining due to continued weight loss. This means that Dr. Brown's concerns lessen regarding Claimant's BMI with each pound Claimant loses before surgery and the closer he gets to a BMI of 35.

Dr. Rumley explained that a BMI of 40 or more would remove Claimant as a surgical candidate until the BMI is again below 40. This is based on studies that indicate risks and complications are far less when the patient's BMI is under 40. The *Guidelines* do not have such an explicit line in the sand for fusions. The only area of the Guidelines where a BMI of 40 or more as a contraindication related to lumbar surgery is in WCRP 17, Ex. 1, and Sec. 8.b.iv of the *Guidelines* for total disc replacement surgery— which is not contemplated or recommended here.

Dr. Rumley is a board-certified expert in his field of orthopedic surgery. Plus, Dr. Rumley also trained via a spine fellowship at Augusta University which was a level 1 trauma and deformity center. Lastly, he currently trains fellows in spine surgery and therefore maintains an academic role. These additional qualifications adds to the persuasiveness of his opinion and conclusion for the recommended surgery. Plus, what might be considered aggressive to Dr. Brown, might not be considered aggressive by Dr. Rumley, who is a fellow trained spinal surgeon. As a result, the ALJ finds and concludes that Dr. Rumley has convincingly concluded that the TLIF is the most appropriate procedure for Claimant, and Claimant has indicated that he wishes to proceed with TLIF understanding the associated pros and cons as well as the risks and benefits.

As a result, the ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that the lumbar decompression and fusion surgery recommended by Jacob Rumley, D.O. as reasonable and necessary treatment related to his admitted June 29, 2022, industrial injury.

ORDER

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

I. Respondents shall pay for the lumbar decompression and fusion surgery recommended by Jacob Rumley, D.O. as reasonable and necessary treatment related to Claimant's industrial injury.

II. 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: December 5, 2023.

/s/ Glen Goldman

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his admitted September 30, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. after reaching Maximum Medical Improvement (MMI) on September 17, 2020.

2. Whether Claimant has demonstrated by a preponderance of the evidence that a total hip arthroplasty constitutes reasonable, necessary, and causally related medical care for his September 30, 2019 industrial injury.

FINDINGS OF FACT

1. Claimant has worked as a Delivery Driver for Employer for over 25 years. On September 30, 2019 he sustained admitted work injuries to his right hip and lower back. Claimant subsequently obtained medical treatment through Authorized Treating Provider (ATP) Concentra Medical Centers.

2. On December 6, 2019 Claimant underwent a lumbar spine MRI without contrast. The imaging revealed "[s]pinal canal narrowing at L4-5 primarily due to hypertrophic changes about the facet joints and a posterior disc protrusion."

3. On December 6, 2019 Claimant underwent an MRI of his right hip. The imaging showed the following:

> 1. Findings suggesting mild cam-type of femoral acetabular impingement. There is increased signal traversing the anterosuperior labrum raising concern for a nondisplaced labral tear. 2. Mild tendinosis with mild undersurface and interstitial tearing of the right common hamstring tendon origin on the ischial tuberosity.

4. On February 25, 2020 Claimant underwent surgical intervention for his September 30, 2019 lower back injuries. He specifically had a bilateral microdiscectomy and right-sided far lateral microdiscectomy at L4-L5.

5. On September 17, 2020 Frederic Zimmerman, D.O. determined that Claimant had reached Maximum Medical Improvement (MMI) for his admitted industrial injuries. He assessed Claimant with the following: (1) a lumbar discogenic injury, that had been surgically repaired, with chronic radicular symptoms down the right lower extremity; and (2) a right hip labral tear that had been treated non-surgically with a steroid injection. Dr. Zimmerman noted that Claimant had plateaued in his recovery. He assigned a 24% whole person permanent impairment rating, released Claimant to full duty employment, and recommended medical maintenance care. The MMI report specified that Claimant

would follow-up with Nathan Faulkner, M.D. at Orthopedic Centers of Colorado in 18 months for possible hip surgery.

6. On November 23, 2020 Dr. Faulkner recommended right hip arthroscopic surgery. He reasoned that Claimant had failed conservative treatment and suffered persistent pain as a result of his labral tear.

7. On July 13, 2021 Claimant underwent a Division Independent Medical Examination (DIME) with Justin D. Green, M.D. He concluded that Claimant had not reached MMI. Dr. Green remarked that Claimant's symptomatic labral tear required additional orthopedic evaluation.

8. On December 13, 2021 Claimant returned to Dr. Faulkner for an examination. He noted that Claimant had good relief from a diagnostic injection that suggested most of the pain was coming from his right hip joint. Based on Claimant's failure of conservative treatment, positive response to the hip injection and continued symptoms, Dr. Faulkner recommended a total hip replacement.

9. On December 20, 2021 Claimant visited Angie Schack, PA-C for an examination. After reviewing Claimant's medical records and performing a physical examination PA-C Schack recommended a total right hip arthroplasty. She suggested a right hip injection and referred Claimant to David C. Loucks, M.D.

10. On December 22, 2021 Respondents and Claimant's former attorney executed a Stipulation. The parties agreed that Claimant had reached MMI on September 17, 2020. The Stipulation was approved on December 28, 2021.

11. On January 4, 2022 Claimant returned to Dr. Faulkner for an examination. Dr. Faulkner remarked that Claimant's right hip MRI showed a labral tear with mild chondromalada. He also commented that Claimant obtained good relief from a diagnostic Injection that suggested most of his pain was coming from his hip joint. Dr. Faulkner concluded that, based on Claimant's failure of conservative treatment, persistent pain/dysfunction and positive diagnostic response, Claimant should proceed with a total hip replacement. He noted the procedure provides a quicker recovery and has a more predictable outcome in patients of Claimant's age with a cartilage Injury.

12. On January 19, 2022 Claimant visited Dr. Loucks for a surgical evaluation. He recounted that in early December 2021 Claimant had undergone an MRI that revealed moderate to high grade changes of the right hip with partial labral tearing and femoral acetabular impingement. Dr. Loucks noted that nine days earlier Claimant had received a repeat intra-articular right hip injection that provided approximately 60% relief of his groin and buttocks symptoms.

13. On February 18, 2022 Claimant returned to Dr. Loucks for an examination. After conducting a physical examination and reviewing Claimant's medical records, Dr.

Loucks assessed Claimant with a tear of the right acetabular labrum and femoral acetabular impingement. He recommended a total right hip arthroplasty.

14. On January 5, 2023 Claimant visited Pressley Swann, M.D. for an evaluation of his right hip pain. Dr. Swann remarked that Dr. Loucks referred Claimant for a second opinion about proceeding with a total right hip arthroplasty. He conducted a physical examination and reviewed pertinent imaging. Dr. Swann agreed with Dr. Loucks' recommendation for a total right hip replacement. He explained that x-rays revealed "some pincer based acetabular and impingement as well as a cam type impingement with a loose body in his joint."

15. On February 16, 2023 Claimant visited Barry Nelson, D.O. at Concentra. In addressing Claimant's right hip, Dr. Nelson noted that he had no additional recommendations for conservative treatment. He explained that Claimant had the option of an arthroscopic repair of the right hip or a total hip arthroplasty. Dr. Nelson left the decision about the appropriate surgery with orthopedic surgeons Drs. Loucks and Swann.

16. Claimant testified at the hearing in this matter. He explained that at the time of MMI he was experiencing pain in the right hip, groin and buttocks area. However, his buttocks and groin symptoms have worsened since he reached MMI. Furthermore, Claimant's right leg has become more unstable.

17. Claimant has established it is more probably true than not that he should be permitted to reopen his admitted September 30, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. On September 17, 2020 ATP Dr. Zimmerman determined that Claimant had reached MMI. He assessed Claimant with the following: (1) a lumbar discogenic injury, that had been surgically repaired, with chronic radicular symptoms down the right lower extremity; and (2) a right hip labral tear that had been treated non-surgically with a steroid injection. On July 13, 2021 DIME Dr. Green concluded that Claimant had not reached MMI. He remarked that Claimant's symptomatic labral tear required additional orthopedic evaluation. The parties subsequently stipulated that Claimant had reached MMI on September 17, 2020.

18. The record reveals that Claimant has suffered a worsening of his right hip condition since reaching MMI on September 17, 2020. At the time of MMI Claimant's right hip labral tear had been treated non-surgically and required additional orthopedic evaluation. Claimant credibly testified that his right hip pain has subsequently worsened. The pain has affected his well-being and overall ability to function. The records are consistent with Claimant's testimony. The medical records note that Claimant underwent extensive care after MMI to help maintain his condition. Claimant's ATP's provided detailed documentation about his persistent right hip symptoms and need for a total hip replacement.

19. Dr. Faulkner determined that Claimant had good relief from a diagnostic injection that suggested most of the pain was originating from his right hip joint. Based on Claimant's failure of conservative treatment, persistent pain/dysfunction and positive

diagnostic response, Dr. Faulkner recommended proceeding with a total hip replacement. Similarly, Dr. Loucks concluded that a total right hip arthroplasty was warranted. An MRI had revealed moderate to high grade changes of the right hip with partial labral tearing and femoral acetabular impingement. Dr. Loucks noted that Claimant had received a repeat intra-articular right hip injection that provided approximately 60% relief of his groin and buttocks symptoms. Finally, Dr. Swann agreed with Dr. Loucks' recommendation for a total right hip replacement. He explained that x-rays revealed "some pincer based acetabular and impingement as well as a cam type impingement with a loose body in his joint."

20. The persuasive medical records, in conjunction with Claimant's credible testimony, reflect that Claimant has suffered a change in his right hip condition since reaching MMI on September 17, 2020. Claimant has suffered a worsening of his right hip symptoms that warrants additional medical treatment in the form of a total hip arthroplasty. He has experienced persistent pain and dysfunction in his right hip that has been resistant to conservative treatment. Accordingly, Claimant has demonstrated that he is entitled to reopen his admitted September 30, 2019 Workers' Compensation claim.

21. Claimant has demonstrated by a preponderance of the evidence that a total hip arthroplasty constitutes reasonable, necessary, and causally related medical care for his September 30, 2019 industrial injury. The record reveals that Claimant has received significant conservative treatment for his right hip condition. Nevertheless, he continues to suffer persistent right hip and groin symptoms. Treating physicians have assessed Claimant with a tear of the right acetabular labrum and femoral acetabular impingement. The persuasive opinions of Drs. Faulkner, Loucks and Swann suggest that, based on Claimant's failure of conservative treatment, persistent pain/dysfunction and positive diagnostic response to injections, a total right hip arthroplasty is warranted. Dr. Faulkner specifically noted that the procedure provides a quicker recovery and has a more predictable outcome in patients of Claimant's age with a cartilage Injury. The record thus reveals that Claimant's work activities aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant has proven that a total right hip arthroplasty is reasonable, necessary and causally related to his September 30, 2019 admitted industrial injury.

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).

Reopening for Change of Condition

4. At any time within six years of the date of injury, an ALJ may reopen an award on the grounds of fraud, overpayment, error or mistake, or change in condition. §8-43-303(1) C.R.S. The intent of the statute is to provide a remedy to claimants who are entitled to awards of both medical and disability benefits. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186 (Colo. App. 2002). In seeking to reopen a claim based on a change in condition, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004). An ALJ's decision to grant or deny a petition to reopen may therefore "be reversed only for fraud or clear abuse of discretion." *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *see also Heinicke* 197 P.3d at 222 ("In the absence of fraud or clear abuse of discretion, the ALJ's decision concerning reopening is binding on appeal.").

5. As found, Claimant has established it is more probably true than not that he should be permitted to reopen his admitted September 30, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. On September 17, 2020 ATP Dr. Zimmerman determined that Claimant had reached MMI. He assessed Claimant with the following: (1) a lumbar discogenic injury, that had been surgically repaired, with chronic radicular symptoms down the right lower extremity; and (2) a right hip labral tear that had been treated non-surgically with a steroid injection. On July 13, 2021 DIME Dr. Green concluded that Claimant had not reached MMI. He remarked that Claimant's symptomatic labral tear required additional orthopedic evaluation. The parties subsequently stipulated that Claimant had reached MMI on September 17, 2020.

6. As found, the record reveals that Claimant has suffered a worsening of his right hip condition since reaching MMI on September 17, 2020. At the time of MMI Claimant's right hip labral tear had been treated non-surgically and required additional orthopedic evaluation. Claimant credibly testified that his right hip pain has subsequently worsened. The pain has affected his well-being and overall ability to function. The records are consistent with Claimant's testimony. The medical records note that Claimant underwent extensive care after MMI to help maintain his condition. Claimant's ATP's provided detailed documentation about his persistent right hip symptoms and need for a total hip replacement.

7. As found, Dr. Faulkner determined that Claimant had good relief from a diagnostic injection that suggested most of the pain was originating from his right hip joint. Based on Claimant's failure of conservative treatment, persistent pain/dysfunction and positive diagnostic response, Dr. Faulkner recommended proceeding with a total hip replacement. Similarly, Dr. Loucks concluded that a total right hip arthroplasty was warranted. An MRI had revealed moderate to high grade changes of the right hip with partial labral tearing and femoral acetabular impingement. Dr. Loucks noted that Claimant had received a repeat intra-articular right hip injection that provided approximately 60% relief of his groin and buttocks symptoms. Finally, Dr. Swann agreed with Dr. Loucks' recommendation for a total right hip replacement. He explained that x-rays revealed "some pincer based acetabular and impingement as well as a cam type impingement with a loose body in his joint."

8. As found, the persuasive medical records, in conjunction with Claimant's credible testimony, reflect that Claimant has suffered a change in his right hip condition since reaching MMI on September 17, 2020. Claimant has suffered a worsening of his right hip symptoms that warrants additional medical treatment in the form of a total hip arthroplasty. He has experienced persistent pain and dysfunction in his right hip that has been resistant to conservative treatment. Accordingly, Claimant has demonstrated that he is entitled to reopen his admitted September 30, 2019 Workers' Compensation claim.

Medical Benefits

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

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

11. As found, Claimant has demonstrated by a preponderance of the evidence that a total hip arthroplasty constitutes reasonable, necessary, and causally related medical care for his September 30, 2019 industrial injury. The record reveals that Claimant has received significant conservative treatment for his right hip condition. Nevertheless, he continues to suffer persistent right hip and groin symptoms. Treating physicians have assessed Claimant with a tear of the right acetabular labrum and femoral acetabular impingement. The persuasive opinions of Drs. Faulkner, Loucks and Swann suggest that, based on Claimant's failure of conservative treatment, persistent pain/dysfunction and positive diagnostic response to injections, a total right hip arthroplasty is warranted. Dr. Faulkner specifically noted that the procedure provides a quicker recovery and has a more predictable outcome in patients of Claimant's age with a cartilage Injury. The record thus reveals that Claimant's work activities aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant has proven that a total right hip arthroplasty is reasonable, necessary and causally related to his September 30, 2019 admitted industrial injury.

ORDER

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

1. Claimant's request to reopen his September 30, 2019 admitted claim based on a change in condition pursuant to §8-43-303(1), C.R.S. is granted.

2. Claimant is entitled to receive reasonable, necessary and causally related medical benefits including a total right hip arthroplasty as recommended by Drs. Faulkner, Loucks and Swann.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 5, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-214-646-001

ISSUES

1. Whether Respondents' March 20, 2023 Final Admission of Liability (FAL) was defective and thus failed to close the present claim.

2. Alternatively, if the March 20, 2023 FAL was sufficient to close the claim, whether Respondents should be permitted to reopen the matter based on a mutual mistake of material fact pursuant to §8-43-303(1) C.R.S.

3. Whether Respondents have proven by a preponderance of the evidence that they are entitled to terminate Claimant's Temporary Total Disability (TTD) benefits based on a modified duty job offer.

4. Whether Respondents have established by a preponderance of the evidence that Claimant's disability was triggered by the intervening event of cancer treatment that terminated his entitlement to TTD benefits.

FINDINGS OF FACT

1. Claimant worked as a Caregiver at Employer's facility. On June 17, 2022 he sustained an admitted industrial injury during the course and scope of his employment with Employer. Claimant was specifically assaulted by a patient and suffered injuries to his right shoulder and right wrist.

2. On June 22, 2022 Claimant began treatment through Authorized Treating Provider (ATP) Concentra Medical Centers. He received restrictions of no lifting or carrying over 10 pounds, limited pinching or gripping, and no reaching overhead or away from the body.

3. On June 23, 2022 Respondents provided Claimant with an offer of transitional duty. The employment involved serving meals, helping with resident activities, spending one-on-one time with residents, cleaning laundry, and other tasks as assigned. Although Claimant accepted the position, there is no evidence that the job duties were reviewed or approved by Claimant's treating physician.

4. On June 24, 2022 Claimant returned to Concentra for an examination. He received increased restrictions of no lifting or carrying more than five pounds, limited pinching or gripping, and no reaching overhead or away from the body. Respondents did not subsequently provide a modified duty job offer.

5. On July 1, 2022 Claimant was restricted to no use of his right upper extremity/right arm. The restrictions were renewed on July 6, July 29, August 29, September 2, and September 30, 2022.

6. On November 2, 2022 Employer's Business Office Coordinator [Redacted, hereinafter BG] confirmed to Insurer's Adjuster that Employer could not accommodate Claimant's restrictions.

7. While Claimant's restrictions were still in place, he underwent treatment for cancer. Respondents have not offered any evidence related to Claimant's cancer treatment. Notably, there is no evidence that Claimant was under any restrictions due to his treatment.

8. On November 11, 2022 Claimant's ATP reiterated the restrictions of no use of the right upper extremity, no patient contact, and to avoid hazardous conditions, i.e., grabbing of the right hand/wrist. The preceding restrictions were renewed on December 9, 2022.

9. On December 12, 2022 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged Temporary Total Disability (TTD) benefits from June 23, 2022 and continuing.

10. On February 3, 2023 the ATP placed Claimant at Maximum Medical Improvement (MMI) with permanent right arm restrictions including no reaching overhead and away from the body, a five-pound lifting limit with the right hand, and a two-pound repetitive lifting maximum. He received a 29% upper extremity impairment rating that converts to a 17% whole person impairment.

11. On March 2, 2023 Respondents filed a Final Admission of Liability (FAL). The FAL erroneously acknowledged a 17% whole person impairment, rather than the 29% scheduled impairment. The FAL also recognized the previously admitted TTD benefits for the period June 23, 2022 until February 2, 2023.

12. On March 28, 2023 the Colorado Division of Workers' Compensation (DOWC) issued an error Notice regarding the FAL. The Notice requested Respondents to file a corrected FAL within 10 days, admit to a scheduled impairment, and specify a correct amount of TTD benefits. The Notice specifically provided:

> The admission states a position on 17% whole person/non-scheduled impairment, however, the medical report appears to indicate the impairment rating is 29% scheduled impairment to the upper extremity (body code 01). In addition, the required impairment worksheet was not attached to the admission.

The Notice directed Respondents to file a corrected FAL "with a current certificate of mailing date and any required supporting documentation to all parties within 10 days of receipt of this letter."

13. Instead of filing a new FAL as directed by the DOWC, Respondents filed an Application for Hearing (AFH) on April 7, 2023. Respondents' sought to withdraw the FAL on the basis of mutual mistake of material fact.

14. Respondent filed a "Response to Division of Workers Compensation Notice Regarding Final Admission of Liability" with their AFH. They remarked that they were "raising the issue of withdrawal of the FAL based on the mutual mistake of the parties." Respondents elaborated that the mutual mistake included "Respondents' mistakenly admitting to whole person impairment and the mistake regarding Claimant's restrictions and ability to work as claimant was undergoing cancer treatment simultaneously with treatment for the related Workers' Compensation injuries."

15. On April 24, 2023 Respondents filed a new GAL attempting to rescind the entire period of TTD benefits and acknowledge medical benefits only.

16. In response, the DOWC sent a second letter to Respondents dated May 22, 2023. The letter specified that "[t]emporary benefits may not be modified without complying with Rule 6 or through the hearing process. Within 15 days, please provide correspondence regarding your position or file an amended decision reinstating the previously admitted temporary benefits with a current certificate of mailing date."

17. On May 30, 2023 Respondents notified the DOWC that a hearing was scheduled on the issues. They specified that they were "disputing the period during which Claimant was entitled to TTD benefits, as Claimant was undergoing treatment for health issues not related to a work incident." Respondents also sought an overpayment of TTD benefits.

18. The record reveals that Respondents' March 20, 2023 FAL was defective and thus failed to close the present claim. Notably, the FAL erroneously acknowledged a 17% whole person impairment rather than the 29% scheduled impairment. The DOWC advised Respondents that the medical report suggested the admitted impairment should be a 29% scheduled rating to the upper extremity. The DOWC also noted that the required impairment worksheet was not attached to the FAL.

19. After the DOWC informed Respondents that the FAL was defective, Respondents did not file an amended FAL. Instead, Respondents filed an AFH within 10 days to withdraw the FAL. By failing to amend the FAL and clarify the benefits to which Claimant was entitled, Claimant did not receive all the information necessary to make an informed decision. Moreover, Respondents did not attach the required impairment worksheet to the document. Claimant thus lacked sufficient information about whether to challenge the FAL. Therefore, the March 20, 2023 FAL was defective and failed to close any issues.

20. Respondents have failed to prove it is more probably true than not that they are entitled terminate Claimant's TTD benefits based on a modified duty job offer. At no point after June 23, 2022 and prior to MMI did Claimant return to regular or modified duty employment. Although Claimant received an "offer of transitional duty" on June 23, 2022,

it did not comply with Rule 6-4. Despite Claimant's acceptance of the position, there is no evidence that the job duties were reviewed or approved by Claimant's treating physician. He also never received a written release to return to regular employment. The offer of transitional duty thus did not comply with WCRP Rule 6-4. It was therefore insufficient to terminate TTD benefits. Even if the modified job offer was sufficient to cease TTD benefits, Claimant received increased restrictions on the following day. Respondents would thus have had to provide a new modified duty job offer complying with Rule 6-4. Respondents have not met their burden to modify previously admitted TTD benefits because none of the statutory conditions enumerated in §8-42-105(3)(a)-(d), C.R.S. were satisfied until Claimant reached MMI. Claimant is thus entitled to receive TTD benefits for the period June 23, 2022 until terminated by statute on February 3, 2023.

21. Respondents have failed to establish it is more probably true than not that Claimant's disability was triggered by the intervening event of cancer treatment that terminated his entitlement to TTD benefits. Respondents have not demonstrated that Claimant's cancer treatment severed the causal connection between his industrial injury and wage loss. They have simply offered no evidence that Claimant was under any restrictions due to his cancer treatment. The record reveals that Claimant was consistently restricted from using his right upper extremity until he reached MMI on February 3, 2023. While undergoing cancer treatment, Claimant was under the same restrictions of not using his right arm. Notably, by November 2, 2022, Respondents confirmed that they could not accommodate Claimant's work restrictions. Because Claimant received permanent restrictions and an impairment rating, his industrial injury contributed to his wage loss throughout the entirety of his claim. Accordingly, Claimant is entitled to receive TTD benefits for the period June 23, 2022 until terminated by statute on February 3, 2023.

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).

Validity of the March 20, 2023 FAL

4. The presence of a valid FAL is a jurisdictional prerequisite to the closure of a claim. *McCotter v. U.S. West Communications*, W.C. No. 4-430-792 (ICAO, Mar. 25, 2002). In the absence of full compliance with §8-43-203(2), C.R.S. the claimant's failure to object to a final admission does not close the claim. *Reed v. Demetre Painting*, W.C. No. 3-069-138 (ICAO, Jan. 15, 1993). Specifically, in *Reed* the respondents failed to attach the medical report on which the final admission for permanent disability benefits was predicated. The Panel concluded that, under the circumstances, the claimant's failure to contest the defective final admission did not close the issue of permanent disability. Similarly, in *Burns v. Northglenn Dodge*, W.C. No. 4-486-911 (ICAO, May 12, 2003), the Panel determined that a final admission containing the wrong notice under §8-43-203(2), C.R.S. was invalid and did not close any issues, even absent an objection from the claimant. *See Maloney v. Ampex Corporation*, W.C. No. 3-952-034 (ICAO, Feb. 27, 2001) (failure to attach medical reports as required by statue vitiated effectiveness of FAL). Therefore, if the FAL is insufficient to close the issue of permanent disability benefits, it is also insufficient to close the issue of temporary total disability benefits. *See Bargas v. Special Transit* W.C. No. 4-534-551 (ICAO, June 4, 2004); *Siegmund v. Fore Property Company,* W.C. No. 4-649-193 (ICAO, Jan. 30, 2007). One obvious purpose of the requirements of §8-43-203(2)(b), C.R.S. and Rule 5-5(A) is to provide the claimant with notice of the exact basis of admitted or denied liability in order to permit an informed decision about whether to challenge the final admission. *Silva v. Poudre School Dist.*, W.C. No. 4-651-643 (ICAO, Apr. 30, 2008).

5. As found, the record reveals that Respondents' March 20, 2023 FAL was defective and thus failed to close the present claim. Notably, the FAL erroneously acknowledged a 17% whole person impairment rather than the 29% scheduled impairment. The DOWC advised Respondents that the medical report suggested the admitted impairment should be a 29% scheduled rating to the upper extremity. The DOWC also noted that the required impairment worksheet was not attached to the FAL.

6. As found, after the DOWC informed Respondents that the FAL was defective, Respondents did not file an amended FAL. Instead, Respondents filed an AFH within 10 days to withdraw the FAL. By failing to amend the FAL and clarify the benefits to which Claimant was entitled, Claimant did not receive all the information necessary to make an informed decision. Moreover, Respondents did not attach the required impairment worksheet to the document. Claimant thus lacked sufficient information about whether to challenge the FAL. Therefore, the March 20, 2023 FAL was defective and failed to close any issues.

Temporary Total Disability Benefits

7. To prove entitlement to TTD benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by 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). Eligibility for TTD benefits requires only that the work-related injury contributes "to some degree" to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). 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.

8. WCRP Rule 6-4 enumerates the procedures for terminating TTD benefits based on a modified duty job offer:

> (4) A copy of a written offer delivered to the claimant with a signed certificate of service, containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions.
>
> (a) A written offer of modified duty may only be used to terminate benefits pursuant to this subsection if:
>
> i) A copy of the written inquiry to the treating physician is provided to the claimant by the insurer or employer at the time the authorized treating physician is asked to provide a statement on the claimant's capacity to perform the offered modified duty; and

ii) The claimant is provided a period of 3 business days from the date of receipt of the offer to return to work in response to the offer of modified duty.

9. As found, Respondents have failed to prove by a preponderance of the evidence that they are entitled terminate Claimant's TTD benefits based on a modified duty job offer. At no point after June 23, 2022 and prior to MMI did Claimant return to regular or modified duty employment. Although Claimant received an "offer of transitional duty" on June 23, 2022, it did not comply with Rule 6-4. Despite Claimant's acceptance of the position, there is no evidence that the job duties were reviewed or approved by Claimant's treating physician. He also never received a written release to return to regular employment. The offer of transitional duty thus did not comply with WCRP Rule 6-4. It was therefore insufficient to terminate TTD benefits. Even if the modified job offer was sufficient to cease TTD benefits, Claimant received increased restrictions on the following day. Respondents would thus have had to provide a new modified duty job offer complying with Rule 6-4. Respondents have not met their burden to modify previously admitted TTD benefits because none of the statutory conditions enumerated in §8-42-105(3)(a)-(d), C.R.S. were satisfied until Claimant reached MMI. Claimant is thus entitled to receive TTD benefits for the period June 23, 2022 until terminated by statute on February 3, 2023.

Intervening Event of Cancer Treatment

10. The existence of an intervening event is an affirmative defense to the respondents' liability. *In Re Granados*, W.C. No. 5-146-480 (ICAO, Dec. 5, 2022). Consequently, it is the respondents' burden to prove that the claimant's disability is attributable to the intervening injury or condition and not the industrial injury. *See Owens v. Indus. Claim Appeals Off.*, 49 P.3d 1187 (Colo. App. 2002). The intervening event does not sever the causal connection between the injury and the claimant's condition unless the disability is triggered by the intervening event. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). Whether the respondents have sustained their burden to prove the claimant's disability was triggered by an intervening event is a question of fact for resolution by the ALJ. *See City of Aurora v. Dortch*, 799 P.2d 462 (Colo. App. 1990).

11. As found, Respondents have failed to establish by a preponderance of the evidence that Claimant's disability was triggered by the intervening event of cancer treatment that terminated his entitlement to TTD benefits. Respondents have not demonstrated that Claimant's cancer treatment severed the causal connection between his industrial injury and wage loss. They have simply offered no evidence that Claimant was under any restrictions due to his cancer treatment. The record reveals that Claimant was consistently restricted from using his right upper extremity until he reached MMI on February 3, 2023. While undergoing cancer treatment, Claimant was under the same restrictions of not using his right arm. Notably, by November 2, 2022, Respondents confirmed that they could not accommodate Claimant's work restrictions. Because

Claimant received permanent restrictions and an impairment rating, his industrial injury contributed to his wage loss throughout the entirety of his claim. Accordingly, Claimant is entitled to receive TTD benefits for the period June 23, 2022 until terminated by statute on February 3, 2023.

ORDER

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

1. Respondents' March 20, 2023 FAL was defective and thus failed to close the present claim.

2. Claimant shall receive TTD benefits for the period June 23, 2022 until terminated by statute when he reached MMI on February 3, 2023.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 8, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the follow up sleep study and prescription for Losartan is reasonable and necessary medical treatment related to Claimant's admitted injury?

- Prior to the hearing, the parties agreed that Respondent would pay the outstanding medical bills for Claimant's home supply of oxygen and oxygen concentrator.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her right shoulder while employed by Employer on or about December 18, 2020 when she lifted a seventy five (75) pound ski bag. Claimant subsequently underwent two (2) surgeries to her right shoulder to repair her rotator cuff. Claimant testified that during the second surgery, she had an injection that paralyzed her phrenic nerve and paralyzed her right hemidiaph ragm.

2. Claimant testified that her current symptoms include shortness of breath and that she now uses a BiPAP machine at night when she sleeps along with 2 liters of oxygen. Claimant testified that prior to her workers' compensation injury, she did not use oxygen and did not experience shortness of breath. Claimant testified that prior to the work injury, she had not been diagnosed with asthma.

3. Following Claimant's February 17, 2022 surgery with Dr. Bynum that resulted in her phrenic nerve injury, Claimant sough t treatment with Dr. Hirsch. Dr. Hirsch had Claimant undergo a series of tests that demonstrated Claimant had reduced oxygen intake as a result of the phrenic nerve injury. On May 13, 2022, Dr. Hirsch recommended Claimant obtain a BiPAP machine to assist Claimant with her nighttime hypoxia and shortness of breath.

4. Claimant was subsequently referred for spirometry testing on May 31, 2022. The spirometry testing demonstrated Claimant presented with reduced FEV1 and FVC levels with significant bronchodilator response. Claimant was subsequently referred to National Jewish Hospital where she was initially evaluated on August 23, 2022.and underwent a series of tests.

5. Claimant returned to National Jewish Hospital on September 13, 2022 and was evaluated by Dr. Lin. Dr. Lin noted Claimant's accident history and surgeries and summarized the testing results from Claimant's August visit. Dr. Lin referred Claimant for additional evaluation with Dr. Metjian.

6. Claimant was examined by Dr. Lee at Montrose Regional Health on December 29, 2022. Dr. Lee noted that Claimant had discordant blood pressure readings and hypertension. Dr. Lee noted Claimant had a history of white coat hypertension. Claimant reported to Dr. Lee that she would have her blood pressure tested frequently and never had discordant readings until after her rotator cuff surgery. Claimant was instructed to keep a daily log of her blood pressure and return to discuss use of antihypertensives.

7. Claimant was examined by Dr. Shelton on January 9, 2023. Dr. Shelton noted that Claimant's blood pressure was appropriate for her age, but at times borderline. Claimant reported she would like to avoid medicines for her blood pressure if possible. Dr. Shelton indicated that he believed Claimant's blood pressure would be improved by the receipt of her BiPAP machine and ambubag.

8. Claimant returned to Montrose Regional Health on February 27, 2023. Nurse Pimetel noted Claimant continued to have elevated blood pressure and noted that they may recommend medications including Losartan at a follow up examination in six months.

9. Claimant presented to National Jewish Hospital on April 28, 2023 and was evaluated by Dr. Metjian. Dr. Metian noted Claimant's medical history and her use of the BiPAP machine along with using an ambubag 2-3 times per day. Dr. Metian recommended Claimant start Albuterol and recommended Claimant undergo a sleep study for PAP Titration.

10. Claimant presented the testimony of Dr. Lin at hearing. Dr. Lin is a physician specializing in pulmonary medicine. Dr. Lin testified she treated Claimant when she previously worked at National Jewish Hospital. Dr. Lin testified that Claimant was diagnosed with a paralyzed right diaphragm that was related to her rotator cuff surgery. Dr. Lin testified Claimant underwent a pulmonary function test ("PFT") on May 31, 2022 that showed Claimant had a bronchodilator effect.

11. Dr. Lin testified at hearing that the sleep study recommended by Dr. Metrian was intended to make sure the air pressure in the bypass is at the right level to keep Claimant's lungs open. Dr. Lin opined that the follow up sleep study was appropriate for Claimant's ongoing care.

12. Dr. Lin noted in her testimony that Claimant had been diagnosed with mild asthma after her work injury. Dr. Lin testified that Claimant reported she was asymptomatic from a respiratory stand point prior to her work injury. Dr. Lin testified that when Claimant sustained the injury to her diaphragm, it made it difficult for her to compensate for her underlying asthma. Dr. Lin testified that the proposed sleep study would not be related to Claimant's underlying asthma.

13. Dr. Lin testiffeid that Claimant had reported that she had improvement with her symptoms when she used the ambubag and BiPAP machine. Dr. Lin explained that the BiPAP machine does not treat the phrenic nerve, but instead helps support the

paralyzed diaphragm and allows the body to heal on its own. Dr. Lin testified that the sleep study would help determine what BiPAP pressure settings were effective in preventing Claimant from having low oxygen at night while sleeping.

14. With regard to Claimant's development of hypertension, Dr. Lin testified that weight gain and inactivity could aggravate Claimant's high blood pressure. Dr. Lin also testified that contributing factors for high blood pressure could include anxiety, stress and pain.

15. Dr. Shelton testified for Claimant at the hearing in this matter. Dr. Shelton testified he treats Claimant for the effects of her work injury. Dr. Shelton noted that as a result of the work injury, Claimant sustained an injury to her right rotator cuff which required surgery. Dr. Shelton noted that after Claimant's second surgery, Claimant developed shortness of breath and was diagnosed with phrenic nerve paralysis.

16. Dr. Shelton testified Claimant eventually underwent a plication surgery to her right hemidiaphragm. Dr. Shelton noted that after the plication surgery Claimant reported some improvement, but still had issues with her oxygen levels. Dr. Shelton noted that Claimant had a sleep study recommended that would be a two night study. Dr. Shelton testified that it was his opinion that the sleep study was reasonable and necessary as it could show if Claimant improved after the plication surgery.

17. Dr. Shelton testified that after Claimant's injury she developed high blood pressure. Dr. Shelton testified that he eventually prescribed medication (Losartan) for Claimant's high blood pressure. Dr. Shelton testified that after Claimant's plication surgery, he took Claimant off the medication as she was not tolerating the medications and after the surgery, Claimant's high blood pressure came down to an acceptable level. Dr. Shelton testified that prior to Claimant's high blood pressure coming under control after the surgery, the Losartan was reasonable and necessary medical treatment that was related to Claimant's work injury.

18. Respondent obtained a records review independent medical examination ("IME") of Claimant with Dr. Lesnak on June 23, 2023. Dr. Lesnak summarized Claimant's medical treatment and opined that any treatment for Claimant's diagnosis of reactive airway disease (likely asthma), symptomatic GERO, or episodic hypertension would be unrelated to her diagnosis of a right phrenic nerve injury palsy. Dr. Lesnak further opined that Claimant's hypertension was not related to her work injury.

19. Respondent obtained a records review IME of Claimant with Dr. Schwartz on October 16, 2023. Dr. Schwarz issued a report following his review of the records that summarized Claimant's medical treatment and set forth his opinions involving Claimant's case. Dr. Schwartz opined in his report that Claimant's hypertension was not related to her work injury. Dr. Schwartz noted that Claimant's echocardiogram that was performed on December 1, 2022 showed concentric left ventricular hypertrophy, thickening of the heart that typically occurs from years of untreated hypertension.

20. Dr. Schwartz testified at hearing in this matter and agreed that Claimant had a paralysis of the phrenic nerve that is a rare complication of the nerve block Claimant had during her surgery. Dr. Schwartz testified that Claimant has paralysis of the right diaphragm, so the diaphragm will become flaccid and billow upwards and put pressure on the base of the right lung. Dr. Schwartz testified that the plication procedure involves the surgeon going in and sewing up the diaphragm to keep the diaphragm sitting in a lower position and keeping it from putting pressure on the lung. Dr. Schwartz testified that this procedure doesn't fix the condition, but does improve the condition and will take some time to heal.

21. Dr. Schwartz testified that he would recommend that Claimant undergo a breathing capacity test. Dr. Schwartz testified that this testing could be performed while Claimant was recumbent, but not necessarily asleep. Dr. Schwartz testified that the results of this testing would show whether Claimant needed oxygen at night. Dr. Schwartz also recommended testing of Claimant's oxygen levels with activity to determine whether Claimant needed oxygen during activity.

22. Dr. Schwartz opined in his testimony that Claimant needed oxygen while she sleeps but did not need the BiPAP machine. Dr. Schwartz further opined that a sleep study would not be related to her work injury. Dr. Schwartz opined that if Claimant had sleep apnea, it would not be related to her diaphragm injury.

23. Dr. Schwartz testified that Claimant had thickening of the heart as shown on the echocardiogram was the result of longstanding hypertension and not related to Claimant's workers' compensation injury.

24. With regard to the sleep study, the ALJ credits the Claimant's testimony at hearing along with the testimony of Dr. Lin and Dr. Shelton and finds that Claimant has established that it is more probable than not that the sleep study is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury. The ALJ finds the testimony of Dr. Lin that the sleep study would demonstrate the appropriate levels of oxygen for Claimant to use at night to be credible and persuasive.

25. With regard to the prescription for Losartan, the ALJ credits the testimony of Dr. Shelton that Claimant's blood pressure stabilized after her plication surgery to the point that she no longer needs medication for her high blood pressure. The ALJ further credits the testimony of Dr. Schwartz that the findings of the echocardiogram show evidence of long standing hypertension. The ALJ further credits the testimony of Dr. Schwartz that the work injury did not cause Claimant's hypertension as it preexisted her work injury.

26. The ALJ therefore finds that Claimant has failed to prove that it is more probable than not that the Losartan medication was causally related to her December 19, 2020 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., 2013 The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

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

4. As found, Claimant has proven by a preponderance of the evidence that the medical treatment involving the sleep study recommended by National Jewish Hospital is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her injury. As found, the testimony of Claimant, Dr. Shelton and Dr. Lin are found to be credible and persuasive with regard to this issue.

5. As found, Claimant has failed to prove by a preponderance of the evidence that the prescription for Losartan is reasonable medical treatment related to Claimant's December 19, 2020 work injury. As found, the testimony of Dr. Schwartz is found to be credible with regard to this issue.

ORDER

It is therefore ordered that:

1. Respondent is liable for the sleep study recommended by National Jewish Hospital as reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the injury.

2. Claimant's request for an Order requiring Respondent to pay for the Losartan prescription is denied and dismissed.

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

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

DATED: December 11,2023

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. 5-156-485-004

ISSUES

1. Whether claimant has proven by a preponderance of the evidence that he sustained an injury in the course and scope of his employment on October 13, 2020;

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

3. Whether, in what amounts, and for what periods Claimant is entitled to temporary total or temporary partial disability (TTD or TPD) benefits;

4. Whether Respondents are liable to pay for medical care provided to Claimant to treat his compensable injury;

5. Whether and as of what date Claimant reached maximum medical improvement (MMI);

6. Whether and in what amount Claimant entitled to permanent partial disability (PPD) benefits;

7. Whether and in what amount Claimant is entitled to an award of disfigurement benefits;

8. Whether and in what amount each party is liable for the attorney fees of the other party.

FINDINGS OF FACT

1. Claimant date of birth is December 2, 1955. He was sixty-seven years old at the time of hearing.

2. Claimant was first employed by employer in 2007 as EMT/Paramedic and Assistant Chief of Operations. While he was a full-time employee, Respondent-Employer provided Claimant with health insurance benefits. He worked continuously as a full-time employee for employer until he resigned effective January 1, 2021, as Claimant was unable to work full-time and perform the duties required of his positions. Claimant worked PRN for Respondent-Employer beginning January 1, 2021, doing tasks assigned to him by employer.

3. On September 23, 2020, while he was at work at the [Redacted, hereinafter PS], Claimant was required to receive, and did receive, the flu vaccine, GFK

Fluarix, 0.5 ml.

4. Since June 2020, Claimant had been treated for left quadriceps tendon repair which he had suffered in a non-work related fall. He had surgery and was receiving physical therapy at Rocky Mountain Physical Therapy in Pagosa Springs for the torn quad. The physical therapist reported Claimant had been doing well until October, and on October 13, 2020, he reported Claimant demonstrated bilateral leg weakness with significant difficulty with walking.

5. During October 2020, Claimant was treated by orthopedist Dr. William Webb, for the increasing bilateral leg weakness and rapid loss of function of his legs.

6. An MRI and a low back epidural steroid injection were done to treat low back stenosis identified at L3-S1, which had worsened since Claimant had undergone an L4-S1 fusion in 2013.). There was no improvement in the leg weakness from this treatment.

7. On October 31, 2020 and November 3, 2020, Claimant suffered dislocations of his right hip which required emergency and orthopedic care to reduce the dislocations. The emergency care in November included a lumbar puncture the findings from which were consistent with Guillain-Barre Syndrome (GBS).

8. On November 3, 2020, Claimant was transferred by air transport to University of Colorado Health Memorial Hospital in Colorado Springs where the GBS diagnosis was confirmed and he was treated by specialists including orthopedics, neurology, neurosurgery, radiology, and physiatry. He was treated by intravenous immuno-globulin for five (5) days and experienced significant relief of leg weakness and lack of function.

9. Claimant was transferred to University of Colorado Health Rehabilitation. He was discharged from there on November 19, 2020. He consulted Spine Colorado about the worsened low back stenosis. He was evaluated by his family physician, Dr. Buchner, in Pagosa Springs. He relocated to Denver and attended physical therapy at Spalding Rehabilitation for the GBS symptoms.

10. On December 14, 2020, orthopedic physician Dr. Jennings examined Claimant and opined that Claimant's hip dislocations were due to the effects of the GBS and the generalized lower extremity weakness resulting therefrom, and not due to the prior hip prosthesis revision which Claimant had undergone in 2019.

11. On December 4, 2020, Claimant reported the injury of GBS due to the flu vaccine to the employer. Employer filed a first report of injury on December 11, 2020.

12. On December 16, 2020, Respondents issued a Notice of Contest pending further investigation.

13. Claimant continued outpatient treatment at Spalding Rehabilitation through February, 2021. Improvement occurred, but he continued to experience weakness and fatigue, and balance issues with difficulty walking on any surface other than a flat even surface.

14. On February 5, 2021, Claimant suffered a third right hip dislocation. According to Dr. Jennings at Colorado Joint Replacement, the dislocation was caused by the GBS. The dislocation was reduced by the emergency department of the Medical Center of Aurora.

15. Claimant relocated back to Pagosa Springs from Denver and received care from Dr. Buchner and Rocky Mountain Physical Therapy.

16. On July 11, 2021, Claimant experienced his fourth right hip dislocation while walking. The Pagosa Springs Hospital Emergency Department reduced the dislocation.

17. Claimant received care from Spine Colorado. On January 1, 2022, Dr. Orndorff recommended a L3-4 lumbar fusion. After a second opinion from Dr. Wong in Denver, Dr. Orndorff did the fusion surgery on May 31, 2022. The surgery has relieved the leg pain symptoms from the low back, but the symptoms of generalized weakness, fatigue, balance problems, and coordination attributed to GBS, persist. Claimant described them as ongoing and currently present.

18. Respondents arranged for an independent medical evaluation of Claimant with Elizabeth Bisgard, MD, MPH, FACOEM on October 10, 2022. Dr. Bisgard is certified by the State of Colorado as a Level II accredited physician. Dr. Bisgard reviewed extensive medical records covering Claimant's medical care from May 2010 through May 2022. She wrote a twenty-six (26) page medical record review. She met with Claimant via Zoom and issued a nine (9) page narrative report on October 14, 2020. Dr. Bisgard opined that the GBS is probably related to the flu vaccine, and Claimant's presentation is consistent with post-vaccine GBS, that his four right hip dislocations are secondary to the weakness in his leg from GBS, and therefore are causally connected. She opined that Claimant's lumbar spine condition, bi-lateral shoulder conditions, and Achilles heel issues discussed in her report are unrelated to Claimant's GBS and are outside the scope of the workers' compensation claim. She opined Claimant reached MMI on September 16, 2021. Dr. Bisgard agreed with Claimant's treating physicians that Claimant was able to work in a sedentary position, but that he does not meet the qualifications to work as a paramedic in the field. She opined Claimant's future medical maintenance care for GBS may include physical therapy treatment three to four times a year to upgrade his home exercise program. The parties stipulated to the accuracy and correctness of those opinions. This ALJ finds that Dr. Bisgard's opinions are well supported by the medical records, by Claimant's testimony, and the record as a whole,

and that her reports and opinions are credible and accepted as fact.

19. Dr. Bisgard also opined Claimant has a thirty percent (30%) whole person permanent impairment based on the *AMA Guides, Third Edition (Revised), 1991, Neurologic Table, page 109*, A. The parties declined to stipulate to this opinion as they understand the issue of permanent partial disability benefits (PPD) is not yet ripe and not before this court at this hearing.

20. Claimant testified he had reviewed Dr. Bisgard's report and agreed with her medical record report and with her opinions in her narrative report. The parties stipulated and the record supports that the medical care he has received to treat the effects of the GBS has all been from authorized providers. Claimant testified and reaffirmed that he has had certain medical issues and treatment since the onset of the GBS which were unrelated to the GBS, including an Achilles tear, the lumbar surgery, and shoulder problems.

21. Claimant applied for a hearing on May 10, 2023, on the issues presented herein.

22. Claimant started receiving Social Security retirement benefits beginning January 1, 2021. Exhibits 62-65 document the dollar amount paid for Social Security Retirement and his receipt of Medicare benefits as of January 1, 2021.

23. Claimant's wage and health insurance records of the employer are Exhibits 35-59. Although the first report of injury states Claimant's AWW was $1,420.41, the parties stipulated that Claimant's average weekly wage at the time of injury on October 13, 2020, was $1,446.13. The wage records and exhibits support the parties' stipulation. The AWW as of October 13, 2020, was $1,446.13.

24. Claimant's health insurance benefits from the employer terminated on December 31, 2020. His loss of health insurance benefits increased his average weekly wage. The parties stipulated to an increased average weekly wage commencing January 1, 2021 at the rate of $1,500.00. The exhibits support the parties' stipulation. The AWW beginning January 1, 2021, is $1,500.00.

25. Claimant testified he was able to work part time and remotely due to the GBS symptoms after October 13, 2020, and he worked while he was hospitalized and receiving treatment for GBS and while he was outpatient living at home. The wage records show impairment of his regular historical earnings through reduced hours and wages since the injury through MMI of September 16, 2021. The parties stipulated to the calculated amounts of temporary disability on account of the wage impairment during his disability until MMI as follows: (a) Temporary partial disability compensation from October 13, 2020 to January 1, 2021, in the amount of $5,073.58; and, (b) Beginning January 1, 2021, the parties stipulated that Claimant's average weekly wage increased, as noted

above, and that respondents are entitled to take the statutory offset of fifty percent (50%) predicated upon the initial award of Social Security Benefits. The parties stipulated that Claimant was entitled to temporary partial disability benefits beginning January 1, 2021, through MMI on September 16, 2021, in the total amount of $19,426.07. The exhibits support the stipulations and this ALJ accepts the stipulations as fact.

26. Claimant's testimony is undisputed, and well supported by the exhibits. This ALJ finds that Claimant is credible.

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., 2010. 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 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 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, C.R.S.

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).

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 action; 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); CJI, Civil 3:16 (2006).

4. 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); S*ee 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. Iriando,* 811

P.2d, 379, 383 (Colo. 1991). The claimant must prove a casual nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961, P.2d 571 (Colo.App.1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo.App.2004); *H & H Warehouse v. Vicory*, 805, P.2d 1167 (Colo.App.1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (Oct. 2, 2015).

5. Based upon the evidence and the law, this ALJ concludes that Claimant has established by the preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment on October 13, 2020. As found, Claimant contracted GBS and other causally related conditions, as determined by Dr. Bisgard.

6. Section 8-42-102(2), C.R.S., requires the ALJ to calculate Claimant's average weekly wage based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, §8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3), C.R.S. establishes the so-called "discretionary exemption". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App.1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d 77; *Avalanche Indus v. ICAO*, 166 P.3d 147 (Colo.App.2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity the ALJ is vested with the discretionary authority to use an alternative method of determining fair wage. *See id.*

An ALJ may base an AWW determination "not only on the claimant's wage at the time of the injury, but on other relevant factor when the case's unique circumstances require." *Avalanche Indus, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008), rev'd on other grounds, *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010). The ALJ's discretionary authority permits the ALJ to consider post-injury pay increases a claimant would have received absent the work-related injury. *See In Re Tibbs,* W.C. No. 4-422-333 (ICAO, Apr. 12, 2001); *Wheeler v. Archdiocese of Denver Management Corp.,* W.C. No. 4-669-708 (Dec. 21, 2010). But, an ALJ may not base an award on speculation or conjecture. *Nanez v. Industrial Claim Appeals Office,* 444 P.3d 820 (Colo. 2018); *Upchurch v. Industrial Commission*, 80 P.2d 628 (Colo. App. 1985). To that end, the alleged post-injury wage increase must be "sufficiently definite" to support an increase in the AWW. *Tibbs, supra; Ebersbach v. UFCW local No. 7,* W.C. No. 4-240-475 (May 5, 1997); *Romero v. Cub Foods,* W.C. No. 4-218-823 (Sept. 28, 2000).

7. Based on the evidence and the law, this ALJ concludes that Claimant's AWW should be calculated to include his average earnings, including overtime, and after the loss of Claimant's health insurance, the AWW should be increased to account for his loss of the fringe benefit of health insurance. This ALJ concludes that the calculation of

the AWW should not and will not include any additional amount in the calculation, such as from loss of bonuses, any contributions for social security, retirement or pension contributions, or any other employment benefits. The ALJ concludes that the parties' stipulation and calculation of the AWW is supported by the evidence and the law, and that the AWW from October 13, 2020 to January 1, 2021, is $1446.13, and that the AWW beginning January 2021, is $1,500.00.

8. To prove entitlement to temporary partial disability benefits a claimant must demonstrate by a preponderance of the evidence that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. See §8-42-105 and 106, C.R.S.; *Anderson v. Longmont Toyota,* 102P. 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 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. Acce Electric*, 971 nP.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. *Lumburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

9. Temporary partial disability (TPD) benefits are 66 2/3 percent of the difference between the employee's AWW at the time of the injury (and later as it is increased for lost health insurance benefits), and the employee's AWW during the continuance of his temporary partial disability. Those 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. §8-42-106 (1) - (2), C.R.S.

10. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TPD benefits for the period October 13, 2020 until the date of MMI, September 16, 2021, in the total amount of $24,499.65.

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio,* 886 P2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.* 107 P.3d 999, 1001 (Colo.App.2004). The question of whether a particular disability is the result of the natural

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

12. 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 casual 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).

13. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his October 13, 2020 industrial injuries resulting from the September 23, 2020, flu vaccination required by employer.

14. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1998). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.* Based upon the evidence and the law, this ALJ concludes that Dr. Bisgard's opinions on maintenance medical care are well supported by the evidence, and adopts them: Claimant is entitled to maintenance medical care after the MMI date of September 16, 2021, of four to six physical therapy visits per year.

15. Maximum medical improvement means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-4-201 (11.5). Dr. Bisgard credibly opined that Claimant attained MMI on September 16, 2021. Claimant and Respondents concur with Dr. Bisgard's opinion regarding the date of MMI, and so stipulated at hearing. As found, this ALJ recognizes the parties' stipulation, and concludes that the evidence and the law support Dr. Bisgard's determination that Claimant reached MMI on September 16, 2021.

16. Permanent partial disability benefits are paid after the claim is found compensable by respondents to a claimant when a claimant's injury results in permanent

medical impairment, either scheduled or nonscheduled, and an opinion of permanent impairment is provided, depending on the circumstances of each case, by either a treating physician, or an independent medical examiner, Section 8-42-107.2, C.R.S. This ALJ agrees with the parties' counsel's statements at hearing that the determination of PPD benefits is premature. The parties have agreed to address the issue of PPD benefits after the hearing order is final.

17. Section 8-43-403, C.R.S. addresses attorney fees under the Colorado Workers' Compensation Act and provides for a 20% contingency fee paid by a claimant to his attorney. The few exceptions noted in that Section do not apply to this claim. There are no provisions for respondents to pay the attorney fees of a claimant's attorney except in limited circumstances that do not apply here, such as the setting of a hearing on issues unripe for determination. Section 8-43-211 (2)(d), C.R.S., provides, "if any person requires a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person shall be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting." This statute authorizes a party to seek its fees and costs incurred before the hearing and without reference to the guidelines for seeking attorney fees and costs provided by other statutes or by court rules. Whether attorney fees and costs are reasonable is considered under an abuse of discretion standard. An ALJ does not abuse discretion unless the order is beyond the bounds of reason, as where it is unsupported by the law or contrary to the evidence. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo.App.2001). Since it was Claimant's application for hearing that commenced the litigation and issues presented to the Court herein, this Court concludes that there is no basis for Respondents to pay Claimant's attorney fees.

18. Disfigurement benefits may be awarded to an employee who is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, in addition to all other compensation benefits. §8-42-108, C.R.S. Claimant averred that he has not sustained disfigurement, and he presented no evidence at hearing providing a basis upon which to award disfigurement benefits. Therefore, this Court declines to award disfigurement benefits.

19. The last issue is whether respondents should pay Claimant's litigation costs. In the Colorado Workers' Compensation Act, like attorney fees, costs are generally the responsibility of the party incurring them. One exception is found in Section 8-42-101(5), C.R.S., involving unpaid maintenance medical care bills. Neither that issue nor any exception applies here. This ALJ concludes that each party shall pay their own respective litigation costs.

ORDER

It is therefore ordered that:

1. Claimant sustained an injury in the course and scope of his employment on October 13, 2020.
2. Claimant's average weekly wage at the time of injury was $1,446.14. On

January 1, 2021, Claimant's average weekly wage increased to $1,500.00.

3. Respondents shall pay claimant $5,073.58 as temporary partial disability compensation for the time period beginning October 13, 2020 through December 31, 2020, and temporary partial disability compensation of $19,426.07 for the time period beginning January 1, 2021 through the date of maximum medical improvement on September 16, 2021. The total of temporary disability benefits owed by respondents to claimant through September 16, 2021, is $24,499.65.
4. Respondents shall pay for the reasonable and necessary medical care related to the Guillian-Barre Syndrome (GBS) and consequential care for the Gullian-Barre Syndrome (GBS), in accordance with Dr. Bisgard's opinions in her report discussed above, which includes, but is not limited to the four incidents of the right hip dislocation.
5. Claimant reached MMI on September 16, 2021.
6. The issue of PPD is deferred for future determination.
7. Claimant's application for disfigurement is denied and dismissed.
8. Claimant is not entitled to an award for his attorney's fees and/or litigation costs. Each party shall pay their respective attorney fees and costs.
9. All matters not determined herein are reserved for future determination.

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

DATED: December 11, 2023

/s/ Stephen J. Abbott

_____

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 he sustained a compensable injury to his right shoulder on or about January 18, 2023.

II. If Claimant established that he suffered a compensable right shoulder injury, whether he also established, by a preponderance of the evidence, that the surgery recommended to treat his right shoulder condition is reasonable, necessary, and related to said industrial injury.

III. If Claimant established a compensable injury, whether he also proved that he is entitled to temporary total disability ("TTD") benefits beginning May 26, 2023 and ongoing.

FINDINGS OF FACT

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

1. Claimant is a former heavy equipment mechanic for Employer.[1] On January 18, 2023, Claimant was tasked with changing the batteries and repairing the thumb linkage on an excavator owned by Employer.

2. After changing the batteries without misfortune, Claimant turned his attention to repairing the linkage. Claimant testified that the linkage was difficult to remove and he had to resort to using a 10 pound hand held sledge hammer to loosen/remove the pins holding the linkage to the machine. While hammering, Claimant experienced a sudden onset of pain in his right shoulder.[2]

3. Claimant testified that he reported his injury to his supervisor, [Redacted, hereinafter AW] who was nearby at the time. According to Claimant he said: "I think I hurt my shoulder working on this thing", to which AW[Redacted] replied, "Are you gonna be okay?" Claimant testified that he was able to finish his work shift, albeit in pain. He went home for the evening and took Ibuprofen for his persistent pain.

4. Claimant testified that no written report regarding the incident was completed on the date of the alleged injury.

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[1] At hearing, Claimant testified that he was not sure if he is still employed by [Redacted, hereinafter PC]; however, he added that his last day of work for Employer was May 26, 2023. Moreover, in his position statement, Counsel for Respondents notes specifically that Claimant "was" employed by PC[Redacted] (Employer) as their lead mechanic. Accordingly, the ALJ has elected to characterize Claimant as a former employee of PC[Redacted].

[2] Claimant is right hand dominate. (Resp. Ex. A, p. 1).

5. Claimant testified that he returned to work on January 19, during which shift he worked with a painful shoulder. Again, no conversations occurred between Claimant and his Employer regarding the alleged January 18 injury during this shift and no accident report was completed.

6. Because his shoulder symptoms were not improving with time, Claimant testified that he felt needed to do something for his pain. Accordingly, Claimant testified that on January 24, 2023, he told AW[Redacted] he needed to see a doctor. Neither an incident report nor an employer's first report of injury were completed at this time and Claimant was not referred to a designated medical provider.

7. Claimant proceeded to the offices of his primary care physician (PCP) on January 24, 2023, where he was evaluated by Physician Assistant (PA) Stanley Johnson. PA Johnson noted that Claimant presented with a chief complaint of right shoulder pain during the week prior to his appointment. No specific mechanism of injury (MOI) was documented. Instead, PA Johnson simply noted: "[N]o new trauma old injury not sure, heavy equipment mechanic." (Resp. Ex. C, p. 14).

8. Claimant testified that he went to his personal doctor on January 24 because he did not know that he was supposed to use a workers' compensation doctor and no one referred him to a workers' compensation physician. He testified further that, he told his provider that he was injured on the job. When asked why the provider stated that he said there was no trauma Claimant replied, "I have no idea on that." Based on the brevity of the information contained in the "History of Present Illness" section of PA Johnson's January 24, 2023 report, the ALJ credits Claimant's testimony to find it probable that he told PA Johnson he was injured at work and PA Johnson omitted additional details regarding the history and mechanism of Claimant's injury (MOI) when completing his report.

9. An x-ray of the right shoulder was obtained during Claimant's January 24, 2023 appointment.[3] The indication for imaging was documented as: "Pt. c/o pain in right shoulder that extends down RUE to Rt. Thumb. "Pt. denies trauma, surgery, and prior known injury. Pt states frequent use and heavy lifting." *Id*. at p. 16. Claimant's x-ray revealed: "Moderate joint space narrowing and enthesophyte formation of the acromioclavicular joint" and "[n]o displaced fracture." *Id.*

10. An "Employer's First Report of Injury" (FROI) was completed on January 25, 2023. (Resp. Ex. H, p. 35). The form is only partially completed and is unsigned. *Id.* Consequently, it is unknown who completed the form. Claimant testified that he did not complete the form and was never asked to provide or verify any information contained on the form itself. Regarding the MOI, the FROI contains the following statement: "Employee states that between the days of 1/16/23 and 1/20/23 he thinks he injured his shoulder while either removing batteries from excavator." *Id*. Nothing follows the words "while either removing batteries from excavator." Thus, it is unknown

[3] It was noted that Claimant would need an MRI following his x-ray. (Resp. Ex. C, p. 13).

what other activity Claimant reported to the author of the FROI regarding the activity that allegedly caused his shoulder injury. As presented, the ALJ finds the FROI unverified, incomplete and of limited utility in helping determine the issues endorsed for hearing. *Id*.

11. On February 2, 2023, approximately two weeks after his claimed injury date, Claimant underwent an MRI of the right shoulder. No prior MRIs were available for comparison, which the ALJ finds consistent with Claimant's testimony that he has never had any prior injuries to or treatment for his right shoulder. According to the interpreting radiologist, this MRI revealed a small amount of fluid in the subacromial/subdeltoid bursa consistent with subacromial/subdeltoid bursitis. Additionally, there was a near complete tear of the supraspinatus tendon; however, as interpreted by the radiologist, the remaining tendons of the rotator cuff, including the infraspinatus, subscapularis and the long head of the biceps were unremarkable and normally located. (Resp. Ex. C, p. 16).

12. Following his MRI, Claimant was referred to the Orthopedic Centers of Colorado for evaluation. On March 8, 2023, Claimant was evaluated by Shannon M. Constantinides, Nurse Practitioner (NP) for Dr. David Weinstein.

13. NP Constantinides obtained the following history regarding Claimant's January 18, 2023 injury: "[Claimant] is a pleasant 48-year-old RHD (right hand dominate) heavy equipment operator who reports today for orthopedic evaluation of chronic right shoulder pain. . . . He states that he was working on a piece of equipment that required a bit of heavy lifting. He noticed a fairly acute onset of right shoulder pain." (Resp. Ex. D, p. 17). NP Constantinides also reviewed and independently interpreted Claimant's February 2, 2023 MRI. According to NP Constantinides, Claimant's MRI revealed "low-grade partial-thickness tearing of the subscapularis tendon" along with "high-grade partial-thickness (essentially full thickness) intratendinous tearing of the supraspinatus." *Id*. at p. 18. In addition to this tearing, the MRI demonstrated fluid in the subacromial space, an attenuated appearance to the long head of the biceps with degenerative change at the biceps and labral anchors and degenerative change at the AC joint with subchondral cystic edema. *Id*. NP Constantinides noted that Claimant's history, symptoms, exam and imaging were consistent with the following:

- *Traumatic* Complete Tear of the Rotator Cuff, Sequela
- Tendinopathy of Right Rotator Cuff
- Biceps Tendinopathy, Right
- Degenerative Superior Labral Anterior-To-Posterior (SLAP) Tear OF Right Shoulder
- Arthrosis of Right Acromioclavicular Joint

(Resp. Ex. D, p. 19) (Emphasis added).[4] Regarding treatment, NP Constantinides makes the following observations/comments:

> Radiographically, there are perhaps a few remaining fibers intact of [Claimant's] supraspinatus, however, his tear pattern is essentially full-thickness. . . . The likelihood of this doing well without surgery is low. Conservative care would be aimed at temporizing pain symptoms. This would include rest, activity modification, use of anti-inflammatories, physical therapy, and cortisone injections. Again, the patient was counseled that conservative care will not cure a nearly full-thickness intratendinous rotator cuff tear. Definitive treatment would be in the form of a right shoulder arthroscopic decompression, rotator cuff repair, and possible biceps tenodesis.

(Resp. Ex. D, p. 19).

14. Claimant expressed a desire to proceed to surgery and advised NP Constantinides that he would discuss the same with Employer. (Resp. Ex. D, p. 20).

15. Following completion of the FROI and Claimant's apparent discussion with Employer regarding his desire to proceed with surgery, Insurer, through their third party administrator, denied liability for Claimant's asserted injury by "Notice of Contest" filed March 23, 2023. (Resp. Ex. G, p. 32). Liability was denied due to Insurer's need to investigate the claim and obtain Claimant's medical records since he "sought treatment outside of w/c provider." *Id.*

16. Claimant would not see a workers' compensation doctor until May 30, 2023, when he would be evaluated by PA Michael Gottus at Concentra Medical Centers (Concentra). (Resp. Ex. E, pp. 21-26). During the May 30, 2023 appointment PA Gottus noted Claimant's chief complaint as: "The patient presents today with pt states working on excavator installing batteries injuring right shoulder in January, has already seen specialist and has imaging."[5] *Id*. at p. 21. PA Gottus' report further states, "While working overhead on heavy equipment felt dull ache in rt shoulder. d/w boss. No pop." *Id.* at p. 22. Claimant testified that lifting the batteries overhead was not the cause of the injury because you cannot lift them overhead given their weight. In reference to PA Gottus' indication that Claimant's injuries were caused while working overhead, Claimant testified, "I don't know why he put that statement in."

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[4] Based upon the content of NP Constantinides evaluation, the ALJ finds that Claimant likely has acute on chronic pathology in the right shoulder. Indeed, the ALJ is convinced that the right, essentially complete (full thickness) intratendinous supraspinatus tear is probably acute and traumatic in nature while the subscapularis tear, SLAP tear and bicipital tendon changes are degenerative in origin.

[5] The ALJ finds this documentation incomplete. Indeed, PA Gottus failed to note what Claimant presented with. Nonetheless, based upon the totality of the evidence presented, the ALJ infers that PA Gottus probably meant to indicate that Claimant presented with right shoulder pain.

17. PA Gottus referred Claimant back to Dr. Weinstein. He also imposed a 5 pound lifting and 20 pound carrying restriction with the right arm. (Resp. Ex. E, p. 24). He precluded Claimant from reaching overhead and climbing with use of the right arm. *Id.* Claimant testified that Employer did not accommodate these restrictions. Consequently, Claimant testified that his last day of work for Employer was May 26, 2023. According to Claimant, he was referred to Human Resources (HR) to apply for short-term disability (STD) benefits. Claimant testified that his claim was approved and he was paid STD benefits through September 3, 2023. Claimant testified upon termination of his STD benefits on September 3, 2023, he has had no income from any source.

18. Respondents sent Claimant to Dr. John Raschbacher for an independent medical examination (IME) on July 11, 2023. In his IME report, Dr. Raschbacher documents the following concerning the MOI: "[Claimant] was repairing a linkage on an excavator. This was in his shop. The piece he was working on was on the machine. He was standing in front of it using a sledgehammer to try to break it free or separate the sides of the linkage. This was about at his face level, and he was pounding with the sledgehammer. He had [an] acute onset of pain while doing this. He was striking the linkage to get it off the pin. The shoulder pain in the right shoulder developed acutely, and the next day he was worse, and it was aching pretty good. He was first seen for it on 1-24, and worked in the interim between the 18th and the 24th. He denies any prior or similar problem, injury, or condition of the shoulder." (Resp. Ex A, p. 2).

19. Following a medical records review and physical examination, Dr. Raschbacher opined that based upon Claimant's history, physical examination and medical record review, his "injury is likely work related in causation and should be accepted as work related and treated as such." (Resp. Ex. A, p. 3). Dr. Raschbacher specifically noted, "The mechanism of injury he described is appropriate for either or both rotator cuff tear and labral tear, and at this point the appropriate treatment is to proceed with surgical repair." *Id.*

20. Dr. Raschbacher issued an addendum to his July 11, 2023 IME report on July 25, 2023. (Resp. Ex. B, p. 12). In his addendum, Dr. Raschbacher notes that the conclusions referenced in his July 11, 2023 IME report assumed that Claimant provided an "accurate history of the mechanism of injury", noting further that if the MOI was "other than what was described" by Claimant or there were "different histories with respect to mechanism of injury, then the conclusions concerning work-relatedness may need to be withdrawn or altered. *Id.*

21. As noted, Dr. Raschbacher testified by deposition on September 14, 2023.[6] Dr. Raschbacher is board certified in family medicine but has exclusively practiced occupational medicine for the past 20 years. (Depo. Tr. Dr. Raschbacher, hereinafter Depo. Tr., p. 5, ll. 3-7). Dr. Raschbacher testified as a Level II accredited expert in occupation medicine. (Depo. Tr., p. 5, ll. 9-11; p. 6, ll. 1-5). When asked about Claimant's diagnosis, Dr. Raschbacher testified that "based on his imaging tests,

[6] Mistakenly identified as June 14, 2023 in Respondents' post-hearing position statement.

Claimant had a rotator cuff tear and a labral tear and "also some preexisting non-work related degenerative changes at the shoulder on the right." (Depo. Tr. p. 7, ll. 6-9). Regarding the supraspinatus tear specifically, Dr. Raschbacher testified that there is no reason to think that it wasn't acute. Indeed, he agreed that it should be assumed that it was an acute tear. (Depo. Tr. p. 8, ll. 21-25; p. 9, ll. 1-9).

22. Dr. Raschbacher testified that PA Johnson did not delineate an actual MOI in his January 24, 2023 report. (Depo. Tr. p. 10, ll. 1-6). When asked about his understanding of the mechanism of the injury, Dr. Raschbacher testified that during the IME, Claimant reported that he first experienced symptoms January 8, 2023,[7] while repairing an excavator's linkage in Employer's shop. *Id.* at p. 12, ll. 5-11). Dr. Raschbacher understood Claimant's report to indicate that he was not involved in bench work but rather standing in front of the machine and striking the linkage at face level in an effort to break it free with the sledge hammer. *Id*. at ll. 10-17.

23. When asked whether he believed that using a sledgehammer could have been the mechanism of the injury, Dr. Raschbacher testified that it fit with his diagnosis, noting further that "slinging a sledge at face level, arms up swinging and then the impact could have torn the rotator cuff." (Depo. Tr. p. 13, ll. 15-21).

24. Dr. Raschbacher was also asked whether he believed that changing the batteries in the excavator could have caused the injuries in question. In response, Dr. Raschbacher testified, "I wouldn't expect, generally installing or replacing batteries, that you likely tear a rotator cuff or injure the shoulder." (Depo. Tr. p. 13, ll. 1-14).

25. Dr. Raschbacher was also asked what type of response he would expect from person who experienced an acute event. He testified that he would "expect somebody to say I was doing this and my shoulder started to hurt." He also testified, "You don't stub your toe on Monday, and say, Ouch, on Wednesday. I'd expect you to report it pretty quickly." (Depo. Tr. p. 15, ll. 19-25; p. 16, ll. 1-3). The evidence presented persuades the ALJ that Claimant probably reported his symptoms to AW[Redacted] on January 18, 2023 and presented to a medical providers office within a week. Accordingly, the ALJ finds that Claimant reported his injury and sought treatment expeditiously.

26. Regarding the compensable nature of Claimant's asserted injury, Dr. Raschbacher testified:

> Well that's going to depend on you all and the ALJ. My opinion is that if he gave an accurate history and was pounding with a sledge that could account for an acute rotator cuff tear. If that history is not accurate, and he was not doing that, and didn't give us an accurate history, then I don't see any reason to consider it work-related.

[7] Based upon the totality of the competing evidence, the ALJ finds Dr. Raschbacher's reference to a symptom onset date of 1/8/2023 erroneous. Indeed, Dr. Raschbacher subsequently clarified that the actual date of injury is 1/18/2023. (Depo. Tr. p. 17, ll. 1-16).

(Depo. Tr. p. 16, ll. 4-13).[8]

27. Dr. Raschbacher testified that if the claim is determined to be compensable and Claimant remains symptomatic, sufficient time has passed such that Claimant should proceed expeditiously with the recommended surgery. (Depo. Tr. p. 19, ll. 17-23; p. 23, ll. 11-18).

CONCLUSIONS OF LAW

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

Compensability

A. 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 his burden of proof concerning compensability, Claimant must establish that the condition for which he 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(l)(b), C.R.S.*

B. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course 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.

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[8] Interestingly, Dr. Raschbacher had the 1/24/23, 3/8/23 and 5/30/23 medical reports at his disposal during the 7/11/23 IME but chose not to raise alarm about the asserted differences between the MOIs raised in those reports and the MOI Claimant reported during his 7/11/23 IME. Rather, he plainly elected to credit Claimant's verbal report regarding the MOI to find the injury "work related in causation". (Resp. Ex. A, p. 3). Based upon the evidence presented, the ALJ finds it probable that Dr. Raschbacher was contacted by Respondents or their counsel after receipt of Dr. Raschbacher's July 11, 2023 IME report at which time they probably discussed the concern Dr. Raschbacher outlined in his July 25, 2023 addendum. Nonetheless, Dr. Raschbacher did not comment further and did not "withdraw or alter" his opinion regarding causality, except to state during his testimony that it was up to the ALJ to determine Claimant's credibility.

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). In this case, Respondents contend that Claimant failed to establish that he suffered a compensable injury because he "gave vague, changing, and speculative reports of the mechanism of injury when seeking medical treatment" which Respondents argue "weighs in favor of a finding that Claimant has not proven a compensable injury under the Act by a preponderance of the evidence." As support for their assertion, Respondents cite to the documented history of present illness contained in the medical records from the different providers who have evaluated Claimant. The ALJ is not persuaded.

C. 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). Based upon a totality of the evidence presented, the ALJ is persuaded that Claimant's right shoulder symptoms have their origins in his work related functions, and is sufficiently related to those functions, i.e. repair and maintenance of Employers equipment, so as to be considered part of his service to Employer. Here, Claimant testified that he has had no history of prior symptoms or treatment directed to the right shoulder and no evidence was presented to refute this testimony. Moreover, the tearing of the supraspinatus appeared "traumatic" and "acute." Accordingly, the ALJ is convinced that Claimant's symptoms and need for treatment "arose out of" his work duties on January 18, 2023 when Claimant developed pain in the shoulder while using a sledge hammer to break the linkage on an excavator his was assigned to fix. Consequently, the record evidence also supports a conclusion that Claimant's alleged injury occurred within the time and place limits of his employment and during an activity connected to his work-related functions as a mechanic for Employer, namely changing the batteries and fixing the linkage on Employer's excavator. Based upon the evidence presented, the ALJ is persuaded that the alleged injury occurred in the course and scope of Claimant's employment.

D. In support of this conclusion, the ALJ credits Claimant's testimony to find it probable that his various treating providers documented an incomplete and inaccurate history regarding the MOI in this case. Indeed, as pointed out by Dr. Raschbacher, PA Johnson's January 24, 2023 report does not delineate an actual MOI. Moreover, the ALJ finds the March 8, 2023 and May 30, 2023 reports from NP Constantinides and PA Gottus regarding Claimant's MOI vague. Claimant has no control over what aspects of the history he provided to a particular provider get documented and he seemed genuinely surprised when questioned regarding the content of those reports. In contrast to PA Johnson, NP Constantinides and PA Gottus, Dr. Raschbacher obtained a history and MOI substantially consistent to what Claimant provided at hearing, which MOI is capable, according to Dr. Raschbacher, of causing the type of injury and tearing

revealed in an MRI obtained approximately 2 weeks after the inciting event. In this case, the ALJ concludes that the totality of the evidence presented is sufficient to justify an inference that Claimant's symptoms, need for treatment and disability were caused by the activities associated with fixing the thumb linkage on Employer's excavator on or about January 18, 2023.[9] Accordingly, the ALJ is convinced that there is a sufficient nexus between Claimant's January 18, 2023 work activities and the alleged injury to establish compensability.

Claimants Entitlement to 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, 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. As noted, Claimant has proven that he suffered a compensable right shoulder injury. Moreover, the ALJ is convinced that the recommended surgery in this case is reasonable, necessary and related to Claimant's January 18, 2023 industrial injury. Indeed, the radiographic findings of Claimant's right rotator cuff demonstrate that Claimant's supraspinatus tear was acute and that there were "perhaps a few remaining fibers intact of the supraspinatus; however, his tear pattern is essentially full thickness". (RHE D, p. 19). NP Constantinides has opined that the "likelihood of doing well without surgery is low" and that further "conservative care will not cure a nearly full thickness intratendinous tear". *Id*. The ALJ credits Claimant's testimony regarding his persistent symptoms and notes Dr. Raschbacher's agreement that because sufficient time has passed since the incident in question, Claimant should "proceed expeditiously" with the recommended surgery if he remains symptomatic. Based upon this evidence, the ALJ persuaded that the recommended right shoulder surgery is reasonable, necessary and

[9] Based in part upon Claimant's probable report to his providers that he was injured at work while pounding with a sledge hammer in combination with his testimony that he did not engage in activities outside work likely to cause injury and the imaging which supports a conclusion that Claimant suffered an acute/traumatic, near full-thickness intratendinous supraspinatus tear which appears superimposed on other degenerative findings.

related to Claimant's January 18, 2023 injury. Accordingly, the ALJ concludes that Respondents are liable for this and all other treatment designed to cure and relieve Claimant from the ongoing effects of his January 18, 2023 industrial injury.

Claimant's Entitlement to Temporary Total Disability

G. To receive temporary disability benefits, Claimant must prove the injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). 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).

H. In this case, it has been determined that Claimant sustained a compensable injury to his right shoulder. The evidence also supports a finding that Claimant was returned to work in a modified capacity by Dr. Daniel Peterson following his May 30, 2023 appointment with PA Gottus. (RHE E, pp. 24-26). Claimant testified and the ancillary evidence supports a conclusion that Employer could not accommodate his physical restrictions and referred him to Human Resources (HR) to initiate the paperwork necessary to secure short-term disability benefits (STD). Claimant testified that his claim for STD benefits was approved and that his last day of work was May 26, 2023. According to Claimant, he has not returned to work and has had no income from any source since September 3, 2023.[10] Again, no contrary evidence was presented to refute Claimant's testimony.

I. Based upon the evidence presented, the ALJ is convinced that Claimant's ability to perform his regular employment as heavy mechanic was probably impaired by both a restriction of bodily function, i.e. shoulder pain from his compensable injury and the restrictions imposed on him by his authorized treating providers at Concentra. Consequently, the ALJ is convinced that Claimant has proven that he suffered a disability. Moreover, since he has had no earnings since his last STD benefits were paid and the evidence presented fails to support a finding that a triggering event has

[10] Claimant agrees that, if he is entitled to TTD benefits, Respondents would be entitled to an offset in his benefits due to his receipt of STD benefits between May 26, 2023 and September 3, 2023.

occurred by which Respondents could terminate ongoing TTD, Claimant has proven that he has suffered an actual wage loss as a direct and proximate consequence of the above referenced compensable right shoulder injury. Because the ALJ concludes that Claimant has proven that he is "disabled" and that this disability has resulted in an actual wage loss within the meaning of § 8-42-105, C.R.S., he has proven that he is entitled to TTD benefits beginning May 26, 2023 and continuing until those benefits can be terminated in accordance the provisions of the Workers' Compensation Act. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999); C.R.S. § 8-42-105(3)(a)-(d). Respondents shall be entitled to credit the amount of short-term disability benefits paid between May 26, 2023 and September 3, 2023 against TTD benefits owed.[11]

ORDER

It is therefore ordered:

1. Claimant's January 18, 2023 right shoulder claim is compensable.

2. Respondents are liable for all reasonable, necessary and related medical treatment to cure and relieve Claimant of the effects of his January 18, 2023 industrial injury, including the recommended right shoulder surgery. All medical expenses shall be paid pursuant to the workers' compensation medical benefits fee schedule.

3. Respondents shall pay TTD in accordance with C.R.S. § 8-42-103(1)(b), for the period beginning May 26, 2023 and ongoing, subject to any applicable offsets, at a rate of sixty-six and two-thirds percent of Claimant's average weekly wage (AWW), until such benefits can be properly terminated by operation of law.

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

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

Dated: December 12, 2023.

/s/ Richard M. Lamphere

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

[11] At hearing, the issue regarding the amount of Claimant's average weekly wage and the amounts to be paid in TTD was reserved pending the ALJs determination regarding the compensable nature of Claimant's right shoulder injury.

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 https://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-223-042-002

ISSUES

1. Whether Claimant established by a preponderance of the evidence that an L4-5 microdiscectomy performed by Adam Hebb, M.D., was reasonable and necessary to cure or relieve the effects of Claimant's June 5, 2021 work injury.

FINDINGS OF FACT

1. Claimant is a firefighter employed by Respondent who sustained an admitted injury on June 5, 2021. Claimant sustained an injury to her lower back while participating in a work-related training exercise.

2. Claimant has a history of back issues dating to November 2016, when she sustained an injury lifting weights. (Ex. 7). Following the November 2016 injury, Claimant was diagnosed with lumbar radiculopathy and lumbar spondylosis. (Ex. 9). An MRI performed on July 18, 2017 mild to moderate lumbar spine degeneration, with a an moderate L4-5 broad-based central disc protrusion, with moderate bilateral neuroforaminal and lateral recess narrowing. (Ex. 8).

3. Claimant received physical therapy through Cascade Physical Therapy on a regular basis through May 2021. In the year before June 5, 2021, Claimant attended nine physical therapy visits. Claimant's physical therapy records from 2017 through 2021 document that Claimant experienced pain and stiffness in her lower back aggravated by sitting, lifting, and bending. Claimant's records document Claimant being active in weight training, CrossFit, skiing, and physical work as a firefighter.

4. Claimant reported the June 5, 2021 incident to Employer on the day it occurred. Claimant described the incident as follows "We were practicing victim removal. I wrapped my arms around a victim around his middle to lift him up [and] felt a harp pain in the lower-middle of my back. I felt dizzy, I let him back down and told my supervisor. I did not pass out." (Ex. 11). At hearing, Claimant testified that the "victim" she lifted in the training exercise was a 180-pound co-worker, and that she immediately felt pain in her lower back at her belt line. Claimant further testified that she had not experienced similar pain in the past.

5. Following the injury, Claimant reported the incident to her supervisor, and contacted a nurse via Employer's "OUCH Line." Claimant testified, credibly, that she was advised to wait a couple of days to see if her condition improved, and then to seek help if it did not. On June 8, 2021, Claimant returned to Cascade Physical Therapy for treatment for her injury, and treated solely with Cascade until April 2022.

6. On April 8, 2022, Claimant filed a second report of injury for her June 5, 2021 injury. Claimant reported that she was still having lower back pain and glute numbness, and that

her back was continually aggravated by her work duties. Claimant was advised by the OUCH Line nurse to seek treatment with a physician.

7. On April 11, 2022, Claimant saw Elizabeth Esty, M.D., and Douglas C. Scott, M.D., at Denver Health. Claimant reported that her symptoms had not improved with physical therapy, and that she was experiencing occasional anterior left thigh numbness, and symptoms in her left gluteal area. Dr. Esty reviewed Claimant's November 2016 MRI report. Based on her examination and review of records, Dr. Esty opined that Claimant's problem was a work-related exacerbation of her pre-existing condition, and ordered a new lumbar MRI. (Ex. 15).

8. The lumbar MRI was performed on April 15, 2022, and showed at L4-5, "Desiccation of the disc with a broad-based central/left subarticular disc protrusion with mild to moderate bilateral facet arthrosis. There is moderate spinal stenosis with compression of the descending left L5 nerve and contact of the descending right L5 nerve within the subarticular recess. Mild to moderate left and mild right foraminal stenosis." (Ex. 16).

9. Claimant returned to Denver health on April 18, 2022, and saw Dr. Scott. Dr. Scott reviewed the MRI and noted that it showed possible irritation of the left L5 and S1 nerve roots, and referred Claimant to a physical medicine and rehabilitation physician and for EMG/NCV testing. (Ex. 16).

10. On May 6, 2022, Claimant saw Samuel Chan, M.D., on referral from Dr. Scott. An EMG/NCV test he performed was normal. On June 9, 2022, Dr. Chan performed a left L5S1 transforaminal epidural steroid injection (TESI), which Claimant later reported provided no benefit. (Ex. 18, 19 & 20). On July 14, 2022, Dr. Chan referred Claimant for an orthopedic surgery evaluation. (Ex. 21).

11. On August 23, 2022, Claimant saw Maria Kaplan, PA, physician assistant for Stephen Pehler, M.D., at Orthopedic Consultants of Colorado. Based on Claimant's MRI, and lack of response to conservative treatment, Ms. Kaplan recommended Claimant undergo a bilateral L4-5 microdiscectomy. (Ex. 22).

12. After consultation with Dr. Scott, Claimant sought a second opinion regarding spine surgery from David Wong, M.D., on September 19, 2022. Dr. Wong offered Claimant additional potential treatment options, including continued conservative therapy and injections. Dr. Wong opined that Claimant was not an ideal candidate for fusion surgery, but did not address performance of a microdiscectomy. (Ex. 25).

13. Claimant consulted with Dr. Pehler on October 21, 2022. Dr. Pehler recommended Claimant undergo a bilateral L4-5 microdiscectomy and decompression surgery. (Ex. 26). On October 24, 2021, Dr. Scott agreed with Dr. Pehler's recommendation for surgery.

14. On November 9, 2022, Claimant underwent an independent medical examination (IME) with Lawrence Lesnak, D.O., at Respondent's request. (Ex. E). Dr. Lesnak testified at hearing and was admitted as an expert in occupational medicine. Based on his review of records and examination of Claimant, Dr. Lesnak opined that Claimant sustained a

work-related lumbosacral sprain/strain. He further opined that Claimant did not require any further medical care for her work-related injury, and that Claimant had reached maximum medical improvement (MMI), and that she was not a surgical candidate. (Ex. E).

15. Dr. Lesnak opined that Claimant's April 2022 MRI showed "similar if not the exact findings" as her July 2017 MRI, that "**appeared to be completely unrelated to her 06/05/2021 reported occupational incident**." (Emphasis original). (Ex. E). The ALJ notes that Dr. Lesnak did not review the 2017 MRI film, and his opinion relies on the radiologist report for the 2017 MRI. Contrary to Dr. Lesnak's testimony, the July 2017 does not document "similar if not the exact same findings." For example, the July 2017 MRI report does not document compression of the left L4-5 nerve root, nor does it document a left-sided disc protrusion, both of which are shown on the April 2022 MRI. Dr. Lesnak's testimony on this issue is not credible or persuasive. Similarly, his opinion that Claimant sustained only a soft tissue injury, and that she was not a surgical candidate is neither credible nor persuasive.

16. On December 5, 2022, Dr. Scott responded to correspondence from Respondent which requested that Dr. Scott review Dr. Lesnak's report, and comment on whether he agreed Claimant had reached MMI. Dr. Scott responded "NO" and wrote "I recommended that she proceed [with] recommended lumbar spine surgery, but apparently not authorized by insurance carrier." (Ex. 29).

17. Claimant returned to Dr. Scott on March 20, 2023, reporting that her back conditioned seemed worse. He noted that the request for surgery was denied by Respondent, and that Claimant continued to receive physical therapy for which she paid out of pocket. He referred Claimant for additional physical therapy, and back to Dr. Chan for a repeat ESI. (Ex. 31).

18. On April 5, 2023, the parties entered into a stipulation noting that Claimant's request for surgery had been denied, but stipulating that Claimant could proceed with the recommended surgery through her private health insurance – [Redacted, hereinafter KR], and that if the procedure was found reasonable, necessary and related to her work injury, Respondent would waive any defense related to authorization of the care or provider under WCRP 16. (Ex. 21).

19. On April 6, 2023, Claimant had another lumbar MRI, which showed at L4-5: "Disc desiccation. There is a focal disc herniation/extrusion located at the left central zone measuring 4 mm. Disc herniation contacts and posteriorly displaces the descending left S1 nerve root and contacts the medial margin of the exiting left L5 nerve root." (Ex. 32).

20. On April 14, 2023, Claimant returned to Dr. Chan for a new EMG study. Dr. Chan noted that she had MRI findings impingement on the L5 and S1 nerve roots, which could be a pain generator, and clinical findings consistent with left L5 and S1 radiculitis. However, Claimant's EMG was normal. He offered Claimant an additional ESI injection, which Claimant did not pursue. (Ex. 33).

21. On May 10, 2023, Claimant saw Adam Hebb, M.D., a neurosurgeon at Kaiser Permanente regarding surgery. Dr. Hebb recommended a left L4-5 hemilaminectomy and microdiscectomy, and scheduled the Claimant for surgery, which was performed on June 8, 2023. (Ex. 35 and 38). Approximately two months following surgery, on August 16, 2023, Claimant saw Dr. Hebb and reported that her back pain had resolved, she reported that she continued to have left calf pain in an L5 distribution, but that it was improved compared to before surgery. (Ex. 44).

22. On July 25 and 27, 2023, Claimant underwent an IME with L. Barton Goldman, M.D., at Claimant's request. Dr. Barton opined that Claimant's MRIs demonstrated "clear evidence of a significant change in the patient's underlying anatomy between 2017 and April 15, 2022 that is quite consistent with the change of her symptom presentation to more left lower extremity referred pain within 2 weeks of the June 5, 2021 work-related injury." He opined that as a result of Claimant's work injury, she sustained an aggravation of a pre-existing chronic lumbosacral strain and L4-5 disc protrusion leading to L4-5 disc herniation and extrusion. He opined that the Claimant's L4-5 surgery was work-related, stating "it is highly medically probable that were it not for the patient's work-related injury of June 5, 2021 that she would not have required the surgery she underwent on June 8, 2023. " The ALJ finds Dr. Goldman's opinion credible and persuasive.

23. On September 18, 2023, Dr. Lesnak issued an addendum report to his previous IME report, in which he reiterated his prior opinions, stating "There is absolutely no medical evidence to support that [Claimant] required any type of lumbar spine surgical procedures whatsoever as it would in any way pertain to her 06/05/21 occupational incident claim." (Ex. D). Dr. Lesnak's opinions are contrary to the opinions of Drs. Scott, Pehler, Hebb, and Goldman, and are not persuasive.

24. At hearing, Claimant testified that her position as a firefighter is a physically demanding job which she was able to perform prior to June 5, 2021 without difficulty. After her June 5, 2021 injury, Claimant continued to work, self-limited her work, due to difficulty performing certain tasks. Although Claimant did not have formal work restrictions, she testified that she received assistance from coworkers in performing heavy lifting tasks, and that her lieutenant was aware of her injuries and limitations.

25. Claimant testified that the June 5, 2021 incident caused significant pain in a single spot in her back that she had not previously experienced. She acknowledged that she had received treatment at Cascade for the same area of her lower back, but that the June 5, 2021 injury felt very different. Claimant testified that her back continued to worsen over time, and she was experiencing pain into her leg, calf and toes, and had pins and needles sensation in her left leg. She testified that these symptoms were different than those she previously experienced. Before the June 5, 2021 injury, she had not been referred to a surgeon nor had surgery been recommended. She credibly testified that the June 8, 2023 surgery resolved her back pain and most of her radicular symptoms. She indicated she has no foot numbness and occasional nerve pain in the left calf, which is decreasing. Claimant returned to work full time and full duty in October 2023. She testified that she no longer requires assistance in the performance of her job. Claimant's testimony was consistent and 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).

SPECIFIC MEDICAL BENEFITS AT ISSUE

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. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals*

Office, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).” *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant’s request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009)

Claimant has established by a preponderance of the evidence that the June 9, 2023 surgery was reasonable and necessary to cure or relieve the effects of her June 5, 2021 industrial injury. The credible evidence demonstrates that while Claimant had a preexisting back condition, that condition was aggravated and worsened by the June 5, 2021 work-injury. The ALJ credits the opinions of Drs. Scott, Pehler, Hebb, and Goldman that Claimant was an appropriate surgical candidate. The ALJ also credits Dr. Goldman’s opinion that but for Claimant’s June 5, 2021 work injury, she would not have required surgery. Claimant’s April 2022 MRI shows anatomical changes in the Claimant’s back that did not exist on the July 2017 MRI, including a left-sided disc protrusion and compression of the left L4-5 nerve, conditions addressed by Dr. Hebb in surgery.

ORDER

It is therefore ordered that:

1. The June 9, 2023 surgery performed by Dr. Hebb was reasonable and necessary to cure or relieve the effects of Claimant’s June 5, 2021 industrial injury.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 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: December 12, 2023

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a work-related injury on December 1, 2021.

    a. If Claimant established a compensable injury occurring on December 1, 2021, whether Claimant establish by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment to cure or relieve the effects of that injury.

    b. If Claimant established a compensable injury occurring on December 1, 2021, whether Claimant established by a preponderance of the evidence an entitlement to temporary disability benefits related to that injury.

2. Whether Claimant established by a preponderance of the evidence that he sustained a work-related injury on June 13, 2022.

    a. If Claimant established a compensable injury occurring on June 13, 2022, whether Claimant establish by a preponderance of the evidence an entitlement to reasonable and necessary medical treatment to cure or relieve the effects of that injury.

    b. If Claimant established a compensable injury occurring on June 13, 2022, whether Claimant established by a preponderance of the evidence an entitlement to temporary disability benefits related to that injury.

STIPULATIONS

1. The parties stipulated that Claimant's average weekly wage is $789.90.

FINDINGS OF FACT

1. Claimant began working for Employer on October 6, 2021, as a food services technician at [Redacted, hereinafter PV] Hospital. Claimant's duties included preparing food, setting up and breaking down his station, cleaning, stocking, and various other duties.

2. Claimant testified that on November 30 or December 1, 2021, he was taking out trash when a co-worker asked him to lift a box of potatoes. Claimant testified that he felt a "slight pop" in his stomach. He then went to the restroom, lifted his shirt, and noticed a small ½ inch bulge above his navel. Claimant testified that the bulge was not painful, and that he did not inform Employer of the incident on that date.

3. On December 1, 2021, Claimant had a telephone consultation with Heather Schnorr, FNP the UCHealth Family Medicine Center for medication refills for an unrelated condition. Ms. Schnorr documented that Claimant had "some concerns for a hernia – Reports having a lean 6 pack and has tissue that pops through and he is able to push it in. Not painful." The medical record does not document any work-related activity causing the condition. Claimant was advised to follow up with his primary care provider. (Ex. U). Claimant's testified he informed [Redacted, hereinafter SR] that the hernia occurred at work while lifting a box of potatoes.

4. Claimant's next documented medical visit was December 29, 2021, when he saw Joshua Hammond, M.D., at UCHealth Family Medicine Center. Dr. Hammond noted a new umbilical hernia, which Claimant believed resulted from lifting at work, and requested a surgical referral. Claimant reported working out frequently, and that the bulge caused discomfort. Dr. Hammond diagnosed Claimant with an umbilical hernia without obstruction or gangrene, and referred Claimant to general surgery to discuss treatment options. (Ex. V).

5. Claimant's returned to Dr. Hammond on January 26, 2022, noting that he had not yet scheduled hernia surgery. (Ex. X). Claimant had additional visits with Dr. Hammond on February 16, 2022, and March 23, 2022, during which his hernia was not addressed, other than listing the diagnosis of umbilical hernia. (Ex. Y, Z, AA).

6. On April 6, 2022, Claimant saw John Hunter, M.D., at UCHealth for further evaluation of the umbilical hernia. Claimant reported noticing a small bump over the umbilicus for a few months, which he characterized as bothersome, but not severely painful. Dr. Hunter noted there was "No inciting event or injury. He works at PH[Redacted] in Food services but does not have to do a lot of strenuous lifting or anything there." Based on his evaluation, Dr. Hunter recommended a laparoscopic hernia repair, with mesh. (Ex. BB).

7. On June 9, 2022, Claimant underwent surgery for repair of the umbilical hernia. (See Ex. FF).

8. Claimant returned to work on June 13, 2022, working in the kitchen for Employer. As part of his job duties, Claimant moved a large bin full of ice from a rolling cart onto a counter when he felt a pull, and pain in his stomach. Claimant testified he informed his supervisor, and went to the emergency room.

9. On June 13, 2022, Claimant went to the UCHealth emergency department at Poudre Valley Hospital, reporting that he was moving ice that morning when he felt a "tear" in his abdomen. On examination, it was noted that Claimant's surgical incisions were intact, and that there was no swelling, bruising, or recurrence of the hernia. Claimant reported mild pain to palpation, but no other significant symptoms. Upon discharge, Claimant's symptoms had improved. Claimant had a previously scheduled appointment with Dr. Hunter for that day, and was instructed to keep the appointment. (Ex. F).

10. On June 13, 2022, saw Dr. Hunter, reporting experiencing increased pain after lifting a tray of ice at work. On examination, Dr. Hunter noted that Claimant's surgical incisions were intact, and that Claimant was mildly tender at the incision, but no other significant symptoms. Dr. Hunter advised Claimant to avoid strenuous activity or lifting more than 20 pounds for two to three weeks from the date of surgery. (Ex. EE). Dr. Hunter authored a June 13, 2022 letter advising that Claimant was unable to participate in sports or perform strenuous activities from June 9, 2022 through July 3, 2022. He indicated Claimant could return to work at full duty effective July 4, 2022. (Ex. FF)

11. On June 17, 2022, Claimant saw Kevin O'Toole, D.O., at the UCHealth occupational medicine clinic. Claimant reported on his intake form that his injury occurred on December 29, 2021, while "lifting 50-pound boxes of potatoes for coworkers." Claimant reported to Dr. O'Toole that the initial hernia was not bad, and he waited to have surgery until his symptoms worsened. Claimant reported to Dr. O'Toole that after surgery, he was assigned temporary lifting restrictions of no more than 20 pounds, and returned to work on June 13, 2022. He reported that he was "assigned to move an ice cart" and felt a "tear" in his left abdomen. On examination, Dr. O'Toole noted no palpable defect, no swelling, bulging or pain complaint with Valsalva maneuver. Dr. O'Toole's assessment was that Claimant's hernia was not probably work-related, and that there was no evidence of worsening following the June 13, 2022 work incident, and opined that "it is not medically probable that [Claimant was] seeking treatment for a work-related disease." He placed Claimant at maximum medical improvement and recommended no maintenance care or permanent impairment rating. (Ex. HH).

12. On June 22, 2022, Respondents filed a Notice of Contest, indicating that Claimant's injury was not work-related. (Ex. A).

13. On June 28, 2022, Claimant returned to Dr. Hunter's office for a post-surgical wound check with Allison Kennedy, RN. Ms. Kennedy noted that Claimant's incisions were well healed, without signs of swelling, or infection, and that Claimant did not need medication for pain. Claimant requested to return to work on July 4, 2022. (Ex. II).

14. Claimant returned to Dr. Hammond on July 20, 2022, August 17, 2022, and March 1, 2022, for unrelated medical problems. During these visits, claimant did not report issues with the hernia. (Ex. LL, MM, & NN).

15. On May 31, 2023, Claimant saw Dr. Hammond, and reported that bulging above the hernia repair site while doing sit-ups. (Ex. OO). Claimant did not report additional symptoms after May 31, 2023.

16. Claimant testified that, on December 29, 2021, he informed his manager of food services, [Redacted, hereinafter WA], that he was diagnosed with an umbilical hernia, but did not complete any written report. After being diagnosed with the hernia on December 29, 2021, Claimant continued with his normal job activities. Claimant testified that he did not receive any treatment for the hernia between December 2021 and April 2022, because it was not painful, and did not interfere with his personal or job activities.

17. Claimant testified he returned to work after his June 9, 2022 surgery because he believed he would be doing cashier work, and would not be lifting more than ten pounds. Claimant testified that prior to his surgery, he spoke with supervisor, [Redacted, hereinafter SS], and WA[Redacted], and informed them he would be having hernia surgery. Claimant testified that he had submitted a written request for time off for surgery. Claimant testified that his post-surgery restrictions included no lifting of more than 10 to 20 pounds, and that he understood he would be training as a cashier following surgery.

18. After the June 13, 2022 incident, Claimant did not return to work until July 4, 2022. Claimant testified that after returning to work in July 2022, he did not have any further problems with his hernia, although the surgical scars remain. Claimant has since moved to a different job for Employer working with patient transport, which he described as extremely physical.

19. SS[Redacted] testified at hearing that she works with Claimant as a "team lead" and that she often worked with Claimant when he was worked as a food services technician. She testified that Claimant did not tell her he had sustained a work-related hernia in December 2021, and she learned about the hernia a few weeks before Claimant's surgery in June 2022. She indicated Claimant requested two days off work for his surgery, and he did not tell her it was work-related. SS[Redacted] testified she was not aware of any restrictions placed on Claimant when he returned to work on June 13, 2022. Claimant only worked a couple of hours before he had to leave due to pain. SS[Redacted] testified that if she was aware of any restrictions, she would not have allowed Claimant to lift ice on June 13, 2022.

20. WA[Redacted] was the manager of food services during the times relevant to the issues in this case. WA[Redacted] testified that Claimant did not discuss a hernia with him in December 2021, and he first learned Claimant had sustained a hernia when Claimant submitted a vacation request approximately two to three weeks before Claimant's June 2022 surgery. WA[Redacted] did not recall Claimant telling him how the hernia occurred, or that it was work-related. WA[Redacted] testified that he was not aware of any specific work restrictions after Claimant's surgery, and if he was aware of restrictions he would have assigned Claimant job duties that did not require heavy lifting, such as making pizzas or sandwiches.

21. [Redacted, hereinafter KB], an investigative claims unit adjuster for Insurer testified at hearing. KB[Redacted] testified she became aware that Claimant was asserting that he sustained a work-related injury on June 14 or 15, 2022. She spoke with Claimant on June 16, 2022, and he informed her he had already scheduled an appointment with Dr. O'Toole for the following day. KB[Redacted] testified that Dr. O'Toole is an authorized treating physician, from Insurer's perspective. She testified that Insurer did not authorize treatment with Dr. Hammond or Dr. Hunter.

22. Respondents submitted Dr. O'Toole's post-hearing deposition in lieu of live testimony. Dr. O'Toole was admitted as an expert in occupational medicine, and testified he did not see evidence that Claimant sustained a re-herniation at his June 17, 2022 examination. He further testified that umbilical hernias may occur spontaneously without

an inciting event, and that the most common cause is a congenital weakness in the abdominal musculature. He testified that the June 13, 2022 incident did not lead to a substantial or permanent aggravation of Claimant's hernia, and that there was no need for additional treatment due to the June 13, 2022 incident. Dr. O'Toole's testimony on these issues was 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).

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. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa Cty. Valley Sch. Dist. #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr 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). 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 failed to establish that he sustained a compensable injury arising out of the course of his employment with Employer on either November 30, 2021, December 1, 2021, or June 13, 2022. Claimant's assertion that he sustained an injury on November 30, 2021 or December 1, 2021 while working for Employer is not supported by credible evidence. Although Claimant did report to SR[Redacted] a bulge in his abdomen on December 1, 2021, the record does not reference any cause of the event, or that the hernia was a recent occurrence. The ALJ does not find it credible that Claimant reported the injury as occurring at work while lifting a box of potatoes, or that SR[Redacted] would have failed to document such a report

When Claimant saw Dr. Hammond on December 29, 2021, it was documented that Claimant thought the hernia resulted from lifting at work, however, no specifics of how the incident occurred were documented. Claimant saw Dr. Hunter on April 6, 2022, it was documented that there was "no inciting event or injury." Claimant's first documented report of sustaining and injury while lifting potatoes at work was on June 17, 2022, when he saw Dr. O'Toole. Between December 29, 2021 and June 17, 2022, Claimant had at least eight visits with health care providers for various issues (including visits with Dr. Hammond and Dr. Hunter specifically for a hernia) and did not report any specific work-related incident causing a hernia. Moreover, none of Claimant's treating medical providers have opined that Claimant's hernia was the result of work-related activities.

Although Claimant testified that on or around December 29, 2021, he informed WA[Redacted] he sustained a hernia at work, the ALJ finds more credible the testimony of WA[Redacted] and SS[Redacted] that Claimant did not report a hernia occurring at work to either of them. The ALJ concludes that Claimant has not met his burden of establishing that it is more likely than not that he sustained a hernia on or about December 1, 2021 arising out of the course of his employment with Employer.

The evidence demonstrates that Claimant did experience a "tearing" sensation while working on July 13, 2022. However, this incident did not result in any exacerbation or aggravation of Claimant's condition, beyond transient pain, and the incident itself did not necessitate Claimant's time off from work. Claimant's contention in position statements that the July 13, 2022 incident caused a tear in the mesh implanted during the June 9, 2022 surgery is not supported by the medical records. Claimant was examined by four different providers (twice on June 13, 2022, once on June 17, 2022, and once on June 28, 2022), none of these medical professionals documented disruption of the surgical sutures, or other findings indicating the surgical mesh became torn. The ALJ finds credible Dr. O'Toole's opinion that the June 13, 2022 incident did not require additional treatment, and did not cause an aggravation of Claimant's hernia. The ALJ concludes that while Claimant did experience pain at work on June 13, 2022, the incident did not aggravate or exacerbate his condition, and merely resulted in transient pain which resolved. Claimant's time off work between June 13, 2022 and July 4, 2022, was not the result of a work-injury, but was the result of his non-work-related hernia surgery. Claimant has failed to meet his burden of establishing that he sustained an injury arising out of the course of his employment with Employer on June 13, 2022.

Medical Benefits

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

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

Temporary Total Disability

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

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

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that he sustained a work-related hernia on November 30, 2021, or December 1, 2022.

2. Claimant has failed to establish that he sustained a work-related injury on June 13, 2022, or that he aggravated or exacerbated a pre-existing condition.

3. Claimant's request for medical benefits is denied.

4. Claimant's request for temporary total disability and temporary partial disability benefits is denied.

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: December 12, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-151-120-003

ISSUES

- Did Claimant prove [Redacted, hereinafter WM] is a statutory employer with respect to a left knee injury Claimant suffered on August 7, 2020?
- Medical benefits.
- Average weekly wage.
- Temporary Total Disability benefits.

PROCEDURAL ISSUES

During the hearing, it was learned that Claimant's actual employer, [Redacted, hereinafter CF], had an active bankruptcy case pending in the United States Bankruptcy Court for the District of Colorado, denominated Case No. [Redacted, hereinafter CA]. Pursuant to 11 U.S.C. § 362(a), filing a bankruptcy petition automatically stays the commencement or continuation of any judicial or administrative action against the debtor to recover a claim that arose before the commencement of the bankruptcy case. The ALJ agreed to receive the parties' evidence at the hearing, subject to further investigation into the status of the bankruptcy matter. At a post-hearing status conference on February 27, 2023, it was agreed that (1) the parties would forthwith file a motion for relief from the stay with the Bankruptcy Court, (2) no decision would be rendered regarding Claimant's workers' compensation claim without approval of the Bankruptcy Court, and (3) any decision will be limited to WM's[Redacted] potential liability as Claimant's statutory employer.

FINDINGS OF FACT

1. CF[Redacted] was a mushroom farm that grew, harvested, and sold mushrooms to retailers, food distributors, and restaurants.

2. Claimant worked for CF[Redacted] as a mushroom harvester.

3. On August 7, 2020, Claimant injured her left knee when she lost her balance and twisted her knee. She was diagnosed with meniscal tears and ultimately underwent arthroscopic surgery.

4. CF[Redacted] was uninsured for workers' compensation liability at the time of Claimant's injury. CF[Redacted] directly paid $5,722.00 for medical bills related to the injury, including the surgery. CF[Redacted] also paid Claimant wage continuation for an unknown period when she was off work because of the injury.

5. WM[Redacted] and CF[Redacted] executed a contract under which CF[Redacted] produced and packaged mushrooms for WM's[Redacted] "private label" brand, "[Redacted, hereinafter HS]" (hereinafter "HS[Redacted]"). The contract provides standards for products sold to WM[Redacted], including allowed ingredients, a non-GMO requirement, product sustainability requirements, nutrition analysis, and taste standards.

6. In August 2020, CF[Redacted] produced mushrooms for approximately 7 to 12 retailers and food distributors, including WM[Redacted], [Redacted, hereinafter SK], [Redacted, hereinafter FT], and several smaller companies. CF[Redacted] previously supplied mushrooms for [Redacted, hereinafter RR], although the contract ended sometime before 2020.

7. The mushrooms CF[Redacted] sold to most customers were packaged in containers identified with the CF[Redacted] company name and label. However, mushrooms sold to WM[Redacted] were packaged in containers bearing the HS[Redacted] label. Similarly, mushrooms sold to RRs[Redacted] during the pendency of its contract were labeled with RRs[Redacted] private brand name(s).

8. Claimant's supervisor instructed her to harvest certain types and sizes of mushrooms each day. Claimant had no control over the assignments and did not know which customers would be receiving the mushrooms she harvested on any given day. Claimant does not know whether the mushrooms she was harvesting at the time of the injury were intended for WM[Redacted] or any other customer of CF[Redacted].

9. CF[Redacted] shipped mushrooms to WM[Redacted] under the HS[Redacted] label on August 10 and August 13, 2020. No mushrooms were shipped on August 7, 2020.

10. There is no persuasive evidence any mushrooms Claimant was harvesting at the time of her injury were sold and shipped to WM[Redacted] under the HS[Redacted] label.

11. Claimant failed to prove WM[Redacted] is a statutory employer with respect to her injury. There is no persuasive evidence that Claimant was harvesting mushrooms for WM's[Redacted] HS[Redacted] brand when the injury occurred.

CONCLUSIONS OF LAW

Under § 8-41-401(1)(a), a company that contracts out part or all its work to any subcontractor is considered the statutory employer of the subcontractor and the subcontractor's employees. If the subcontractor is uninsured, the subcontractor's employees may reach upstream to the statutory employer for workers' compensation benefits. *Finlay v. Storage Technology Corp*., 764 P.2d 62 (Colo. 1988). The purpose of the statutory employer provision is to prevent employers from avoiding liability for workers' compensation benefits by contracting out their regular business to uninsured independent contractors. *Id*.

The test for whether an employer is a "statutory employer" is whether the work contracted out is part of the employer's regular business as defined by its total business operation. *Finlay v. Storage Technology Corp., supra*; *Humphrey v. Whole Foods Market*, 250 P.3d 706 (Colo. App. 2010). In applying this test, courts should consider elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer. *Id*. The work must be "such a part of [its] regular business operation as the statutory employer ordinarily would accomplish with [its] own employees." *Snook v. Joyce Homes, Inc*., 215 P.3d 1210, 1217 (Colo. App. 2009).

As found, Claimant failed to prove WM[Redacted] is a statutory employer with respect to her injury. Even if we accepted the premise that growing, harvesting, and packaging produce is sufficiently integral to WM's[Redacted] regular business to render it a statutory employer, there is no persuasive evidence that Claimant was processing mushrooms bound for WM[Redacted] at the time of her injury.

This deficiency is fatal to the claim. Under the Act, a defining element of an individual's status as an "employee" is the performance of services "*for* another." Section 8-40-202(2)(a) (emphasis added). Although the statutory employer provision expands the pool of entities that can be deemed a claimant's "employer," there is no persuasive basis to conclude it was intended to change the definition of an "employee," or obviate the fundamental requirement that an injury arise out of services performed "for" the putative employer.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits from WM[Redacted] and [Redacted, hereinafter ZH] is denied and dismissed.

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

DATED: December 13, 2023

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he was entitled to reasonably necessary and related medical benefits to include a left shoulder surgery recommended by Dr. Cary Motz.

FINDINGS OF FACT

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

A. Generally

1. Claimant was employed with Employer as a truck driver and would do rounds to pick up dumpsters and barrels full of grease.

2. On September 14, 2022 he had made a stop, which was hard because he would have to push the grease barrel across the parking lot, over a drain grate and up to the truck to dump it. The tank was fairly big, and when it was completely full, it would weight about 2,500.00 lbs. The tank was on small casters or wheels and had to be manipulated to move it. He would have to push, pull and use a pry bar in order to get it to the truck, attach the chains and dump the tank's contents. Sometimes he would just pump the grease out but in this case, the tank was so far away from the truck, it was impossible to do so.

B. The Accident

3. On September 14, 2022 at approximately 3 a.m. he was pushing the tank across the parking lot, up an incline when it got stuck on a grate. He was pushing and pulling, trying to hurry up because he was previously yelled at when he made too much noise at this stop. While he was doing this, he felt pain in both shoulders. It was a sharp pain in the front of his shoulders and above the glenohumeral joint. He stated that as the day and night progressed, he had more and more pain in the shoulder. By the time he went to bed the pain was really bad.

4. Once he reached home, he googled his symptoms, which lead him to a "beer can" test, and was something he did to see if there was anything wrong with his shoulder. He extended his arms out, as if he was holding a beer can, then he turned his arm so that the can would be upside down, then push on his hand to see if there was pain, which would be indicative of an injury to the shoulder. He felt an increase in pain.

C. Claimant's Testimony

5. He reported the injury to his bilateral shoulders to his supervisor.

6. Employer did not send him to be attended for a couple of days to see how he did. He was then seen at Workwell a few days later. He was examined and provided restrictions.

7. Claimant returned to modified work, riding with a new hire to instruct him on how to perform the job. But because he was getting worse, climbing in and out of the truck and driving, he was referred to get an MRI of the bilateral shoulders. He discussed the findings with both Dr. Bates and Dr. Javernick. Dr. Javernick conveyed that had a fairly large but not complete tear of the left rotator cuff. Claimant continued physical therapy and had an injection into the left shoulder, which improved the shoulder some for a short time, but the pain returned. Dr. Javernick then recommended surgery for both the right and the left shoulders, stating that the left side tear was larger than what the MRI report indicated. The pain in the left side was always more than that of the right side despite the complete tear on the right, compared to the partial tear on the left.

8. Claimant had an earlier incident in April 2022 when he was pushing a dumpster with his left knee and it popped. He had an MRI but the knee was intact so he had therapy and was released.

9. Claimant had a subsequent incident in October 2022, where he was getting into the cab of the truck, when his right shoulder pain was so bad that the arm suddenly gave out and he slipped off the truck step, falling on his left side and injuring his left knee. His left shoulder pain also caused some slight decrease in range of motion. He was sent to Concentra for treatment and eventually to Dr. Mark Failinger.

10. Claimant continued to have pain in his left shoulder with reaching, pulling, holding onto anything, had worse pain symptoms at night, and decreased strength. He was getting sharp pains and aching in his left shoulder when carrying something heavy. He was eventually transferred to Concentra to keep all his medical appointments at one clinic. He was seen by Dr. Failinger for the left shoulder, which was when Dr. Failinger advised him of his impending retirement, transferring Claimant's care to Dr. Cary Motz.

11. He did continue the physical therapy at Concentra but that did not really show much improvement or lasting benefit.

12. Dr. Motz recommended surgery and Claimant continues wanting to proceed with the left shoulder surgery recommended.

13. Claimant had never had any injuries to his left shoulder prior to September 14, 2022, nor any medical care.

D. Medical Records

14. Claimant was first evaluated by PA-C Donald Downs of Workwell on September 19, 2022. Claimant provided him a history that was consistent with Claimant's testimony. Mr. Downs noted that it was more likely than not that Claimant's history of injury and the physical exam that Claimant's complaints were work related. Claimant was positive for joint pain, had tenderness at the bicipital groove, good strength but pain with endpoints of overhead movements, increased pain with posterior beltline lift off, with empty can test, and a positive Hawkins' test. Mr. Downs found no ecchymosis, erythema or edema, and found good strength on belly press. Claimant was referred to physical

therapy, recommended ice and heat as needed for pain and swelling, provided medications and restrictions, and was given a diagnosis of strain of the left shoulder joint.

15. Claimant started physical therapy on the same day. David Schulteis, DPT documented that Claimant had bilateral shoulder pain that was getting worse and that before this work injury on September 14, 2022, Claimant did not have prior problems with the shoulders. Claimant gave a history of mechanism of injury that was consistent with his testimony. He noted that following the injury Claimant had weakness with manual muscle testing for shoulder abduction, a positive empty can testing, decreased range of motion (ROM), weakness, limited work tolerance, and limited functional tolerance.

16. On September 21, 2022 Claimant returned with continued bilateral shoulder pain, left greater than right. Dr. Daniel Bates evaluated Claimant stating that his primary problem was dull and sharp pain located in the left shoulder. Dr. Bates noted that Claimant had pain in the anterior bicipital groove, palpable biceps tendon in the groove with moderate tenderness, with tenderness to palpation along the supraspinatus muscle belly in the subacromial and a positive empty can test. He diagnosed left shoulder joint sprain. Dr. Bates noted that Claimant's complaints were likely work related.

17. Claimant returned to see Dr. Bates on September 27, 2022. Claimant was complaining of worsening symptoms of pain and discomfort from physical therapy and working, getting in and out of the truck, including bilateral shoulder pain though he had some relief with a TENS unit and icing. He documented tenderness to palpation of the left shoulder bicipital groove, subacromial tenderness, supraspinatus muscle belly tenderness, with positive Hawkins, Neer's, empty can test, with poor strength. Dr. Bates referred Claimant for an MRI of the left shoulder and discontinued physical therapy.

18. Claimant had an MRI performed at Health Images Fort Collings on September 30, 2022. Dr. Steven Ross noted a low to moderate grade intrasubstance supraspinatus tendon tear, a low grade intrasubstance subscapularis tendon tear, and significant inflammation of the acromioclavicular joint.

19. Dr. Bates reviewed the MRIs of the bilateral shoulders on October 5, 2022. He noted a mild to moderate tearing which was partial thickness tearing of the infraspinatus. He documented that Claimant continued to worsen. On exam he noted moderate tenderness to palpation over the infraspinatus muscle belly, and at the posterior inferior shoulder. He provided work restrictions of no use of the arm over shoulder height, and no lifting, pushing or pulling over 40 lbs., only from floor to waist. He continued to diagnose left shoulder joint sprain and made a referral to an orthopedic surgeon. He stated that objective findings were consistent with the work related mechanism of injury.

20. Claimant was seen by Justin Kutz, PTA on October 18, 2022. Claimant was improving with pain tolerance but had bilateral shoulder pain frequently, especially with reaching overhead with the left arm, when he would feel a very sharp pain.

21. On October 20, 2022 Dr. Bates noted that Claimant was awaiting authorization for the right full thickness tear surgery but would proceed with steroid injection into the left shoulder. On exam of the left shoulder, he documented that Claimant showed tenderness to palpation in the subacromial space and along the supraspinatus

muscle belly as well as a positive Hawkins, positive Neel's, and positive empty can. He performed no other exam or testing.

22. Claimant started treatment with Concentra for a left ACL injury on October 24, 2022 that happened when his right arm gave out while getting into the passenger side of the cab. Claimant also provided a history of the bilateral shoulder claims and that he was awaiting surgery. Claimant fell to the ground on his left side, causing worsening symptoms of his left shoulder. The October 25, 2022 note also provided a history of Claimant's treatment related to his prior left knee injury of April 18, 2022, which resolved with treatment. Dr. Wendy Carle recommended that Claimant be seen for any aggravation to the left shoulder related to this new fall onto his left side. She noted loss of range of motion of the left shoulder but did not document any other testing.

23. Dr. Bates continued seeing Claimant and documenting the same exam findings. He performed an ultrasound guided subacromial injection on October 28, 2022. At that time he reduced Claimant's weight limit to 25 lbs. lifting, pushing and pulling floor to waist, no kneeling, crawling, squatting or climbing and not commercial driving. In follow up visits he noted that insurer had yet to authorize the surgery for the right shoulder.

24. As found, the records from Workwell fail to show that any of the providers even assessed for AC joint pain or pathology by performing an O'Brien's test (an active compression test), a shear test or an AC joint provocation tests. As found, the Workwell providers listed those tests that were negative or normal in their reports, leading this ALJ to conclude that they simply did not test the AC joint for pain or tenderness.

25. John R. Schwappach, M.D. evaluated Claimant on January 20, 2023 for a Independent Medical Examination requested by Respondents. He issued a report on February 2, 2023. This report focused more on Claimant's knee ACL rupture than the shoulder injuries, though he noted that Dr. Failinger recommended shoulder surgery take place before completing ACL reconstruction. The physical exam only documented decreased range of motion measurements and no other physical findings regarding the shoulders, though he made normal findings regarding other body parts. He opined that the ACL findings were caused by Claimant's October 24, 2022 work injury and required reconstruction surgery.

26. Dr. Matthew A. Javernick of Orthopaedic & Spine Center of the Rockies evaluated Claimant on February 1, 2023. He read the left shoulder MRI as showing a high-grade interstitial tear greater than 50% of the supraspinatus. He recorded that Claimant had left greater than right shoulder pain, had pain with overhead activity, lifting objects away from the body and at night. He noted a positive Hawkins', Neer's, empty can test, though no tenderness of the AC joint at that point in time. Dr. Javernick commented that Claimant elected to proceed with surgery on the left, including rotator cuff repair, biceps tenotomy, subacromial decompression, "and any other indicated procedures."

27. Dr. Schwappach performed a medical records review on February 6, 2023 at Respondent's request. He noted a history generally consistent with Claimant's testimony. He reviewed the records from Workwell noting Claimant's ROM deficits of the left shoulder. He noted that the left shoulder MRI scan demonstrated a low grade intrasubstance tear of the supraspinatus tendon and subscapularis tendons. He opined

that it was most consistent with a rotator cuff strain as there was no full thickness rotator cuff tear or labral pathology detected in the left shoulder. He also noted the acromioclavicular inflammation. He stated that Claimant sustained an acute exacerbation to the right shoulder pathology and left shoulder rotator cuff strain, which was conservatively treated and that Claimant had reached maximum medical improvement (MMI) by October 20, 2022.

28. On March 15, 2023 Dr. Javernick's office finally reached the correct adjuster and noted a request for surgery would be faxed.

29. Claimant was evaluated by Mark Failinger on March 16, 2023 on his multiple issues including the left knee ACL, and the bilateral shoulder rotator cuff pathology. Claimant reported of the three body parts that the left shoulder was the worst and requested that the surgery for the left shoulder take place before the ACL reconstruction. He noted bilateral shoulder pain and left knee pain. Dr. Failinger noted that, while Claimant believed the adjuster was making arrangement for all three conditions be treated at Concentra, Dr. Failinger had no authority to proceed with assessment and treatment of the shoulder conditions. Dr. Failinger noted that, since he would be retiring that he would refer Claimant to Dr. Motz for further care.

30. Cary Motz, M.D., an orthopedic surgeon, issued a report on March 21, 2023 detailing Claimant's history of injuries beginning with the April 18, 2022 left knee injury which resolved with treatment, the bilateral shoulder injuries of September 14, 2022 and the subsequent left knee injury of October 24, 2022. At that time, Claimant was complaining of moderate left shoulder pain with pain at night, pain with overhead use and pain about the superior aspect of the shoulder. The right shoulder had moderate discomfort with use, pain with overhead use, and some pain at night. The left knee had occasional swelling and feelings of instability. On exam of the left shoulder he indicated that Claimant had moderate AC joint tenderness with positive cross-arm adduction test, mild limitation of motion with positive impingement Hawkins test and tenderness over the biceps tendon. He commented that the MRI showed partial thickness intrasubstance supraspinatus tear and significant edema in the distal clavicle at the AC joint with degenerative changes.

31. Dr. Motz opined that the September 14, 2022 work injury was the cause of Claimant's left shoulder pain and AC joint pain, showing signs of impingement. He noted that the subacromial steroid injection did not give much improvement. He recommended a steroid AC joint injection to determine if it provided diagnostic and therapeutic effects and that it was necessary to retain and/or regain further bodily function and return to pre-injury functionality, which was performed on that day, and also referred Claimant to further physical therapy for the left shoulder. Dr. Motz stated that, following the injection, if Claimant continued to have persistent issues, that he would be evaluated for rotator cuff surgical intervention and repair. He recommend that they repair the rotator cuff as the first procedure and then address Claimant's knee, but if they were going to be significantly delayed due to denial of prior authorization with the right shoulder, or for that matter the left shoulder, that Claimant required surgical intervention and that Dr. Motz would proceed with the ACL reconstruction in the interim.

32. Jeffrey Wallace, PA-C, attended Claimant on a telehealth visit. He assessed Claimant with a left AC sprain on March 24, 2023 and ordered physical therapy for the shoulders. He noted that the cases were being combined. As found, this is the point in time that Claimant fully transferred to Concentra for the left shoulder injury. PA Wallace also referred Claimant to Dr. Motz for the left shoulder.

33. Dr. Motz documented on April 5, 2023 that the injection gave Claimant good relief for a few days but his symptoms returned. He noted that surgery for the left ACL reconstructions was approved but both the left shoulder and right shoulder surgeries had been denied. Claimant continued to report that the left shoulder was the most painful of his injuries. On exam he noted AC joint tenderness of the left shoulder, positive cross arm adduction test, and mild limitation of motion. He also remarked that Claimant had signs of impingement and partial tearing of the rotator cuff and that the AC joint injection was diagnostic. He discussed an arthroscopy with debridement, decompression, and distal clavicle excision, which should significantly improve Claimant's symptoms in left shoulder and should be a fairly quick recovery

34. Dr. Schwappach issued a third report on April 5, 2023. He noted that the records reviewed were unable to demonstrate a surgical lesion of Claimant's left shoulder, and again opined that Claimant only sustained a left shoulder strain of the rotator cuff.

35. Mr. Wallace evaluated Claimant on April 10, 2023 and noted no issues with his shoulders and did not distinguish between the shoulders on exam, though he stated that Claimant had not progressed with either steroids or physical therapy and that Claimant was awaiting surgery. This report and subsequent reports from this provider were neither credible nor persuasive as the reports focused primarily on the lower extremity injury and repeated the exact same findings multiple times, causing this ALJ to believe that they were copied and pasted. He noted that objective findings were consistent with the work related mechanism of injury.

36. On April 24, 2023 Mr. Wallace ordered further PT for the left AC joint sprain and sequelae and provided work restrictions of less than light duty work.

37. Claimant's next visit, on May 30, 2023, was with Dr. Carle who noted that Claimant had limited range of motion of the left shoulder, with an 8/10 pain and symptoms worse at night, with joint pain, swelling and stiffness, and was still awaiting approval of left shoulder surgery. She found tenderness in the AC joint, in the superior shoulder and in the posterior shoulder, with abnormal ROM with pain (estimates) with forward flexion and abduction. The last report from Concentra still had a restriction of no driving commercial vehicles.

38. Physical therapy records for treatment of the left knee indicated that the Claimant recovered from the April 18, 2022 left knee injury after injections and 9 PT visits. There was little mention of the shoulder injury before March 30, 2023 other than to state Claimant was holding the knee surgery until after his shoulder surgery. Claimant was eventually transferred to a home exercise program for the knee. PT restarted on March 30, 2023 with assessment of the bilateral shoulders when care for the shoulders was transferred from Workwell to Concentra. Mr. Caymen Menard noted that they "[i]ntroduced ROM for B shoulders, light RTC activation/strengthening as well. Pt has ROM and strength deficits to be expected with ongoing B RTC injuries. Added B shoulder

goals to reflect pivot from knee to shoulders here in therapy." Mr. Menard found abnormal range of motion and worked with Claimant to improve motion.

39. On May 2, 2023 Mr. Menard noted that they would be stopping pre surgery PT for the shoulders as Claimant was to have knee surgery the following week. He noted that they would restart after the surgery. When Claimant restarted PT on May 31, 2023, it was only for the left knee. Mr. Menard documented that Claimant was having worsening shoulder symptoms as a result of using crutches following surgery. At that point, Claimant was only allowed to do toe touch weight bearing. Once he was allowed to discontinue the crutches, his shoulders started to improve again.

40. Claimant followed up with PA Wallace on June 13, 2023. He noted Claimant had tenderness in the AC joint and had a positive painful arc when performing rotator cuff test. He noted that Claimant was awaiting authorization for left shoulder surgery under Dr. Motz and that objective findings were consistent with the work related mechanism of injury.

E. Dr. Motz's Testimony

41. Cary Motz, M.D. testified, on behalf of Claimant, as a board certified expert in orthopedic sports medicine as well as a Level II accredited physician. He first evaluated Claimant on March 23, 2023. He took a history and reviewed the medical records, including the MRI images and reports of the left shoulder. He noted that the images showed an inflamed acromioclavicular joint with some mild arthritis, and a moderate partial thickness rotator cuff tear. He disagreed with the radiologist that the tear was low grade. In fact he agreed with Dr. Javernick, the other orthopedic surgeon, that Claimant had a high grade interstitial tear of the rotator cuff that appeared to be greater than fifty percent thickness as well as a low grade subscapularis tear. He did not have the prior surgeon's report though, when he reviewed the records originally. Dr. Motz opined that there was inflammation due to the trauma to the September 14, 2022 left shoulder injury and not some arthritic inflammatory process. He stated that the lack of prior problems with his shoulders indicated it was more likely to be traumatic in nature. He opined that it was more likely than not that the partial thickness left rotator cuff tear was related to the traumatic injury of September 14, 2022. He also opined that the symptoms caused by the partial thickness tear were consistent with the reported mechanism of injury.

42. On exam he noted that Claimant had signs of impingement syndrome and had pain in the AC joint and some weakness. Claimant had a positive cross-arm adduction test which indicated pain in the AC joint and was positive. Claimant also had positive impingement, and Hawkins signs showing that Claimant had either bursitis or symptomatic rotator cuff pathology. Dr. Motz also explained that an empty can test was also indicative of rotator cuff pathology or impingement. A positive Neer's test can also indicate rotator cuff pathology or impingement. These are all objective test performed by providers and he expected Claimant's tests to be positive given his MRI findings, with the impingement, Hawkins and empty can test confirming the partial thickness tear and the AC joint pain and crossed arm adduction test correlating to the AC joint pathology. He did discuss that Claimant only had mild loss of range of motion (ROM) of the shoulder though he had pain with ROM.

43. Following his exam, Dr. Motz recommended arthroscopy with a decompression and extensive debridement and an AC joint resection/distal clavicle excision and possible rotator cuff repair, upon evaluating the cuff during surgery to assess the cuff's condition. Further, because both the subacromial steroid injection and the AC joint steroid injection gave similar response, he opined that it was difficult to say whether the majority of the pathology and symptoms are coming from the rotator cuff or the AC joint. He stated he would be unable to say definitely until he could see the cuff first hand.

44. Dr. Motz stated that the purpose of the surgery would be to debride the bursitis, remove a section of the distal clavicle to decompress the AC joint, and evaluate the rotator cuff to see if it required repair. He opined that the left shoulder surgery was reasonable and necessary to proceed with since Claimant had been through over a year of conservative treatment, including more than one injection and extensive physical therapy, and Claimant met all the criteria for proceeding with surgery under the Medical Treatment Guidelines for the shoulder as well as it being necessary to alleviate his left shoulder pain.

45. Dr. Motz did both Claimant's left knee surgery in May 2023 and his right shoulder surgery in August 2023 and noted that Claimant had done really well from both surgeries. Dr. Motz expected the same from the left shoulder surgery.

46. He opined that Claimant had not reached MMI for the left shoulder injury because he needed the left shoulder surgery in order to reach MMI. He opined that the surgery was needed to address the September 14, 2022 work related injuries and trauma to the left shoulder. He opined that the small amount of arthritis in the AC joint was aggravated with the injury and that they had not been able to calm that down with "the injection and physical therapy and anti-inflammatories and topical treatments and all the other things" or treatments.

47. Dr. Motz opined that absent any other mechanisms, events, or history or injuries to the left shoulder, Claimant sustained a left shoulder injury on September 14th, 2022, and that the findings on the MRI of September 30, 2022 were causally related to the September 14, 2022. He explained that it was clear that the AC joint was inflamed, but there was also a moderate small partial thickness rotator cuff tear. He opined that the inflammation found in the AC joint was due to trauma. He also opined that the partial thickness tear was also more likely than not due to the traumatic work injury. He based his opinion, at least partially, on the fact that Claimant had no prior history of left shoulder problems, and had a mechanism injury sufficient enough to cause tears in the rotator cuffs.

48. He noted that the same analysis for causation that Dr. Schwappach used with regard to Claimant's knee injury would apply to Claimant's left shoulder. Specifically that in an otherwise health forty one year old with good left shoulder motion and no other contraindicated pathology, Claimant should have left shoulder surgery as recommended. Dr. Motz also stated that Dr. Schwappach failed to perform essential tests in order to render an opinion regarding the left shoulder including provocative maneuvers, empty can test, adduction, positive beltline, Neer's or Hawkins as he did not document those measurements. He further vehemently disagreed with Dr. Schwappach's opinion that Claimant's ongoing problems were not caused by the September 14, 2022 accident.

49. Dr. Motz was not suggesting or recommending a biceps tenotomy as recommended by Dr. Javernick. He opined that the Claimant's pain generator is a combination of the partial thickness tear and the AC joint inflammation. He stated that the MRI which took place two weeks after the accident showed both pathology and that Claimant had continuing problems with both the rotator cuff and the inflamed AC joint. Dr. Motz specifically opined that the pain was limiting his function, which needed to be addressed in order to restore and improve his function. He opined that the sources of Claimant's pain comes from both the inflamed AC joint and the rotator cuff and that both pathologies were present when he had his MRI. He continued to recommend a left shoulder arthroscopy to repair the rotator cuff, subacromial decompression to address the impingement or issues regarding a bone spur of the bone above the rotator cuff and resect the coracoacromial ligament, debridement, and distal clavicle excision to address the AC joint inflammation. He stated that the vast majority of shoulder surgeries were undertaken to alleviate the patient's pain symptoms.

F. Dr. Schwappach's testimony

50. John R. Schwappach, M.D. testified, on behalf of Respondents, as a board certified expert in orthopedic surgery and as a Level II accredited physician. He stated that he initially did a record review but he also performed an Independent Medical Examination of Claimant. He performed an examination that included range of motion of the shoulders as well as some provocative tests, which he did not record. He reviewed the MRI film of the left shoulder and disagreed with Dr. Javernick's and Dr. Motz's opinions that there was a high grade tear, stating he would consider it a low grade one. He stated that, based on his exam of the left shoulder, Claimant had a partial interstitial tearing but not a significant one, that is tearing within the fibers of the tendinous tissue, and that Claimant's findings were more consistent with a rotator cuff strain than a tear.

51. Dr. Schwappach stated that the MRI scan raised the question whether Claimant had inflammation from some sort of arthritic process at the AC joint, which was clearly present, or was it post-traumatic. The fact that there was change from the first surgical request from Dr. Javernick, to the second surgical recommendation told him that something was occurring in the pathology subsequent to the work event, the industrial accident, that was causing that change in symptoms. Dr. Schwappach opined that a different process was involved than the industrial accident in causing the need for the distal clavicle excision. He opined that the procedure might be an indicated procedure, but it did not fall under the auspice of the industrial accident. He did not state that the initial AC joint pathology had resolved, only that it was not related to the accident. He opined that the arthroscopy with a debridement, decompression, and distal clavicle excision recommended by Dr. Motz may be reasonably necessary but not related to the September 2022 work injury.

52. He explained that assessment of whether the partial tear was a high grade or a low grade tear was subjective depending on the reviewer's own subjective opinion and it was his opinion that Claimant had a low grade partial tear. This information was only one piece of information used to generate an opinion, the other was the physical exam. He also opined that the AC joint inflammation was due to arthritis and not any trauma to the joint.

G. Conclusive Findings

53. As found, Claimant did not have any problems or symptoms into his left shoulder until the September 14, 2022 incident where Claimant was pushing a very heavy container of grease across the parking lot when the small wheels got caught in a grate and Claimant had to struggle to get it out, and injured his bilateral shoulders. Despite the immediate pain, he continued to the truck on an incline in order to empty the container.

54. As found, Dr. Motz's opinions were more credible and persuasive than the contrary opinions of Dr. Schwappach. Dr. Motz' opinions that Claimant injured his left shoulder during the event of September 14, 2022, and that the ongoing symptoms and pathology were injured or aggravated at that time, especially the facts that the findings on the MRI of the left shoulder including the partial tear and the AC joint inflammation were caused by the September 14, 2022 work injury. Further, Dr. Motz credibly opined that the findings on the MRI were supported by his and other authorized provider's positive findings on exam, including Dr. Javernick's and Dr. Bates's opinions. On the other hand, Dr. Schwappach was not persuasive in his explanation that when he examined Claimant he performed all the provocative maneuvers and tests, found nothing, and simply did not document them in his report. Neither was Dr. Schwappach persuasive in his opinion that the pathology found on the MRI was not caused or aggravated by the September 14, 2022 accident.

55. As found, Dr. Motz was persuasive in explaining that Claimant has two distinct pathologies, the AC joint inflammation and the partial rotator cuff tear as found on MRI. As found, Dr. Motz's opinion with regard to the more likely cause of Claimant's ongoing symptoms is the AC joint pathology which was aggravated by the September 14, 2022 accident, though he had positive response, though short lived, to the injection of the AC joint and the subacromial space. As found, the AC pathology and significant inflammation of the acromioclavicular joint showed on the MRI only two weeks after the accident supported Dr. Motz's opinion that Claimant had an aggravation of his underlying AC pathology.

56. As found, Dr. Motz's recommendations for surgery including arthroscopy with decompression, extensive debridement, AC joint resection/distal clavicle excision and possible rotator cuff repair, are reasonably necessary and related to the admitted September 14, 2022 work injury which is intended to restore Claimant's function, ability to use his left upper extremity and either resolve or ameliorate his pain in the left shoulder.

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

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, supra.

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

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

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

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

B. Authorized Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537, (ICAO May 31, 2006). A claimant must prove by preponderance of evidence direct and proximate causal relationship between an injury and the need for medical treatment sought. C.R.S. Sec. 8-43-301(b)-(c), *Lutz v. Indus. Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999). Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). The 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. *Merriman v. Indus. Commission*, 120 Colo. 400, 210 P.2d 449 (1949). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colo. Springs School Dist*., W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

As found, Claimant was credible and persuasive that he was in the course and scope of his employment on September 14, 2022 when he was pushing a barrel full of grease across the parking lot and it got stuck on a grate. In pushing and pulling the barrel, and then pushing it up the parking lot incline, Claimant injured his left shoulder. Since the injury, Claimant consistently complained to his providers that his left shoulder pain was worse than either the right shoulder torn rotator cuff pain or the pain caused by ruptured ACL of the left knee. Claimant had no prior injuries or symptoms in the left shoulder before September 14, 2022. Further, as found, Claimant's testimony was consistent with the medical records in describing the mechanism of injury. This was also consistent with medical providers, including PA Downs who stated that it was more likely than not that Claimant's history of left shoulder injury, and the physical exam, that Claimant's complaints were work related. PA Wallace and Dr. Bates also stated that objective findings were consistent with the work related mechanism of injury.

Dr. Motz was also found more credible and persuasive over the contrary opinion provided by Dr. Schwappach. As found, Dr. Motz credibly explained that his physical examination of Claimant, including positive Hawkins', positive Neer's, and impingement signs and the pathology found on the left shoulder MRI imaging, all were consistent with rotator cuff pathology and cross body adduction which was consistent with the AC joint pathology. Dr. Motz's credible and persuasive opinion that the left shoulder pathology and subsequent symptoms were caused by the September 14, 2022 admitted work injury and that the surgery he was recommending, a decompression, extensive debridement, AC joint resection/distal clavicle excision and possible rotator cuff repair, was reasonably necessary and related to the September 14, 2022 accident were also credible and very persuasive. From the totality of the credible and persuasive evidence, Claimant has shown that the surgery recommended by Dr. Motz is reasonably necessary and related to cure and relieve Claimant of his admitted injuries of September 14, 2022, including the arthroscopy with decompression, extensive debridement, AC joint resection, distal clavicle excision and possible rotator cuff repair.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for the Claimant's left shoulder surgery as recommended by Dr. Cary Motz.

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

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

DATED this 14th day of December, 2023.

By: _____
ELSA MARTINEZ TENREIRO
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-220-534-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with Employer on October 25, 2022.

2. Whether Claimant has proven by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

3. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant chose Dr. Nelson at Concentra Medical Centers as his ATP and they are not responsible for medical treatment, including the January 27, 2023 lower back surgery, performed by John Rives Barker, M.D. at Rocky Mountain Spine Clinic, P.C.

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his October 25, 2022 industrial injury.

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 26, 2022 through May 15, 2023.

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

FINDINGS OF FACT

1. Employer is a construction company with a primary focus on residential building and foundations. Claimant is a 17-year-old male. On September 14, 2022 Claimant was hired to work for Employer as a General Laborer. His job duties involved performing manual labor including carrying tools, digging holes and using basic tools.

2. Claimant asserted that on October 25, 2022 he sustained an injury to his lower back while working for Employer. He specifically contended that he was digging a trench and removing dirt using buckets with attached ropes when he felt a pain in his lower back.

3. For the six-week period that Claimant worked for Employer prior to his injury, he earned gross wages of $5,247.94. Dividing $5247.94 by 6 weeks equals an Average Weekly Wage (AWW) of $874.65.

4. On October 25, 2022 Claimant visited the office of Project Manager [Redacted, hereinafter AG] and reported that "[he had] to go to the chiropractor because [his] sciatic [was] acting up again." Claimant did not specifically report a work injury or how he injured his back. In additional text message exchanges with AG[Redacted], Claimant still did not report any specific work injury.

5. On October 26, 2022 Claimant also sent the following text message to Director of Sales Operations [Redacted, hereinafter PH]:

> Hey PH[Redacted], I talked to AG[Redacted] yesterday after work and took a day off today because I screwed up my back. Saw a doctor today.
>
> I have a herniated disc in my back. I've been unable to move today from inflammation.
>
> I'm getting MRI done and a bunch of chiropractic work. My doctor said I should not be working this week.
>
> I can get a note if it helps.

6. Claimant subsequently provided a note from chiropractor Kimberly Kesner, DC that mentioned a back strain and took him off work for four days. Notably, Claimant attended four chiropractic sessions between October 25, 2022 and October 31, 2022.

7. On October 27, 2022 Claimant visited Southmoor Emergency and Urgent Care Center. Claimant explained that he felt pain after lifting buckets out of a trench for an extended period of time at work. Further, the record reveals that Claimant was experiencing right-sided lower back pain with left-sided sciatica. Claimant explained that he subsequently could not work because of his symptoms. He noted that movement caused shooting pain.

8. On November 7, 2022 PH[Redacted] sent a text message to Claimant to check on his status. In response, Claimant informed PH[Redacted] that he had filed a claim for Workers' Compensation.

9. On November 9, 2022 Employer completed a First Report of Injury. The Report specified that on October 25, 2022 Claimant injured his back. Specifically, Claimant was lifting seven gallon buckets of dirt and rocks out of a 10-foot hole. After repeated motion for several hours Claimant's back began to tighten and he felt pain down his left leg from his hip to his ankle. Claimant told his foreman that he needed to cease working and rest. Although the record includes a First report of Injury, Claimant did not receive a list of at least four designated medical providers.

10. On November 18, 2022 Claimant began medical treatment with Barry Nelson, D.O. at Concentra Medical Centers. Claimant recounted that he felt pain in his lower back and hip after pulling rocks and dirt out of a hole. Dr. Nelson diagnosed

Claimant with: (1) lumbar back pain with radiculopathy affecting left lower extremity and (2) left hip pain. He determined that his objective findings were consistent with a work-related mechanism of injury. Dr. Nelson limited Claimant to modified duty with no lifting in excess of five pounds. He prescribed medications, ordered a left hip MRI and requested a lumbar spine MRI. Dr. Nelson also referred Claimant to a neurosurgeon, physiatrist, and physical therapy three times per week for two weeks.

11. On November 22, 2022 Claimant visited Michael J. Rauzzino, M.D. for a neurosurgery evaluation at Concentra. Claimant reported that he "felt his back gave out on him. He asked to be taken off his work, still his boss told him he could not stop working." Claimant then noted his pain became worse and localized in his back down his left leg. Dr. Rauzzino noted that Claimant likely had a herniated disc at L4-L5. He recommended an MRI and injection therapy.

12. On December 2, 2022, Claimant underwent MRIs of hip and lumbar spine. His lumbar spine MRI revealed multilevel, multifactorial, degenerative changes superimposed on a developmentally small spinal canal. There was also advanced spinal canal stenosis at L4-5 and L5-S1.

13. On December 20, 2022 Claimant returned to Dr. Rauzzino for an examination. After reviewing Claimant's MRI, Dr. Rauzzino noted a large herniated disc on the left side at L4-L5. He explained that Claimant was likely a candidate for an immediate decompression of the nerve. Additionally, Dr. Rauzzino offered to refer Claimant through Concentra. However, Claimant rejected the offer and noted he would likely seek treatment outside of the Workers' Compensation system because his claim had been denied. Notably, Dr. Rauzzino commented that Claimant had likely suffered a compensable occupational injury.

14. Claimant did not immediately pursue surgery. Instead, he took a vacation to Mexico around January 14, 2023.

15. After his vacation, Claimant attended an evaluation with John Rives Barker, M.D. on January 23, 2023 at Rocky Mountain Spine Clinic, P.C. The record does not reveal any referral from Concentra physicians. Claimant reported that he began developing back pain while removing dirt from a hole at work. Dr. Barker noted that Claimant had a large disc herniation at L4-L5 with severe stenosis. He recommended a decompression instead of a fusion or disc arthroplasty due to Claimant's young age. The recommended surgery consisted of a laminectomy at L4-5 and L5-S1 as well as a discectomy at L4-5. The surgery was scheduled for January 27, 2023.

16. On January 26, 2023 Claimant returned to Dr. Nelson at Concentra for an examination. Dr. Nelson reviewed Claimant's MRI and notes from Dr. Rauzzino. He remarked that Claimant was scheduled to undergo surgery with Dr. Barker on the following day.

17. On January 27, 2023 Claimant underwent surgery with Dr. Barker. The surgery specifically consisted of a laminectomy at L4-L5 and L5-S1 as well as a discectomy at L4-L5.

18. On February 9, 2023 Claimant underwent an Independent Medical Examination (IME) with Orthopedic Surgeon David H. Effenbein, M.D. Dr. Effenbeim recounted that Claimant is a 17-year-old male who was working for Employer as a Laborer. He noted that on October 25, 2022 Claimant was lifting buckets of dirt out of a ditch by pulling up on a rope. Claimant had to prop his left leg against something while he was bending over at the waist to lift the heavy buckets of dirt. After a few hours Claimant developed pain in his lower back and tingling in the left leg. After receiving conservative medical treatment, Claimant then underwent lower back surgery with Dr. Barker. After reviewing Claimant's medical records and conducting a physical examination, Dr. Effenbein concluded that Claimant's back injuries were related to his October 25, 2022 work activities. He concisely reasoned that Claimant "is a 17-year-old high school student. He had only been working as a laborer for six weeks when his injury happened. He reports no prior problems with his lower back or left leg." Dr. Effenbein also noted that Claimant's medical treatment was related to his October 25, 2022 work injuries.

19. On February 13, 2023 Claimant returned to Dr. Barker for a post-surgical follow-up. Dr. Barker noted some residual leg pain and increased Claimant's medications for continued healing. The record does not reveal any further notes from Dr. Barker.

20. On February 23, 2023 Claimant again visited Dr. Nelson for an examination. Dr. Nelson recommended beginning physical therapy in two weeks and noted that Claimant would continue to follow-up with Dr. Barker.

21. On April 26, 2023 Claimant returned to Dr. Nelson and reported continued symptoms. Notably, Dr. Barker had ordered a repeat MRI. Dr. Nelson commented that Claimant would continue to follow-up with Dr. Barker and would undergo the MRI as planned.

22. Claimant has established it is more probably true than not that he suffered a lower back injury during the course and scope of his employment with Employer on October 25, 2022. Claimant's testimony and the persuasive medical records reveal that Claimant injured his lower back while at work. Initially, Claimant explained that he was digging a trench and removing dirt by using buckets with attached ropes when he began developing lower back symptoms. Although Claimant mentioned back pain to AG[Redacted] on the date of the incident, he did not attribute his symptoms to his work activities. Furthermore, a text message on the following day to PH[Redacted] also reveals that Claimant injured his back and was going to seek chiropractic treatment, but Claimant did not connect his condition to his work activities. Claimant did not complete a First Report of Injury until November 9, 2022. Despite initially failing to delineate that he injured his back at work, the medical records reveal that Claimant suffered a compensable injury to his lower back area while performing his job duties on October 25, 2022.

23. On November 18, 2022 Claimant began medical treatment with Dr. Nelson at Concentra. Claimant recounted that he felt pain in his lower back and hip after pulling rocks and dirt from a hole at work. Dr. Nelson diagnosed Claimant with: (1) lumbar back pain with radiculopathy affecting left lower extremity and (2) left hip pain. He determined that his objective findings were consistent with a work-related mechanism of injury. Similarly, after reviewing Claimant's MRI, Dr. Rauzzino noted a large herniated disc on Claimant's left side at L4-L5. Notably, Dr. Rauzzino commented that Claimant had likely suffered a compensable occupational injury. Finally, at a February 9, 2023 IME with Dr. Effenbein, Claimant reported he was lifting buckets of dirt out of a ditch by pulling up on a rope. After a few hours he developed pain in his lower back and tingling in the left leg. Dr. Effenbein reasoned that Claimant's work activities on October 25, 2022 caused his lower back and left leg symptoms.

24. Based on Claimant's consistent account and a review of the persuasive medical records, Claimant suffered a lower back injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable lower back injury on October 25, 2022.

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

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26. Because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose Concentra for treatment. Respondents have demonstrated by a preponderance of the evidence that Claimant chose Dr. Nelson at Concentra as his ATP. Respondents are thus not responsible for medical treatment, including the January 27, 2022 lower back surgery, provided by Dr. Barker.

27. Following his October 25, 2022 injury, Claimant waited several weeks and then specifically sought treatment with Dr. Nelson on November 18, 2023. Claimant subsequently continued to receive treatment through the referrals made by Dr. Nelson and Dr. Rauzzino. On December 20, 2022 Claimant rejected a surgical referral from Dr. Rauzzino and expressed his preference to go outside of the Workers' Compensation system for lower back surgery. Claimant then waited approximately one month, went on vacation to Mexico, and sought treatment with Dr. Barker at Rocky Mountain Spine Clinic, P.C. on January 23, 2023. The record does not reveal any referral from Concentra

physicians. On January 27, 2023 Claimant underwent surgery with Dr. Barker that consisted of a laminectomy at L4-L5 and L5-S1 as well as a discectomy at L4-L5.

28. Claimant did not suggest that he wished to change his ATP and continued to treat regularly with Dr. Nelson after his surgery. Claimant returned to Dr. Nelson for monthly follow-up visits on February 23, 2023, March 23, 2023 and April 26, 2023. The record thus reveals that Claimant has clearly demonstrated through his conduct that he has chosen Dr. Nelson as his ATP. Accordingly, by continuing to obtain treatment for several months at Concentra without concerns, Claimant exercised his right of selection.

29. Claimant has also failed to establish the existence of a medical emergency that required surgical intervention with Dr. Barker on January 27, 2023. Although Dr. Barker urged Claimant to obtain the surgery, Claimant had known about the likely need for surgery for approximately one month. Specifically, on December 20, 2022 ATP Dr. Rauzzino suggested that Claimant would be a candidate for surgery and offered to make a referral. Nevertheless, Claimant refused and suggested he would go outside of the Workers' Compensation system. Even with knowledge of the need for surgery, Claimant failed to seek treatment until he attended an evaluation with Dr. Barker on January 23, 2023. It appears that no emergency existed and Claimant had time to go on a vacation to Mexico approximately one or two weeks before his follow-up with Dr. Barker. Based on the extended timeframe and Claimant's knowledge that he required surgery as early as December 20, 2022, Dr. Barker's surgical intervention did not constitute a bona-fide emergency to justify an exception to the authorization requirement. Accordingly, Respondents are not liable for the unauthorized treatment, including the January 27, 2023 surgery, rendered by Dr. Barker.

30. Claimant has demonstrated it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his October 25, 2022 industrial injury. Specifically, Respondents are financially responsible for Claimant's treatment and referrals through Concentra. However, Claimant has submitted a number of medical bills and requests for mileage reimbursement that do not have corresponding supporting medical documentation. He has thus not met his burden to establish an entitlement to the medical benefits or mileage reimbursement. Specifically, Claimant has not provided medical documentation and Respondents are not liable for treatment with the following providers: (1) Dr. Sydney Dittman, Centura Health 5351 S. Rosyln St.; (2) Dr. Hashim Khan, Dr. Robert Gessman, Spine One Health, 8500 Park Meadows Dr.; (3) evaluations with Dr. John Barker following February 13, 2023; (4) Colorado Athletic Condition, 10450 Park Meadows Dr.; (5) Healthone Services, Rocky Mountain Spine Clinic, 10103 Ridge Gate Pkwy.

31. Claimant has proven it is more probably true than not that he is entitled to receive TTD benefits for the period October 26, 2022, through May 15, 2023. The record reveals that Claimant only provided initial work restrictions from his chiropractor Dr. Kesner for four days following October 26, 2023 or through October 30, 2022. On October 27, 2022 Claimant visited Southmoor Emergency and Urgent Care Center because of his lower back pain after lifting buckets out of a trench for an extended period of time at work. Claimant explained that he subsequently could not work because of his pain symptoms.

He specifically noted that movements caused shooting pain. Claimant did not provide additional work restrictions until he attended an evaluation with Dr. Nelson on November 18, 2022. Dr. Nelson specifically limited Claimant to modified duty with no lifting in excess of five pounds.

32. Although Claimant did not provide work restrictions for the period October 31, 2022 through November 17, 2022, his testimony reflects that he suffered an impairment of wage earning capacity as demonstrated by his inability to resume his prior work. Claimant's testimony, in conjunction with the work restrictions assigned by treating medical providers, reflects that his October 25, 2022 lower back injury impaired his ability to effectively and properly perform his regular employment. Claimant's October 25, 2022 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant is thus entitled to receive TTD benefits for the period October 26, 2022 through May 15, 2023.

CONCLUSIONS OF LAW

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

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

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

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re*

Swanson, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

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

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

7. As found, Claimant has established by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with Employer on October 25, 2022. Claimant's testimony and the persuasive medical records reveal that Claimant injured his lower back while at work. Initially, Claimant explained that he was digging a trench and removing dirt by using buckets with attached ropes when he began developing lower back symptoms. Although Claimant mentioned back pain to AG[Redacted] on the date of the incident, he did not attribute his symptoms to his work activities. Furthermore, a text message on the following day to PH[Redacted] also reveals that Claimant injured his back and was going to seek chiropractic treatment, but Claimant did not connect his condition to his work activities. Claimant did not complete a First Report of Injury until November 9, 2022. Despite initially failing to delineate that he injured his back at work, the medical records reveal that Claimant suffered a compensable injury to his lower back area while performing his job duties on October 25, 2022.

8. As found, on November 18, 2022 Claimant began medical treatment with Dr. Nelson at Concentra. Claimant recounted that he felt pain in his lower back and hip after pulling rocks and dirt from a hole at work. Dr. Nelson diagnosed Claimant with: (1) lumbar back pain with radiculopathy affecting left lower extremity and (2) left hip pain. He determined that his objective findings were consistent with a work-related mechanism of injury. Similarly, after reviewing Claimant's MRI, Dr. Rauzzino noted a large herniated

disc on Claimant's left side at L4-L5. Notably, Dr. Rauzzino commented that Claimant had likely suffered a compensable occupational injury. Finally, at a February 9, 2023 IME with Dr. Effenbein, Claimant reported he was lifting buckets of dirt out of a ditch by pulling up on a rope. After a few hours he developed pain in his lower back and tingling in the left leg. Dr. Effenbein reasoned that Claimant's work activities on October 25, 2022 caused his lower back and left leg symptoms.

9. As found, based on Claimant's consistent account and a review of the persuasive medical records, Claimant suffered a lower back injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable lower back injury on October 25, 2022.

Right of Selection/Authorized Treating Physician

10. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228, 229 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires respondents to provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381, 383 (Colo. App. 2006).

11. The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO, Oct. 28, 2016); *Loy v. Dillon Companies*, W.C. No. 4-972-625 (Feb. 19, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

12. Although §8-43-404(5)(a), C.R.S. grants employers the initial authority to select the ATP, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical

provider. *Sims v. Indus. Claim Appeals Off,,* 797 P.2d 777, 781 (Colo. App. 1990). The purpose of the medical emergency exception is to allow an injured worker the ability to obtain immediate treatment without undergoing the delay inherent in notifying the employer and obtaining a referral or approval. *Delfosse v. Home Services Heroes, Inc.*, W.C. No. 5-075-625-001 (ICAO, Apr. 26, 2021). Once the emergency has ended the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381, 384 (Colo. App. 2006); *see* W.C.R.P. 8-3. Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO, June 29, 2005).

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

14. As found, because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose Concentra for treatment. Respondents have demonstrated by a preponderance of the evidence that Claimant chose Dr. Nelson at Concentra as his ATP. Respondents are thus not responsible for medical treatment, including the January 27, 2022 lower back surgery, provided by Dr. Barker.

15. As found, following his October 25, 2022 injury, Claimant waited several weeks and then specifically sought treatment with Dr. Nelson on November 18, 2023. Claimant subsequently continued to receive treatment through the referrals made by Dr. Nelson and Dr. Rauzzino. On December 20, 2022 Claimant rejected a surgical referral from Dr. Rauzzino and expressed his preference to go outside of the Workers' Compensation system for lower back surgery. Claimant then waited approximately one month, went on vacation to Mexico, and sought treatment with Dr. Barker at Rocky Mountain Spine Clinic, P.C. on January 23, 2023. The record does not reveal any referral from Concentra physicians. On January 27, 2023 Claimant underwent surgery with Dr. Barker that consisted of a laminectomy at L4-L5 and L5-S1 as well as a discectomy at L4-L5.

16. As found, Claimant did not suggest that he wished to change his ATP and continued to treat regularly with Dr. Nelson after his surgery. Claimant returned to Dr. Nelson for monthly follow-up visits on February 23, 2023, March 23, 2023 and April 26, 2023. The record thus reveals that Claimant has clearly demonstrated through his conduct that he has chosen Dr. Nelson as his ATP. Accordingly, by continuing to obtain treatment for several months at Concentra without concerns, Claimant exercised his right of selection. *See Murphy-Tafoya v. Safeway, Inc.*, WC 5-153-600 (ICAO, Sept. 1, 2021) (where right of selection passed to the claimant, six months of treatment with personal

provider following her work injury demonstrated that the claimant had exercised her right of selection); *Rivas v. Cemex Inc*, WC 4-975-918 (ICAO, Mar. 15, 2016) (through his words and conduct in obtaining treatment from Workwell for five weeks the claimant selected Workwell as his authorized provider); *Pavelko v. Southwest Heating and Cooling*, WC 4-897-489 (ICAO, Sept. 4, 2015) (the claimant exercised his right of selection when he obtained treatment for two years from provider recommended by the employer); *Tidwell v. Spencer Technologies*, WC 4-917- 514 (ICAO, Mar. 2, 2015) (where the employer failed to designate an authorized medical provider and claimant obtained treatment from personal physician Kaiser for his industrial injury, the claimant selected Kaiser as his authorized treating physician through his words or conduct).

17. As found, Claimant has also failed to establish the existence of a medical emergency that required surgical intervention with Dr. Barker on January 27, 2023. Although Dr. Barker urged Claimant to obtain the surgery, Claimant had known about the likely need for surgery for approximately one month. Specifically, on December 20, 2022 ATP Dr. Rauzzino suggested that Claimant would be a candidate for surgery and offered to make a referral. Nevertheless, Claimant refused and suggested he would go outside of the Workers' Compensation system. Even with knowledge of the need for surgery, Claimant failed to seek treatment until he attended an evaluation with Dr. Barker on January 23, 2023. It appears that no emergency existed and Claimant had time to go on a vacation to Mexico approximately one or two weeks before his follow-up with Dr. Barker. Based on the extended timeframe and Claimant's knowledge that he required surgery as early as December 20, 2022, Dr. Barker's surgical intervention did not constitute a bona-fide emergency to justify an exception to the authorization requirement. Accordingly, Respondents are not liable for the unauthorized treatment, including the January 27, 2023 surgery, rendered by Dr. Barker.

Medical Benefits

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

19. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501

(Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Off.,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Off.,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (reasoning that the surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

20. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his October 25, 2022 industrial injury. Specifically, Respondents are financially responsible for Claimant's treatment and referrals through Concentra. However, Claimant has submitted a number of medical bills and requests for mileage reimbursement that do not have corresponding supporting medical documentation. He has thus not met his burden to establish an entitlement to the medical benefits or mileage reimbursement. Specifically, Claimant has not provided medical documentation and Respondents are not liable for treatment with the following providers: (1) Dr. Sydney Dittman, Centura Health 5351 S. Rosyln St.; (2) Dr. Hashim Khan, Dr. Robert Gessman, Spine One Health, 8500 Park Meadows Dr.; (3) evaluations with Dr. John Barker following February 13, 2023; (4) Colorado Athletic Condition, 10450 Park Meadows Dr.; (5) Healthone Services, Rocky Mountain Spine Clinic, 10103 Ridge Gate Pkwy.

Temporary Total Disability Benefits

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

22. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period October 26, 2022, through May 15, 2023. The record reveals that Claimant only provided initial work restrictions from his chiropractor Dr. Kesner for four days following October 26, 2023 or through October 30, 2022. On October 27, 2022 Claimant visited Southmoor Emergency and Urgent Care Center because of his lower back pain after lifting buckets out of a trench for an extended period of time at work. Claimant explained that he subsequently could not work because of his pain symptoms. He specifically noted that movements caused shooting pain. Claimant did not provide additional work restrictions until he attended an evaluation with Dr. Nelson on November 18, 2022. Dr. Nelson specifically limited Claimant to modified duty with no lifting in excess of five pounds.

23. As found, although Claimant did not provide work restrictions for the period October 31, 2022 through November 17, 2022, his testimony reflects that he suffered an impairment of wage earning capacity as demonstrated by his inability to resume his prior work. Claimant's testimony, in conjunction with the work restrictions assigned by treating medical providers, reflects that his October 25, 2022 lower back injury impaired his ability to effectively and properly perform his regular employment. Claimant's October 25, 2022 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant is thus entitled to receive TTD benefits for the period October 26, 2022 through May 15, 2023.

Average Weekly Wage

24. 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.*

25. As found, the record reveals that for the six-week period that Claimant worked for Employer prior to his injury, he earned gross wages of $5,247.94. Dividing $5247.94 by 6 weeks equals an AWW of $874.65. An AWW of $874.65 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

1. Claimant suffered a compensable lower back injury on October 25, 2022 during the course and scope of his employment with Employer.

2. The right to select an ATP passed to Claimant through Respondents' failure to provide a written list of at least four designated medical providers

3. Claimant selected Concentra as his ATP.

4. Respondents are financially responsible for payment of Claimant's authorized, reasonable and necessary medical expenses for the treatment of his lower back injury. However, Respondents are not liable for unauthorized treatment, including the January 27, 2023 surgery, rendered by Dr. Barker, Furthermore, Claimant has not provided medical documentation and Respondents are not liable for treatment with the following providers: (1) Dr. Sydney Dittman, Centura Health 5351 S. Rosyln St.; (2) Dr. Hashim Khan, Dr. Robert Gessman, Spine One Health, 8500 Park Meadows Dr.; (3) evaluations with Dr. John Barker following February 13, 2023; (4) Colorado Athletic Condition, 10450 Park Meadows Dr.; (5) Healthone Services, Rocky Mountain Spine Clinic, 10103 Ridge Gate Pkwy.

5. Claimant is entitled to receive TTD benefits for the period October 26, 2022 through May 15, 2023.

6. An AWW of $874.65 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

7. 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: December 14, 2023.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-128-978-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that the medical procedure she underwent with Aaron Liddell, MD, DMD, FACS on September 8, 2023 was reasonable and necessary and causally related to her January 21, 2020 admitted industrial injury.

2. Whether Respondents should reimburse Claimant for the $5,039.00 she incurred in out-of-pocket expenses for fixed partial dentures and veneers.

NOTICE OF THE PROCEEDINGS

1. Respondents failed to attend the November 15, 2023 video hearing in this matter. Therefore, prior to entering an order, the ALJ must consider whether Claimant had adequate notice of the proceedings.

2. Office of Administrative Courts Rules of Procedure for Workers' Compensation Hearings (OACRP) Rule 24 governs the entry of orders against non-appearing parties at hearings. Rule 23 provides, in relevant part:

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

3. On September 8, 2023 the Office of Administrative Courts (OAC) sent a Notice of Hearing to Respondents' Claims Representative [Redacted, hereinafter MH] at [Redacted, hereinafter SK] with the following e-mail address: [Redacted, hereinafter MHE]. The Notice specified that the hearing would be conducted on November 15, 2023 at the OAC, 1525 Sherman St., 4th Floor Denver, CO 80203.

4. On November 6, 2023 PALJ Eley conducted a pre-hearing conference in the present matter. He recounted that Respondents had been notified of the proceeding, but failed to participate. PALJ Eley specified:

> The Division served notice of this prehearing conference (PHC) on 11/2/23. Notice was sent to MH[Redacted] at SK[Redacted] via email at MHE[Redacted]. A Google Meets invitation was sent to the same email address on 11/3/23 with instructions on attending the meeting. This PALJ attempted to contact MH[Redacted] by telephone at [Redacted, hereinafter MHP] at 9:02AM, again at approximately 9:10AM, and left voicemails. Despite these efforts, Respondents failed to appear or participate.

The Division sent a copy of the pre-hearing order to Respondents at the following address: Claims Representative MH[Redacted] MHE[Redacted].

5. On November 14, 2023 the OAC sent an Amended Notice of Hearing. The OAC emailed the parties details of the virtual hearing to be conducted on November 15, 2023 through Google Meet. The parties were notified of the option to attend either by video (by clicking the hyperlink) or by telephone. The telephone number and access code were provided on the invitation. The OAC again sent the Notice to Respondents' Claims Representative MH[Redacted] at SK[Redacted] with the following e-mail address: MHE[Redacted].

6. Despite the preceding notice of the November 15, 2023 video hearing, Respondents failed to appear. At the outset of the hearing, the ALJ reviewed the record to determine whether Respondents had received adequate and proper notice of the 8:30 a.m. hearing. Based on a review of the file and comments from Claimant's counsel, the ALJ was satisfied Claimant had proper and adequate notice of the matter. Because the case involved Claimant's Application for Hearing (AFH), the ALJ proceeded with the hearing.

7. The preceding chronology reflects that Respondents had adequate notice of the November 15, 2023 hearing in this matter. The Notice of Hearing was sent to Respondents' email address on file with the OAC. Moreover, on November 14, 2023 the OAC sent an Amended Notice of Hearing. The OAC emailed the parties details of the virtual hearing to be conducted on November 15, 2023 through Google Meet. The parties were notified of the option to attend either by video (by clicking the hyperlink) or by telephone. The record thus demonstrates sufficient evidence to create a rebuttable presumption that Respondents received notice of the hearing. Respondents have failed to rebut the presumption. Because Respondents had adequate notice of the November 14, 2023 hearing but chose not to appear, entry of an order is appropriate.

FINDINGS OF FACT

1. On January 21, 2020 Claimant suffered admitted industrial injuries to her face and mouth during the course and scope of her employment with Employer.

2. Claimant subsequently received medical treatment paid for and authorized by Respondents. The treatment included care with Aaron Liddell, MD, DMD, FACS at Colorado Oral Surgery.

3. On August 7, 2023 Dr. Liddell communicated with Respondents regarding Claimant's need for additional dental treatment. He detailed the following:

> I have been working with [Claimant] over the course of the past 3 years. In brief, she presented to my office s/p mechanical fall wherein she sustained an avulsive injury to tooth #9, in addition to bilateral mandibular condyle fractures. Ultimately, we have completed bilateral TMJ total joint replacement to rehabilitate her condyle fractures. This was because her condyle fractures were not able to be operated on at the time of the injury, based on the location of the fractures. She developed a secondary malocclusion which was addressed with orthodontics and joint replacement. She is now nearing completion of her orthodontic treatment. She is pending final reconstruction of her dentition, which will be completed with a fixed partial denture and veneers.

Dr. Liddell summarized that Claimant had completed significant treatment, but still required care in the form of fixed partial dentures and veneers.

4. MH[Redacted] is a Claims Representative for SK[Redacted]. MH[Redacted] has not responded to the provider at any time regarding the request for medical authorization for the fixed partial denture and veneers.

5. Respondents made no attempt to communicate with Claimant's counsel about the disputed issues in this matter. The record reveals that Respondents refused to attend multiple pre-hearing conferences and the scheduled hearing on November 15, 2023. MH[Redacted] has not communicated with Claimant's counsel since August 24, 2023.

6. In an attempt to regain use of her mouth and eat solid food, Claimant underwent the preceding reconstruction with Dr. Liddell on September 8, 2023. Claimant elected to pay out-of-pocket for the procedure. She specifically paid $5,039.00 for the dental work using her personal credit card on September 8, 2023.

7. Claimant has demonstrated it is more probably true than not that the medical procedure she underwent with Dr. Liddell on September 8, 2023 was reasonable, necessary and causally related to her January 21, 2020 admitted industrial injury. Initially, Claimant suffered facial and dental injuries while working for Employer. As persuasively recounted by Dr. Liddell, Claimant underwent significant dental treatment and required specific orthodontic care based on a secondary malocclusion. To complete the treatment, Claimant required final reconstruction of her dentition with a fixed partial denture and veneers. The record reveals that the treatment constituted causally related, reasonable and necessary care for her admitted industrial injuries.

8. Claimant is also entitled to recover the $5,039.00 she incurred in out-of-pocket expenses for her fixed partial denture and veneers. The record reveals that she underwent the procedure with Dr. Liddell on September 8, 2023 and incurred out-of-pocket expenses in the amount of $5,039.00. Respondents shall thus reimburse Claimant $5,039.00 for her costs.

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). 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 demonstrated by a preponderance of the evidence that the medical procedure she underwent with Dr. Liddell on September 8, 2023 was reasonable, necessary and causally related to her January 21, 2020 admitted industrial injury. Initially, Claimant suffered facial and dental injuries while working for Employer. As persuasively recounted by Dr. Liddell, Claimant underwent significant dental treatment and required specific orthodontic care based on a secondary malocclusion. To complete the treatment, Claimant required final reconstruction of her dentition with a fixed partial denture and veneers. The record reveals that the treatment constituted causally related, reasonable and necessary care for her admitted industrial injuries.

7. As found, Claimant is also entitled to recover the $5,039.00 she incurred in out-of-pocket expenses for her fixed partial denture and veneers. The record reveals that she underwent the procedure with Dr. Liddell on September 8, 2023 and incurred out-of-pocket expenses in the amount of $5,039.00. Respondents shall thus reimburse Claimant $5,039.00 for her costs.

ORDER

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

1. The medical procedure Claimant underwent with Dr. Liddell on September 8, 2023 was reasonable, necessary and causally related to her January 21, 2020 admitted industrial injury.

2. Respondents shall reimburse Claimant $5,039.00 for her out-of-pocket costs for her fixed partial denture and veneers.

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

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

DATED: December 18, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-219-793-001

ISSUE

1. Did Claimant overcome the Division Independent Medical Examination (DIME) physician's opinion that Claimant is at maximum medical improvement (MMI) by clear and convincing evidence?

FINDINGS OF FACT

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

1. Claimant is a 47 year-old male who worked for Employer. He was hired on February 28, 2022, to work as a carpenter. (Ex. A).

2. On May 2, 2022, Claimant was helping Employer with some cement work. Claimant testified they were pouring cement in a column when he slipped on a wet step, twisting his left leg. Claimant further testified that when he fell, his weight, including his tools, fell on his leg, causing him to hurt his leg and back. (Tr. 15: 1-19).

3. Later that day, Claimant went to Midtown Occupational Health Services, and he was evaluated by Marc Steinmetz, M.D. Claimant's safety supervisor, [Redacted, hereinafter OT], accompanied Claimant to the appointment. According to the medical record, Claimant reported that he "kind of slipped and almost fell and twisted his left knee." His chief complaint was knee pain. There was no mention of any back pain. Claimant was diagnosed with a left knee sprain, and was advised to treat with Advil, Tylenol, ice, and compression. (Ex. G).

4. OT[Redacted] testified that he filled out the Employer's First Report of Injury form on behalf of Claimant. (Tr. 30:23-31:11). Under the section "body part affected," OT[Redacted] wrote "twisted left knee" and under the description of the nature of the injury he wrote "slipped in mud cause[d] twisted left knee." (Ex. A).

5. Claimant had a follow-up appointment on May 4, 2022 with Dr. Steinmetz. He reported slight improvement with his left knee sprain. Claimant had less pain, swelling and stiffness. If Claimant continued to have medial knee joint pain, Dr. Steinmetz would consider ordering an MRI. (Ex. G).

6. On May 13, 2023, Claimant underwent an MRI of his left knee and left quadriceps area. Imaging of the knee revealed a complex degenerative tear of the medial meniscus; tricompartmental chondromalacia, including medial femoral, tibial, and patellofemoral compartment arthritis. The quadriceps MRI showed mild quadriceps tendinosis distally but there was no evidence of a muscle tear. (Ex. R, p. 140).

7. Dr. Steinmetz evaluated Claimant on May 16, 2022. Claimant reported feeling much better. He had a little discomfort in the distal lateral left thigh, but the knee joint did not bother him. Claimant had an appointment with an orthopedic surgeon to review the MRI. There was no documentation of Claimant complaining of back pain. (Ex. G).

8. Michael Hewitt, M.D. evaluated Claimant's left knee on May 18, 2022, and reviewed Claimant's MRI images. Dr. Hewitt reviewed the different treatment options for a medial meniscus tear. He recommended Claimant start with physical therapy, a brace, and anti-inflammatories. Claimant could also consider an injection. (Ex. 7).

9. Claimant participated in physical therapy from May 25, 2022 through June 30, 2022. The therapy addressed Claimant's left knee and distal thigh. There is nothing in the physical therapy records to indicate Claimant was experiencing any back issues. (Ex. J).

10. In June or July 2022, Claimant received a steroid injection in his left knee but it did not provide Claimant with long-term relief. (Ex. R, p. 142).

11. On July 13, 2022, Claimant saw Dr. Steinmetz for a follow-up appointment. Claimant told Dr. Steinmetz he was still experiencing pain in his left thigh distally. He also reported having some back pain "now." The record states, "[o]riginally he did not for [sic] back pain but he says he has some back pain now." The ALJ infers Dr. Steinmetz meant Claimant did not originally have back pain, but now was reporting back pain. Dr. Steinmetz examined Claimant's back. He noted that Claimant said his back was tender, but there was no spasm and Claimant had a grossly normal range of motion, and he had no sciatica. Dr. Steinmetz specifically noted in the medical record that "the notes don't currently support any back issues." With respect to Claimant's knee, Dr. Steinmetz noted that therapy was not likely helping, and he would follow up with Dr. Hewitt regarding surgery. Additionally, he referred Claimant to Samuel Chan, M.D. for an EMG consultation related to Claimant's leg numbness, which was a part of his original complaint. (Ex. K).

12. The ALJ finds that July 13, 2022, is the first time there is any documentation in Claimant's medical records referencing low back pain. The ALJ further finds that this is the first time Claimant reported having any back pain.

13. Claimant saw Dr. Hewitt on July 29, 2022. They discussed Claimant's minimal improvement following conservative management of his knee. Claimant elected to proceed with an arthroscopy of his left knee. (Ex. 7).

14. On August 5, 2022, Claimant had an initial physiatric consultation with Dr. Chan. Claimant's chief complaint was "numbness on outside of the quad." Dr. Chan examined Claimant, including his lumbar spine. Dr. Chan noted there was no tenderness to palpate over bilateral PSIS and sacral sulcus. Straight leg raising was negative, as was Patrick's, Gaenslen's, FABER's and Yeoman's testing. Dr. Chan performed EMG testing on Claimant's left lower extremity. He noted that the EMG was not diagnostic for mearalgia paresthetica. In other words, the EMG was normal. (Ex. L).

15. On August 23, 2022, Claimant underwent an arthroscopic meniscectomy and chondroplasy on his left knee with Dr. Hewitt. (Ex. P).

16. Claimant saw Dr. Steimetz, on October 7, 2022, for a follow-up appointment. Claimant's chief complaint was postop left knee numbness and pain. There is no mention in the medical records regarding Claimant experiencing back pain. To the contrary, under the physical examination section, it notes that Claimant's spine is normal without deformity or tenderness, and he has a normal range of motion. (Ex. M).

17. On October 12, 2022, Claimant went to Midtown Occupational Services as an unscheduled walk-in. Dr. Steinmetz was not there, so Claimant was examined by Lawrence Cedillo, D.O. Claimant complained of low back pain, and he rated his pain as being 10/10. Claimant reported having intermittent low back pain since the date of the work injury. He stated the pain had been at the 10/10 level since October 9, 2022. Claimant also said that he has had lumbar back pain at a 5-6/10 level since the date of his injury. Claimant reported to Dr. Cedillo that he told his coworkers about his back pain on the day of his injury, and that he also told the therapists and other providers he had seen about his back. Dr. Cedillo examined Claimant, and reviewed Claimant's past medical records. Dr. Cedillo opined that Claimant's current complaint of back pain was unrelated to his work injury on May 2, 2022. (Ex. 6).

18. Dr. Chan ordered an MRI of Claimant's lumbar spine. The impression was "[m]ultilevel degenerative changes . . . worse at L4-L5, without significant stenosis." (Ex. 8).

19. On November 16, 2022, Dr. Chan saw Claimant for a follow-up appointment. Dr. Chan placed Claimant at MMI. Dr. Chan assigned Claimant work restrictions and gave him a 12% impairment rating of the lower left extremity. Regarding Claimant's lumbar spine, Dr. Chan noted, "MRI has been reviewed and there are no correlated findings. Lumbar spine is not related to the case on May 2, 2022." (Ex. P).

20. Claimant returned to see Dr. Steinmetz on November 28, 2022. Dr. Steinmetz noted Claimant was at MMI per Dr. Chan. Claimant, however, wanted a different opinion because he still had knee pain, leg tingling and back pain. Dr. Steinmetz noted in the medical record "[h]is main issue is he wants a different opinion regarding MMI issues." (Ex. Q).

21. On December 30, 2022, Claimant presented to Carlos Cebrian, M.D., for an Independent Medical Examination (IME). Dr. Cebrian reviewed Claimant's medical records and examined him. He noted that Claimant's current complaints included left knee pain, left thigh numbness, and low back pain. Dr. Cebrian noted that the first documentation of lumbar spine complaints did not occur until over two months after the industrial injury. Dr. Cebrian agreed with Dr. Chan and Dr. Steinmetz that Claimant's lumbar spine complaints are not causally related to the May 2, 2022, work injury. Dr. Cebrian also agreed with Dr. Chan that Claimant reached MMI on November 16, 2022. Dr. Cebrian completed an IME report dated, December 30, 2022. (Ex. R).

22. On January 5, 2023, Respondents' filed a Final Admission of Liability (FAL) in accordance with Dr. Chan's report, and admitted to a 12% scheduled impairment rating of the lower left extremity, and a November 16, 2022 MMI date. (Ex. B).

23. Claimant objected to the FAL and requested a DIME. On April 6, 2023, DIME physician, S. D. Lindenbaum, M.D. evaluated Claimant. Dr. Lindenbaum opined that "there is no evidence . . . objectively of lumbar disease on MRI to substantiate an acute lumbar spine process. Furthermore, there was no documentation of any mentioned by the patient based on the clinic notes that were reviewed by several doctors of anything stating he had back pain until almost 5 months after the injury." Dr. Lindenbaum agreed with the November 16, 2022 MMI date, and he assigned claimant a 21% impairment rating for Claimant's left knee. (Ex. S).

24. As found, Claimant first reported back pain at his July 13, 2022 appointment with Dr. Steinmetz, approximately two and a half months after his injury. The ALJ infers that Dr. Lindenbaum is referencing Claimant's October 12, 2022 report of back pain of 10/10, which was five months after his injury. The ALJ finds that Dr. Lindenbaum's failure to reference Claimant's July 13, 2022 complaint of back pain does not affect the conclusions he reached regarding MMI. The ALJ finds Dr. Lindenbaum's opinion to be credible and persuasive.

25. On April 11, 2023, Respondents' filed a Final Admission of Liability in accordance with Dr. Lindenbaum's evaluation of a 21% scheduled impairment rating of the lower left extremity, and an MMI date of November 16, 2022. (Ex. D).

26. As found, Drs. Chan, Steinmetz, Cebrian, and Lindenbaum all declined to relate Claimant's lower back complaints to the workplace injury that occurred on May 2, 2022. They based this decision on clinical findings, imaging, and delayed onset of symptoms. The ALJ finds these opinions to be credible and persuasive.

27. Claimant testified he told Dr. Steinmetz about his back pain, but Dr. Steinmetz ignored him. (Tr. 17:3-19). The ALJ does not find this testimony to be credible nor persuasive. At Claimant's July 13, 2022 appointment with Dr. Steinmetz, Claimant complained of back pain. Dr. Steinmetz examined Claimant's back and noted upon examination Claimant said his back was tender, but there was no spasm and Claimant had a grossly normal range of motion, and no sciatica. (Ex. K). The ALJ finds that Dr. Steinmetz did not ignore Claimant's complaint of back pain.

28. At the hearing, Claimant's safety supervisor at the time of the incident, OT[Redacted], testified that Claimant complained of back pain from the onset of the initial injury. (Tr. 28:11-29:1). OT[Redacted] also testified that he completed the First Report of Injury on behalf of Claimant, and he did not document any injuries to Claimant's back. (Tr. 30:23-31:11). He only documented Claimant's injury to his left knee. (Ex. A). OT's[Redacted] testimony that Claimant complained of back pain at the time of the injury is not credible, nor is it persuasive.

29. As found, Claimant did not complain of back pain until July 13, 2022. The ALJ finds that Claimant's low back complaints are not causally related to the May 2, 2022 admitted work injury. The ALJ finds that Claimant did not prove by clear and convincing evidence that Dr. Chan's DIME opinion that Claimant reached MMI on November 6, 2022 is incorrect.

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. *See* § 8-43-201, C.R.S.

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

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

Burden to Overcome DIME on MMI

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transp. v. Indus. Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Constr. Mgmt.,* WC 4-356-512 (ICAO, May 20, 2004).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colo. Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). 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*., WC 4-476-254 (ICAP, 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*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *Id.; MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002).

Claimant argues that the DIME in incorrect, and he is not at MMI because he is still experiencing back pain. Specifically, Claimant asserts that his low back pain complaints are causally related to the industrial accident and therefore necessitate medical treatment. The only evidence Claimant presented to support his assertion that he injured his back in the May 2, 2022 admitted work injury is his testimony, and the testimony of OT[Redacted]. As found, Mr. OT's[Redacted] testimony is inconsistent with his written statements generated at the time of the accident and it is neither credible nor persuasive. The medical records, the First Report of Injury, and the opinions of Dr.

Lindenbaum, Dr. Cebrian, Dr. Chan, and Dr. Steinmetz directly contradict Claimant's assertion that he experienced low back pain immediately following the industrial accident.

The weight of the evidence presented shows that Claimant's low back complaints are not causally related to the May 2, 2022 claim. Claimant has failed to demonstrate, by clear and convincing evidence, that Dr. Lindenbaum's DIME opinion is incorrect.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome the DIME's finding that Claimant is at MMI by clear and convincing evidence.

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: December 18, 2023

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

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that the prescription medication Ubrelvy is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement (MMI)?

2. Has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to reimbursement of costs pursuant to Section 8-42-101(5), C.R.S.? Specifically, Claimant has requested reimbursement of costs totalling $1,703.52.

FINDINGS OF FACT

1. On December 31, 1998, Claimant suffered a compensable work injury. On that date, Claimant fell over 17 feet from an oil rig, striking his head on a steel beam. Claimant was hospitalized and underwent two surgical procedures to treat his head injury. Claimant testified that he underwent additional surgical procedures in June 1999 and then again in 2003 or 2004. Since the December 31, 1998 work injury, Claimant has experienced migraine headaches and neck pain.

2. On February 29, 2012, Respondents filed a Final Admission of Liability (FAL). In the FAL, Respondents admitted for 33 percent whole person impairment, and an MMI date of January 20, 2012. In addition, Respondents admitted for "post MMI medical treatment provided by the [authorized] treating physician that is reasonable, necessary [and] related to the compensable injury."

3. Since the December 31, 1998 work injury, Claimant has experienced migraine headaches and neck pain. Claimant testified that when he has a migraine it feels as though his left eye is being pulled from his eye socket.

4. During this claim, Claimant has undergone treatment for his migraines under the direction of his ATPs, Dr. Joel Dean[1] and Dr. Ellen Price. Under the care of Drs. Dean and Price, Claimant has been prescribed a number of medications. In addition, Dr. Price has administered Botox injections.

5. Based upon the medical records entered into evidence, Dr. Price first recommended Ubrelvy to Claimant on January 6, 2021. On February 12, 2021, Claimant returned to Dr. Price. The medical record of that date indicates that Claimant had tried the Ubrelvy and it was effective. Dr. Price provided Claimant with additional Ubrelvy samples and prescribed him 50 mg.

[1] Dr. Dean retired from practice in late 2022.

6. On May 14, 2021, Claimant reported to Dr. Price that the Botox injections were helping his symptoms. He also reported that he was using Ubrelvy, but "much less than before". Specifically, Claimant reported that he had been taking it three to four times per month, "but now he does not take it at all."

7. On February 10, 2023, Claimant returned to Dr. Price. At that time, Claimant reported that Ubrelvy samples were helpful in relieving his symptoms, but he was unable to get a prescription. Dr. Price provided Claimant with 100mg samples of Ubrelvy and prescribed 16 tablets per month.

8. On March 14, 2023, Claimant was seen by Dr. Price and again reported relief when using Ubrelvy. However, the prescription was not authorized by Insurer.

9. On March 27, 2023, Dr. Price submitted a prescription to Injured Workers Pharmacy for 100mg of Ubrelvy.

10. At the request of Respondents, on March 28, 2023, Dr. Eddie Sassoon reviewed the request for Ubrelvy. In his report, Dr. Sassoon recommended denial of Ubrelvy. In support of this recommendation, Dr. Sassoon noted that the "Guidelines" provide for the use of Ubrelvy as a first or second line treatment of migraines "with documentation or contraindication, failure, or intolerance to [two] or more triptans." Dr. Sassoon further noted that he did not see evidence that Claimant has failed first line triptans. The guidelines Dr. Sasson was referencing in his report were identified as "ODG"[2] It does not appear that Dr. Sassoon referenced the Colorado Medical Treatment Guidelines.

11. Based upon the opinions of Dr. Sassoon, Respondents denied authorization of Ubrelvy.

12. After the retirement of Dr. Dean, On May 12, 2023, Claimant was seen for a neurological consultation at the office of Dr. Seth Kareus. On that date, Claimant reported to Paulina Good, PA that he was using Ubrelvy to manage his migraines. PA Good noted the effectiveness of the Botox injections administered by Dr. Price. PA Good recommended a CGRP drug to address the breakthrough migraines, specifically Emgality. PA Good also recommended the continued use of 100mg of Ubrelvy because it had been very effective to treat Claimant's headaches, without side effects. PA Good did not recommend topiramate because of Claimant's history of kidney stones. She also did not recommend amitriptyline because of Claimant's age. Finally, PA Good did not recommend propranolol because of Claimant's history of depression.

13. On July 5, 2023, Claimant returned to Dr. Price and reported that the monthly Emgality injection was helping his symptoms. Dr. Price recommended Claimant continue Ubrelvy, but no more than 12 tablets per month.

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[2] The ALJ takes administrative notice that OOG appears to stand for Official Treatment Guidelines, which are utilized in Arizona, New Mexico, Oklahoma, and Tennessee. Colorado has not adopted the ODG.

14. On September 20, 2023, Dr. Price authored a letter in which she responded to a number of questions posed to her by Claimant's counsel. In that letter Dr. Price opined that Claimant's migraine headaches are related to the December 31, 1998 work injury. Dr. Price also opined that Ubrelvy was effective treatment of Claimant's migraines and was reasonable and necessary. Specifically, Dr. Price noted that with the use of Ubrelvy, Claimant has been able to "manage his headaches more effectively and be more functional". Dr. Price also noted that the other medications Claimant was using for his headaches, and the Botox treatments, work prophylactically to treat Claimant's migraines, while the Ubrelvy is an abortive treatment.

15. On October 11, 2023, Claimant reported to Dr. Price that the most recent Botox injections had provided 80 percent relief for four weeks. Claimant further reported that he was getting migraines 15 times per month, sometimes lasting as long as five hours. Claimant also reported that Ubrelvy was helping as much as the Emgality. In that same medical record, Dr. Price opined that Claimant should continue with Ubrelvy and Emgality.

16. Claimant testified that his current treatment regime of his migraines are Ubrelvy, Botox injections, Baclofen, and the monthly Emgality injection. Claimant explained that the Botox and Emgality are used before the onset of any migraine. When a migraine does occur, he then takes the Ubrelvy. Claimant further testified that before he used Ubrelvy, a migraine would result in him sitting on the couch, in the dark, until the migraine ended. Since using Ubrelvy, his migraines do not last as long, and he is able to function normally.

17. Dr. Ellen Price testified regarding her treatment of Claimant. Dr. Price began treating Claimant in 2006. Dr. Price explained that the focus of her treatment was Claimant's myofascial pain and headaches, including migraine headaches. Dr. Price testified that in an effort to address Claimant's migraines over the years he has been prescribed Trazadone, Baclofen, Vicodin, Corguard, Flexeril, and Topamax. Dr. Price explained that the newer CGRP drugs have fewer side effects when treating migraines. With regard to Claimant's treatment, Botox injections and Emgality have been effective in preventing the onset of migraines. However, when a migraine does occur, Ubrelvy acts as a "rescue" medication to abort the migraine symptoms, while also allowing Claimant to function. It continues to be Dr. Price's opinion that Ubrelvy is reasonable and necessary to treat Claimant's migraine headaches.

18. The ALJ credits the medical records, Claimant's testimony, and the opinions of Dr. Price over the contrary opinions of Dr. Sassoon. The ALJ finds that the use of Ubrelvy is effective in reducing Claimant's migraine symptoms while allowing him to maintain function. Therefore, ALJ finds that Claimant has successfully demonstrated that it is more likely than not that Claimant's continued use of Ubrelvy is reasonable medical treatment necessary to maintain Claimant at MMI.

19. The ALJ credits the records admitted into evidence and finds that Claimant has demonstrated that it is more likely than not that he has accrued costs totalling $1,703.52 in pursuing this matter.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

5. Although Dr. Sassoon recommended denial of Ubrelvy because of his understanding of the ODG, the ALJ finds Dr. Price's opinions on this issue to be more persuasive. As found, Claimant's use of Ubrelvy has been effective in treating his migraine symptoms, while also allowing him to remain functional. As found, Claimant has demonstrated, by a preponderance of the evidence, that the prescription medication

Ubrelvy is reasonable medical treatment necessary to maintain Claimant at MMI. Respondents shall pay for the requested prescription, Ubrelvy, pursuant to the Colorado Medical Fee Schedule.

6. The claimant has requested costs related to the current Application for Hearing. Section 8-42-101(5), C.R.S. provides:

> If any party files an application for hearing on whether the claimant is entitled to medical maintenance benefits recommended by an authorized treating physician that are unpaid and contested, and any requested medical maintenance benefit is admitted fewer than twenty days before the hearing or ordered after application for hearing is filed, the court shall award the claimant all reasonable costs incurred in pursuing the medical benefit. Such costs do not include attorney fees.

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reimbursement of costs pursuant to Section 8-42-101(5), C.R.S. related to the requested prescription. As found, Claimant is entitled to costs totalling $1,703.52.

ORDER

It is therefore ordered:

1. Respondents shall pay for the requested prescription, Ubrelvy, pursuant to the Colorado Medical Fee Schedule.

2. Respondents shall pay $1,703.52 for the costs incurred as a result of this matter.

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

Dated December 19, 2023.

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

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

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

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

INTERPRETER

[Redacted, hereinafter SS] was present to assist Claimant with interpretation and translation from Punjabi to English at Respondents' request. Claimant understands English and speaks English. He did not want word-for-word translation/interpretation, and the ALJ allowed Claimant to use the interpreter as needed.

EXHIBITS

After filing his hearing application on July 18, 2023, Claimant sent the OAC four PDFs of records presumably intended to be hearing submissions. Claimant's submissions were not organized, numbered or otherwise marked with a discernible method of identification. Included in Claimant's submissions were the following: (1) a 78 page packet of records submitted on November 2, 2023, identified by the ALJ at hearing as Claimant's Exhibit 1; (2) Claimant's hand written answers to Respondents' Interrogatories dated October 18, 2023, submitted to the OAC on October 18, 2023, identified by the ALJ at hearing as Claimant's Exhibit 2; (3) Respondents' Interrogatories to Claimant dated September 6, 2023, also submitted by Claimant to the OAC on October 18, 2023, identified by the ALJ at hearing as Claimant's Exhibit 3; and (4) a 148 page PDF of records submitted by Claimant at 6:50 p.m. on November 13, 2023, the night before hearing, identified by the ALJ as Claimant's Exhibit 4. The ALJ admitted Claimant's Exhibits 1-3 into evidence.

Exhibit 4 consists of various medical bills, Claimant's handwritten description of what he is entitled to, Claimant's apartment rental documents, additional UCHealth medical records, Respondents' Interrogatories to Claimant dated September 6, 2023, and Claimant's Responses to Interrogatories dated October 18, 2023. Respondents did not object to Claimant's November 8, 2023 UCHealth medical records, and they were admitted into evidence. However, Respondents objected to the remainder of Claimant's Hearing Exhibit 4 because the records were not timely exchanged and irrelevant. The ALJ sustained Respondents' objections. Therefore, the only record admitted into evidence contained within Claimant's Exhibit 4 is the November 8, 2023 UCHealth report of Peter Lennarson, M.D.

The ALJ admitted Respondents' Hearing Exhibits A-FF into evidence.

RELEVANT PROCEDURAL HISTORY

On October 16, 2020 a hearing was held before ALJ Kabler on Respondents' attempt to overcome the Division Independent Medical Examination (DIME) opinions of Ranee Shenoi, M.D. on cervical and mental permanent impairment. Claimant also raised issues that included: (1) overcoming Dr. Shenoi's DIME opinion on causation (lumbar/thoracic), MMI and permanent impairment; (2) a request for additional Temporary Total Disability (TTD) benefits, Permanent Total Disability (PTD) benefits, and additional medical benefits. On December 8, 2020 ALJ Kabler issued Findings of Fact, Conclusions

of Law, and Order, determining Respondents overcame Dr. Shenoi's opinion that Claimant sustained cervical spine injuries and mental impairment. He further determined that Claimant suffered no permanent impairment under the claim. ALJ Kabler also reasoned Claimant failed to overcome Dr. Shenoi's opinions regarding MMI, causation and permanent impairment. He further concluded that Claimant failed to prove entitlement to TTD benefits, PTD benefits, and additional medical benefits.

Claimant appealed ALJ Kabler's Order to the Industrial Claim Appeals Office (ICAO) and the ICAO affirmed. Claimant then appealed the ICAO's Order to the Colorado Court of Appeals, but the Court also affirmed. Finally, on February 21, 2023 the Colorado Supreme Court denied Claimant's Petition for Writ of Certiorari. Consequently, the issues determined in ALJ Kabler's December 8, 2020 Order, as subsequently acknowledged by Respondents in a January 12, 2021 Final Admission of Liability (FAL), closed by operation of law.

On March 15, 2023 Claimant applied for hearing on issues including medical benefits, Average Weekly Wage (AWW), disfigurement, TTD benefits, PPD benefits, PTD benefits, penalties, and "other issues." On April 4, 2023 Respondents filed a motion to strike Claimant's hearing application because the issues were closed by operation of law or moot. On April 11, 2023 ALJ Lovato issued an order granting in part Respondents' motion to strike Claimant's hearing application. ALJ Lovato specifically struck compensability, TTD benefits, PPD benefits, PTD benefits, medical benefits and AWW because each issue had been litigated and thus closed as a matter of law. The only issues that remained open and ripe for litigation involved disfigurement, penalties, and "other."

A hearing was then held before ALJ Goldman on July 18, 2023. ALJ Goldman determined that Claimant failed to identify any penalty that could be assessed under the Act. Furthermore, Claimant failed to identify and issue under the "other issues" section of his hearing application that was open and ripe for litigation. Thus, the only remaining issue for hearing was disfigurement. On September 5, 2023 ALJ Goldman issued Findings of Fact, Conclusions of Law, and Order denying and dismissing Claimant's request for disfigurement benefits. Because Claimant did not appeal the Order, disfigurement also closed by operation of law.

On July 18, 2023 Claimant also filed the present hearing application. Claimant identified many of the same issues previously litigated and closed, but on this occasion he also endorsed Petition to Reopen. On August 17, 2023 PALJ Sandberg issued a prehearing order granting Respondents' motion to clarify issues for hearing, striking certain issues as unripe, and finding that the only issue for hearing was reopening. PALJ Sandberg specifically noted "[a]ny and all claims for an increase in average weekly wage, additional temporary disability benefits or medical benefits, are contingent upon a finding of change (worsening) of medical condition as determined by the administrative law judge at hearing." On August 17, 2023 Respondents filed a Response to Application for Hearing endorsing reopening defenses.

ISSUE

Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his Workers' Compensation claim based on error, mistake

or change in condition pursuant to §8-43-303(1), C.R.S. after reaching Maximum Medical Improvement (MMI) on November 14, 2019.

FINDINGS OF FACT

Pre-existing Medical History

1. The record reflects that Claimant has a significant history of injuries based on at least four motor vehicle accidents (MVAs) prior to the present claim. The MVAs occurred in 2004, on December 11, 2007, on April 12, 2015, and on May 12, 2017. Claimant's December 2007 MVA was reportedly a head-on collision at 55 mph – 60 mph.

2. Following his December 11, 2007 MVA, Claimant received extensive and continuous medical care leading up to his March 3, 2019 work injury. Claimant's symptoms involved his neck/cervical spine with radiculopathy into his arms/hands, bilateral shoulders, head/brain (including headaches/migraines), upper back/thoracic spine, chest/ribs, lower back including radiculopathy into his legs/feet, and mental disorders (depression, anxiety, PTSD, somatoform disorder). During the period Claimant received treatment for sleep disturbances, hypertension, dizziness, tinnitus, vestibular issues, neurological concerns, and memory problems. As a result of his plethora of medical issues, Claimant was totally disabled and continuously unemployed for more than ten years.

3. From 2007 to March 3, 2019 Claimant regularly received medications that included narcotics, muscle relaxers, anti-depressants, anti-anxiety medications, sleep aids, and anticonvulsants. He also underwent physical therapy, massage therapy, chiropractic care, acupuncture, cervical injections, trigger point injection. Claimant underwent seven cervical MRIs, and a multi-level cervical fusion was recommended but not pursued.

4. The record reveals that Claimant has a long history of a somatoform disorder. Notably, on July 7, 2011 J. Tashof Bernton, M.D. explained that Claimant

> has symptom magnification and/or somatoform problems in which emotional issues result in increased fixation on bodily symptoms and resultant physical complaints. The patient's clinical course is classic for a somatic presentation including a pattern of increasing symptoms over time, presentation to the emergency room for physical symptoms diagnosed as anxiety, failure of physically based treatments to result in improvement and multiple negative diagnostic evaluations. Disability seeking behavior and identification with the disabled role may play a significant part in the patient's pain complaints as well.

Four years later, on December 9, 2015, Randall J. Bjork, M.D. similarly noted Claimant had somatic fixation and engaged in extensive reporting of symptomatology. On March 1, 2016 Dr. Bjork diagnosed depression with somatic fixation in addition to post concussive headaches, neck pain, back pain, shoulder pain, and chronic PTSD.

5. In a report dated July 24, 2017 Jonathon Scott, M.D. at Blue Sky Neurology documented Claimant's history of chronic cervical issues, noting he had been on disability for years and had chronic disabling neck pain. On December 1, 2017, Dr. Scott noted that, because Claimant did not wish to pursue neck surgery, he had nothing else to offer. On July 19, 2018 Dr. Scott's partner Lisa Roeske-Anderson, M.D. referred Claimant to a pain clinic for cervical injections.

6. On October 1, 2018 Claimant began treatment with pain management specialist Giancarlo Checa, M.D. Claimant complained of neck pain with pain radiating down his arms to his hands with numbness and tingling, shoulder pain, upper thoracic/mid back pain, and lower back pain with symptoms radiating down his left leg. Dr. Checa's diagnoses included cervicalgia, myofascial pain syndrome, lumbar radiculopathy, and lumbago. He ordered a lumbar MRI, prescribed medications, and referred Claimant to spine surgeon Adam Smith, M.D. for an evaluation.

7. On October 26, 2018 Claimant visited Dr. Smith for an examination. He noted that Claimant reported years of neck and back pain with a previous cervical fusion recommendation. After reviewing Claimant's July 26, 2017 cervical MRI, Dr. Smith remarked that Claimant might require a C4-5 and C5-6 anterior cervical discectomy and fusion (ACDF). He also considered Claimant's MRI and recommended lumbar surgery.

8. On November 15, 2018 Claimant underwent lumbar surgery with Dr. Smith. The procedure was specifically described as a left L2, L3 and L4 hemilaminectomy, bilateral partial facetectomy of L2, L3, and L4, and intradural intramedullary resection of a conus/filum mass.

9. On January 8, 2019 Claimant returned to Dr. Smith complaining of continued severe neck pain and a litany of other chronic issues. Dr. Smith documented that Claimant continued to have limited cervical range of motion and high anxiety. He also noted Claimant "[c]ontinues to be very anxious. Fearful body wide pain never getting better. Fearful that he will not have his pain meds. He states: 'I'm uncontrolled. I can't survive without pain medication. If someone stopped my pain medication, I would just go to the ER every day.'" Dr. Smith determined Claimant needed to be weaned off of pain medications and control his anxiety before pursuing more surgery.

March 3, 2019 Workers' Compensation Injury

10. On March 3, 2019 Claimant was involved in a MVA while working as a taxi driver for Employer. The MVA is the basis for the present claim. He visited Rose Medical Center Emergency Department and reported left-sided neck pain. Claimant's attending physician observed "[p]atient with relatively minor mechanism of injury. Patient has no cervical spine tenderness. Patient has some mild left paracervical muscle tenderness. No neurological deficits. No other signs of serious injuries. Patient does not require any x-rays or CTs at this time. Supportive care with Tylenol, ibuprofen and muscle relaxer."

11. On March 6, 2019 Claimant began treatment with Authorized Treating Physician (ATP) Annu Ramaswamy, M.D. Dr. Ramaswamy ordered a thoracic x-ray (normal), a lumbar x-ray (spondylosis), and a chest x-ray (normal). Claimant's cervical x-ray showed only degenerative issues and muscle spasms.

12. On April 11, 2019 Claimant returned to Smith for an evaluation. Claimant's complaints were virtually identical to those documented by Dr. Smith prior to the MVA, including a 5/10 pain level, throbbing and clicking in his neck, and high anxiety. Claimant specified that if he missed even one dose of his narcotics he would have a panic attack. Dr. Smith reiterated that Claimant was not a surgical candidate because of psychological concerns and narcotic dependence.

13. On May 9, 2019 ATP Dr. Ramaswamy remarked that Claimant exhibited somatic complaints and pain behaviors. Similarly, on May 15, 2019 Lawrence Lesnak, D.O. noted a significant number of psychosocial factors affecting Claimant's symptoms, and he believed there was an underlying somatoform disorder. On June 5, 2019 Dr. Lesnak documented that Claimant's multitude of significant complaints did not correspond to objective findings. Similarly, on June 11, 2019 neuropsychologist Kevin Reilly, Psy.D., reported that Claimant's psychological testing showed symptom magnification and negative response bias indicative of non-organic factors. Claimant's testing also revealed symptom magnification.

14. On August 6, 2019 Dr. Ramaswamy determined Claimant was able to return to full duty work. On August 12, 2019 he explained that Claimant's work-related conditions had resolved.

15. On October 14, 2019 psychiatrist Stephen Moe, M.D. remarked that Claimant had reached psychiatric MMI for his work injury and assigned a 5% mental impairment rating. On November 6, 2019 Dr. Ramaswamy noted that he reviewed Dr. Moe's reports and concluded Claimant had reached MMI for all aspects of his March 3, 2019 MVA with a 5% mental impairment rating as determined by Dr. Moe. Dr. Ramaswamy also reviewed surveillance video and observed that Claimant was able to bend, turn his head and push a car without difficulty.

16. On March 15, 2020 Claimant underwent a Division Independent Medical Examination (DIME) with Ranee Shenoi, M.D. Dr. Shenoi addressed MMI, permanent impairment and apportionment of cervical, thoracic, lumbar, and psychological conditions. She determined that Claimant sustained a cervical strain as a result of the March 3, 2019 MVA. Dr. Shenoi determined Claimant reached MMI on November 14, 2019. She commented that Claimant suffered a cervical strain with reactive issues of anxiety exacerbation following the March 3, 2019 MVA.

17. Dr. Shenoi reasoned that Claimant's cervical spine and psychiatric condition qualified for permanent impairment ratings. She thus assigned a 12% whole person cervical rating and 5% mental impairment rating. In response to the DIME Unit requiring a basis for her mental impairment rating, Dr. Shenoi issued an addendum dated April 7, 2020 and stated she did not have time to conduct her own mental impairment evaluation. Dr. Shenoi simply confirmed Dr. Moe's rating. The DIME Unit then required Dr. Shenoi to review prior medical records and submit an addendum report. In an addendum report dated April 13, 2020, Dr. Shenoi stated that, after reviewing prior medical records, her opinions that Claimant sustained a 12% whole person cervical spine impairment rating and a 5% mental impairment rating related to the March 3, 2019 MVA had not changed. In support of her opinion that Claimant's cervical impairment was

related to the March 3, 2019 MVA, Dr. Shenoi noted that his pre-existing cervical condition had resolved prior to March 3, 2019.

18. After reviewing additional medical records Dr. Moe determined the March 3, 2019 work injury did not result in an onset of new symptoms. Claimant sustained no mental impairment related to his claim.

19. Respondents retained Kathleen D'Angelo, M.D. to perform a records review. In a report dated June 3, 2020 Dr. D'Angelo detailed Claimant's medical history before and after the March 3, 2019 MVA and summarized surveillance video. Dr. D'Angelo determined that Claimant did not sustain any work injury on March 3, 2019 except for cervical myofascial irritation. She explained Claimant had self-limited symptoms that required no further treatment, impairment, work modification or maintenance care. Dr. D'Angelo further reasoned that Claimant was at MMI for his work injury.

20. On December 8, 2020 ALJ Kabler issued Findings of Fact, Conclusions of Law, and Order. He found against Claimant on all litigated issues. ALJ Kabler concluded that Claimant achieved MMI on November 14, 2019 with no permanent impairment and no entitlement to additional medical care for his March 3, 2019 MVA. He specifically commented that, "[t]aking the evidence as a whole, the ALJ finds that it is highly probable and free from serious or substantial doubt that Claimant recovered from his March 3, 2019 work injury by at least August 12, 2019, and that physical symptoms and complaints he exhibited after that date were not related to the March 3, 2019 work injury." Therefore, whatever physical issues Claimant experienced subsequent to August 12, 2019 were not causally related to his claim.

Claimant's Subsequent Treatment

22. After Dr. Ramaswamy released him from care, Claimant sought medical treatment outside the Workers' Compensation system primarily through UCHealth. On October 22, 2021 Claimant was evaluated by Chantal O'Brien, M.D. in the UCHealth Neurology Headache Clinic. Claimant presented with chronic migraines without aura, cervicogenic headaches and psychophysiological insomnia. Dr. O'Brien identified a long list of other medical care and work-up Claimant had received, including medications, Botox injections, spinal MRIs, occipital blocks, trigger point injections (TPIs), selective nerve blocks, cervical facet injections, and costochondral steroid injections. She did not perform a causation evaluation or address whether any of Claimant's work-related symptoms had worsened since he reached MMI in November 2019.

23. On May 13, 2022 Claimant returned to Dr. O'Brien's Headache Clinic. Claimant reported symptoms including neck pain, myofascial muscle pain, cervical pain, chronic bilateral low back pain with sciatica, chronic pain syndrome, nonintractable chronic migraine, headache, visual disturbance, and chronic migraine without aura. Dr. O'Brien specifically did not relate any of Claimant's symptoms to his work injury or worsening of condition since he reached MMI on November 14, 2019.

24. On September 6, 2023 Respondents served Claimant with interrogatories directed at the reopening issues. Notably, Respondents' Interrogatory Number 3 asked

Claimant if he believed his claim should be reopened secondary to error or mistake. Claimant answered "I don't know what you taking about what error or mistake on this claim …." Respondents' Interrogatory Number 5 asked Claimant to state whether he agreed with Dr. Sharma's statement that he was not at MMI as of November 14, 2019. In response, Claimant wrote "Yes I agree with Doctor Sharma on June, 2023 assessment about Nov 14, 2019 he not reached maximum medical improvement do agree."

25. Respondents' Interrogatory Number 6 specifically asked Claimant whether his condition had improved, worsened or stayed the same since November 14, 2019. Respondents' Interrogatory 7 queried: "If you believe your condition has worsened since November 14, 2019, state how you were doing on November 14, 2019, and what condition(s) have worsened since November 14, 2019, and in what respect have those identified conditions worsened." Claimant responded that he is now better than before and he did not believe his condition had worsened since November 14, 2019. Instead, his condition has worsened since his work accident.

26. Jeffrey Raschbacher, M.D. performed a comprehensive records review of Claimant's claim. In a report dated October 20, 2023 he specifically considered whether Claimant's Workers' Compensation claim should be reopened. Dr. Raschbacher concluded:

> [t]here is no objective basis or objective finding that warrants re-opening this case. Prior reported symptoms are not supported by objective findings and are not likely true and accurate reports of subjective symptoms (or lack thereof). My medical opinion is that the opinions of Dr. Sharma are without merit. Treatment at UC or elsewhere are not supported by medical evidence or objective findings. He remains at MMI, with no medical evidence supporting a reopening of the case.

Dr. Raschbacher summarized that Claimant has not sustained a worsening or change of his work-related condition since he reached MMI on November 14, 2019.

27. On November 8, 2023 Claimant visited Peter Lennarson, M.D. at the UCHealth Neurology clinic. Dr. Lennarson noted

> [w]e had a somewhat frustrating visit and I wanted more information about his prior symptoms and in particular what symptoms he had prior to his lumbar surgery as I tried to explain a tethered cord could cause a variety of symptoms as well but he did not want to discuss any of that and only wanted to focus on 'getting a paper' saying whether or not he needed neck surgery. I told him that based on his neck MRI and some of his symptoms that surgery for decompression at C45, C56, C67 would be potentially helpful especially for his left arm symptoms and less certain for his neck pain.

There is no suggestion in the preceding report that Dr. Lennarson was aware of Claimant's injury history. Dr. Lennarson also did not provide a causation opinion, did not relate Claimant's conditions to the March 3, 2019 MVA, and did not specify a worsening of condition since Claimant reached MMI.

28. Claimant testified at the hearing in this matter. He explained that at the time of his March 3, 2019 MVA he was not able to see or think, and had electrical shocks through his brain. In addressing whether his claim should be reopened based on a change in condition, Claimant stated "no, no its not" (getting worse). Claimant then stated he wanted to open his claim because when he went to hearing before ALJ Kabler his treatment was not done. Claimant specifically disagreed with Dr. Ramaswamy terminating his medical care and returning him to work in 2019. He felt he had chest, blood pressure and breathing issues that had not been addressed. Claimant explained that, because Dr. Ramaswamy would not provide care, he sought treatment from personal providers at Denver Health and UCHealth. He contended his vision has worsened since his MVA. Claimant also testified he now requires oxygen, and cannot sleep without a sleep apnea machine. Claimant also commented that he requires medications and Botox injections every two months. Finally, he noted his left hand, right hand, and left foot go numb and he is completely losing balance. The preceding testimony reflects that Claimant is presumably alleging all of his current symptoms are related to his March 3, 2019 MVA and his condition has worsened.

29. Claimant has failed to establish it is more probably true than not that he should be permitted to reopen his claim based on error or mistake pursuant to §8-43-303(1), C.R.S. Initially, Claimant suffered industrial injuries on March 3, 2019 when he was involved in a MVA while working as a taxi driver for Employer. He reached MMI on November 14, 2019 with no permanent impairment. Although Claimant has not identified a specific error or mistake as a basis for reopening his claim, his July 18, 2023 hearing application and answers to interrogatories suggest that he is challenging ALJ Kabler's December 8, 2020 Findings of Fact, Conclusions of Law, and Order. ALJ Kabler ruled against Claimant on all litigated issues. He concluded that Claimant achieved MMI on November 14, 2019 with no permanent impairment and no entitlement to additional medical care for his March 3, 2019 MVA.

30. Claimant has not identified a specific mistake or error made by ALJ Kabler that would warrant reopening. Instead, he contends that every aspect of the Order was incorrect. However, ALJ Kabler's Order has repeatedly been affirmed on appeal. Notably, the ICAO affirmed ALJ Kabler's decision that Claimant reached MMI on November 14, 2019 with no impairment, and no entitlement to additional TTD, PPD, PTD or medical benefits including maintenance care. On June 30, 2022 the Colorado Court of Appeals affirmed the ICAO and the Colorado Supreme Court subsequently denied certiorari. Nevertheless, Claimant again contends that ALJ Kabler erroneously decided all issues without identifying a specific error or mistake that warrants reopening. Notably, Claimant testified that he seeks to reopen his claim because, when he went to hearing before ALJ Kabler, his treatment had not concluded. Claimant specifically disagreed with Dr. Ramaswamy terminating his medical care and returning him to work in 2019.

31. Claimant has simply failed to provide persuasive new evidence of mistake or error. Although Claimant and his personal physicians may believe ALJ Kabler was erroneous, the disagreement with ALJ Kabler's decision does not warrant reopening based upon error or mistake. All issues decided by ALJ Kabler were closed following the exhaustion of Claimant's appeals. The record reveals that Claimant has not produced new evidence of any error or mistake. He has not identified a mistake of law or fact that demonstrates a prior award or denial of benefits was incorrect. Accordingly, Claimant's

request to reopen his claim based on error or mistake is denied and dismissed.

32. Claimant has also failed to demonstrate it is more probably true than not that he should be permitted to reopen his claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Claimant has not identified a change in condition of his original compensable injury or of his physical or mental condition that is causally connected to his March 3, 2019 MVA. In his answers to interrogatories Claimant noted that he is not claiming his condition has changed or worsened since he reached MMI on November 14, 2019. Rather, he claims he never reached MMI. To the extent Claimant is alleging he sustained disability and requires additional medical care, he has failed to prove the treatment is causally related to the present claim.

33. The record demonstrates that Claimant has suffered from numerous pre-existing conditions prior to his March 3, 2019 MVA. The symptoms included severe cervical, upper extremity, shoulder, head, rib/chest, lumbar, lower extremity, balance, vision, and sleep conditions. Claimant also suffered from a somatoform disorder and psychological conditions including severe anxiety, depression, and PTSD. To the extent Claimant's low speed MVA on March 3, 2019 aggravated or exacerbated any of the preceding conditions, they were temporary, and completely resolved by November 14, 2019. Although Claimant attributes his conditions and symptoms to his March 3, 2019 MVA, he has failed to establish that any of his symptoms after November 14, 2019 were causally related to his March 3, 2019 MVA. The bulk of the evidence does not support his position. Instead, the conclusions of numerous physicians and comprehensive Order of ALJ Kabler reveal that Claimant's work-related conditions resolved by his November 14, 2019 date of MMI.

34. The record reveals significant, persuasive evidence proving Claimant's current complaints are not causally related to his MVA, and his work-related condition has not changed or worsened. On August 12, 2019 Dr. Ramaswamy commented that all of Claimant's work-related conditions had resolved. On November 6, 2019 he concluded Claimant had reached MMI for all aspects of his March 3, 2019 MVA. Furthermore, on June 3, 2020 Dr. D'Angelo determined that Claimant's only work injury on March 3, 2019 was cervical myofascial irritation. She explained Claimant had self-limited symptoms that required no further treatment, impairment, work modification or maintenance care. Moreover, Dr. Raschbacher summarized that Claimant has not sustained a worsening or change of his work-related condition since he reached MMI on November 14, 2019. Finally, ALJ Kabler notably commented that "it is highly probable and free from serious or substantial doubt that Claimant recovered from his March 3, 2019 work injury by at least August 12, 2019, and that physical symptoms and complaints that he exhibited after that date were not related to the March 3, 2019 work injury." Therefore, any symptoms Claimant experienced subsequent to August 12, 2019 were not causally related to his claim.

35. The overwhelming evidence in the record reflects that Claimant's work-related symptoms as a result of his March 3, 2019 MVA resolved by the time he reached MMI on November 14, 2019. Although Claimant contends that his condition has changed, he has failed to demonstrate that any worsening is causally related to his March 3, 2019 MVA as opposed to his pre-existing myriad of physical and psychological conditions. Thus, because none of his symptoms subsequent to November 14, 2019 are causally

related to the present claim, Claimant has failed to prove a worsening of condition that warrants reopening. Accordingly, Claimant's request to reopen his claim based on a change in condition 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).

4. At any time within six years of the date of injury, an ALJ may reopen an award on the grounds of fraud, overpayment, error or mistake, or change in condition. §8-43-303(1) C.R.S. The intent of the statute is to provide a remedy to claimants who are entitled to awards of both medical and disability benefits. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186 (Colo. App. 2002). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004). An ALJ's decision to grant or deny a petition to reopen may therefore "be reversed only for fraud or clear abuse of discretion." *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *see also Heinicke* 197 P.3d at 222 ("In the absence of fraud or clear abuse of discretion, the ALJ's decision concerning reopening is binding on appeal.").

5. Reopening of a closed claim may be granted based on a mistake of fact. §8-43-303(1), C.R.S. Error or mistake refers to mistake of law or fact that demonstrates a prior award or denial of benefits was incorrect. *Renz v. Larimer Cty. School Dist.*, 924 P.2d 1177 (Colo.App. 1996). When a party seeks to reopen a closed claim based on

mistake, the ALJ must determine whether a mistake was made, and if so, whether it was the type of mistake that justifies reopening. *Travelers Insurance Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo.App. 1981). When determining whether a mistake justifies reopening the ALJ may consider whether the alleged mistake could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *See Klosterman v. Indus. Comm'n*, 694 P.2d 873, 876 (Colo. App. 1984). The power to reopen is permissive and is therefore committed to the ALJ's sound discretion. *Cordova v. Indus. Claim Appeals Off*., 55 P/3d 186, 189 (Colo. App. 2002)

6. Section 8-43-303(1), C.R.S., provides that a Workers' Compensation award may be reopened based on a change in condition. In seeking to reopen a claim based on a change in condition, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

7. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his claim based on error or mistake pursuant to §8-43-303(1), C.R.S. Initially, Claimant suffered industrial injuries on March 3, 2019 when he was involved in a MVA while working as a taxi driver for Employer. He reached MMI on November 14, 2019 with no permanent impairment. Although Claimant has not identified a specific error or mistake as a basis for reopening his claim, his July 18, 2023 hearing application and answers to interrogatories suggest that he is challenging ALJ Kabler's December 8, 2020 Findings of Fact, Conclusions of Law, and Order. ALJ Kabler ruled against Claimant on all litigated issues. He concluded that Claimant achieved MMI on November 14, 2019 with no permanent impairment and no entitlement to additional medical care for his March 3, 2019 MVA.

8. As found, Claimant has not identified a specific mistake or error made by ALJ Kabler that would warrant reopening. Instead, he contends that every aspect of the Order was incorrect. However, ALJ Kabler's Order has repeatedly been affirmed on appeal. Notably, the ICAO affirmed ALJ Kabler's decision that Claimant reached MMI on November 14, 2019 with no impairment, and no entitlement to additional TTD, PPD, PTD or medical benefits including maintenance care. On June 30, 2022 the Colorado Court of Appeals affirmed the ICAO and the Colorado Supreme Court subsequently denied certiorari. Nevertheless, Claimant again contends that ALJ Kabler erroneously decided all issues without identifying a specific error or mistake that warrants reopening. Notably, Claimant testified that he seeks to reopen his claim because, when he went to hearing before ALJ Kabler, his treatment had not concluded. Claimant specifically disagreed with

Dr. Ramaswamy terminating his medical care and returning him to work in 2019.

9. As found, Claimant has simply failed to provide persuasive new evidence of mistake or error. Although Claimant and his personal physicians may believe ALJ Kabler was erroneous, the disagreement with ALJ Kabler's decision does not warrant reopening based upon error or mistake. All issues decided by ALJ Kabler were closed following the exhaustion of Claimant's appeals. The record reveals that Claimant has not produced new evidence of any error or mistake. He has not identified a mistake of law or fact that demonstrates a prior award or denial of benefits was incorrect. Accordingly, Claimant's request to reopen his claim based on error or mistake is denied and dismissed.

10. As found, Claimant has also failed to demonstrate by a preponderance of the evidence that he should be permitted to reopen his claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Claimant has not identified a change in condition of his original compensable injury or of his physical or mental condition that is causally connected to his March 3, 2019 MVA. In his answers to interrogatories Claimant noted that he is not claiming his condition has changed or worsened since he reached MMI on November 14, 2019. Rather, he claims he never reached MMI. To the extent Claimant is alleging he sustained disability and requires additional medical care, he has failed to prove the treatment is causally related to the present claim.

11. As found, the record demonstrates that Claimant has suffered from numerous pre-existing conditions prior to his March 3, 2019 MVA. The symptoms included severe cervical, upper extremity, shoulder, head, rib/chest, lumbar, lower extremity, balance, vision, and sleep conditions. Claimant also suffered from a somatoform disorder and psychological conditions including severe anxiety, depression, and PTSD. To the extent Claimant's low speed MVA on March 3, 2019 aggravated or exacerbated any of the preceding conditions, they were temporary, and completely resolved by November 14, 2019. Although Claimant attributes his conditions and symptoms to his March 3, 2019 MVA, he has failed to establish that any of his symptoms after November 14, 2019 were causally related to his March 3, 2019 MVA. The bulk of the evidence does not support his position. Instead, the conclusions of numerous physicians and comprehensive Order of ALJ Kabler reveal that Claimant's work-related conditions resolved by his November 14, 2019 date of MMI.

12. As found, the record reveals significant, persuasive evidence proving Claimant's current complaints are not causally related to his MVA, and his work-related condition has not changed or worsened. On August 12, 2019 Dr. Ramaswamy commented that all of Claimant's work-related conditions had resolved. On November 6, 2019 he concluded Claimant had reached MMI for all aspects of his March 3, 2019 MVA. Furthermore, on June 3, 2020 Dr. D'Angelo determined that Claimant's only work injury on March 3, 2019 was cervical myofascial irritation. She explained Claimant had self-limited symptoms that required no further treatment, impairment, work modification or maintenance care. Moreover, Dr. Raschbacher summarized that Claimant has not sustained a worsening or change of his work-related condition since he reached MMI on November 14, 2019. Finally, ALJ Kabler notably commented that "it is highly probable and free from serious or substantial doubt that Claimant recovered from his March 3, 2019 work injury by at least August 12, 2019, and that physical symptoms and complaints that he exhibited after that date were not related to the March 3, 2019 work injury." Therefore,

any symptoms Claimant experienced subsequent to August 12, 2019 were not causally related to his claim.

13. As found, the overwhelming evidence in the record reflects that Claimant's work-related symptoms as a result of his March 3, 2019 MVA resolved by the time he reached MMI on November 14, 2019. Although Claimant contends that his condition has changed, he has failed to demonstrate that any worsening is causally related to his March 3, 2019 MVA as opposed to his pre-existing myriad of physical and psychological conditions. Thus, because none of his symptoms subsequent to November 14, 2019 are causally related to the present claim, Claimant has failed to prove a worsening of condition that warrants reopening. Accordingly, Claimant's request to reopen his claim based on a change in condition is denied and dismissed.

ORDER

1. Claimant's request to reopen his March 3, 2019 claim based on error, mistake or a change in condition pursuant to §8-43-303(1), C.R.S. is denied and dismissed.

2. 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, 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. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 21, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-206-591-001

ISSUES

- Did Claimant prove by a preponderance of the evidence she suffered a whole person impairment to her right shoulder?
- If Claimant proved a whole person impairment, did Respondent overcome the DIME's 7% whole person rating by clear and convincing evidence?
- Did Claimant prove by clear and convincing evidence the DIME erred by not providing a cervical or thoracic spine rating?
- Did Claimant prove a right shoulder surgery performed by Dr. Derek Purcell was reasonably needed and causally related to the admitted injury?
- Did Claimant prove Dr. Purcell is an authorized provider?
- Did Claimant prove entitlement to TTD benefits from September 26, 2022 through November 1, 2022, and TPD benefits from November 2, 2022 through March 22, 2023?
- At the hearing, the parties discussed submission of photographs to evaluate Claimant's eligibility for a disfigurement award. No photographs were submitted, and the issue of disfigurement will be reserved for future determination.

FINDINGS OF FACT

1. Claimant works for Employer as a Police Officer. She suffered admitted injuries on May 11, 2021 when she fell while chasing a burglary suspect.

2. Claimant sought treatment at the Memorial Hospital emergency department the evening of the accident. She reported pain in her right shoulder, right knee, and left hip. She did not immediately feel any neck or upper back symptoms. Claimant was diagnosed with multiple abrasions, contusions, and acute shoulder pain.

3. Claimant saw PA-C Magan Grigg at Employer's occupational medicine clinic on May 14, 2021. She reported right shoulder pain radiating to the chest, right pectoral muscle, and right scapula. She denied neck pain. Physical examination showed tenderness to palpation at the subscapularis insertion on the right shoulder with reduced strength of multiple rotator cuff muscles. Impingement signs were negative. Ms. Grigg ordered a shoulder MRI to rule out internal derangement, and referred Claimant to PT.

4. A right shoulder MRI was completed on May 17, 2021. It showed full-thickness supraspinatus tendinopathy but no rotator cuff tear, and mild intra-articular biceps tendinopathy.

5. Claimant returned to the occupational medicine clinic on May 27, 2021 and saw PA-C Paula Homberger. Claimant's knee felt better but her shoulder was worse. She described constant 2/10 right shoulder pain, radiating to the neck and mid back. Ms. Homberger advised Claimant the MRI showed no rotator cuff tear and she should improve quickly with conservative treatment. Ms. Homberger recommended Claimant continue PT.

6. Dr. Nicholas Kurz evaluated Claimant on June 15, 2021. Her shoulder pain had improved to 1/10, but still radiated to the right neck, trapezius, and scapular area. Dr. Kurz recommended four more weeks of PT.

7. On July 15, 2021, Ms. Homberger documented Claimant's right shoulder and neck pain had worsened. She recommended additional PT. That same day, Claimant's therapist noted pain radiating to Claimant's neck and a large trigger point in the right upper trapezius.

8. On August 3, 2021, Ms. Homberger noted pain throughout the shoulder girdle region, including the right trapezius and rhomboid muscles. She referred Claimant to Dr. Chad Abercrombie for chiropractic treatment.

9. Claimant had an initial evaluation with Dr. Abercrombie on August 30, 2021. She reported pain in the right shoulder, right neck, and right upper back. The examination showed tenderness and trigger points along the right trapezius and levator scapula. Dr. Abercrombie also noted increased tone and tenderness at the anterior deltoid, coracobrachialis, pectoralis minor, and proximal bicipital tendon region. Dr. Abercrombie diagnosed a right shoulder strain, cervicothoracic strain, and scapulothoracic pain. He recommended myofascial release techniques, chiropractic manipulation, and dry needling.

10. Claimant treated with Dr. Abercrombie for several months, during which time he consistently documented proximal symptoms affecting the shoulder girdle and right upper quadrant, including the right trapezius, rhomboids, levator scapulae, and pectoralis muscles.

11. On October 20, 2021, Claimant had an orthopedic evaluation with Dr. Michael Simpson. Dr. Simpson noted "pretty significant" rotator cuff tendinitis/tendinosis per the MRI. Physical examination showed positive impingement signs, pain with supraspinatus strength testing, mildly positive Speed's test, and crepitation with dynamic labral testing. Shoulder range of motion was normal. Dr. Simpson diagnosed a right shoulder strain and impingement syndrome and administered a subacromial steroid injection.

12. Claimant followed up with Dr. Simpson on November 17, 2021. The injection had helped, but only lasted two weeks. As a result, Dr. Simpson did not think another injection was warranted. Instead, he recommended platelet rich plasma (PRP) injections.

13. Dr. Kurz re-evaluated Claimant on November 23, 2021. Claimant stated her shoulder was feeling much better after the shoulder injection. She was having no pain at rest, and only 1-2/10 when using the shoulder. The examination showed full range of motion of the shoulder and neck, with no tenderness to palpation or spasm. Dr. Kurz advised Claimant that PRP injections were no longer recommended under the MTGs, and in any event were only previously approved when used to avoid surgery. Claimant had completed treatment with Dr. Abercrombie and was doing a home exercise program. Dr. Kurz put Claimant at MMI with no impairment and released her with no restrictions and no need for maintenance care.

14. On February 24, 2022, Claimant returned to Ms. Homberger because of worsening symptoms. She stated her neck and upper back had not fully resolved when she was discharged in November 2021, and had worsened in early January. She described daily headaches and difficulty sleeping. Her shoulder pain had also gotten worse in the interim. Claimant's pain diagram endorsed pain in the right shoulder radiating to the scapulothoracic region, base of the neck, and back of the head. Ms. Homberger noted tenderness and tightness with palpation of the right trapezius, periscapular area, and occipital muscles showed. Ms. Homberger opined Claimant was no longer at MMI and recommended additional PT and chiropractic treatment. She added a diagnosis of "cervicothoracic strain, previously treated, not listed formally as a diagnosis, worsened."

15. Claimant started PT on February 28, 2022. She reported sharp pain at the base of the neck causing intermittent headaches. She was having difficulty reaching behind her back and sleeping because of shoulder, neck and scapulothoracic pain. The therapist documented tenderness and trigger points in the right trapezius, right supraspinatus, and along the right rib area.

16. Claimant resumed treatment with Dr. Abercrombie on March 1, 2022. She reported continued right-sided neck and upper back pain that had escalated over the past few months with no new injury. Palpation revealed increased muscle tone across the right upper trapezius into the levator scapula, rhomboids, latissimus dorsi and serratus anterior. Dr. Abercrombie performed dry needling to the trapezial ridge, rhomboids and levator scapula.

17. Claimant saw Dr. Kurz on March 24, 2022. Her neck and upper back were "in knots." She denied any new incident, injury, or change in activity that could be responsible for her symptoms. Dr. Kurz stated Claimant remained at MMI but ordered an updated right shoulder MRI to look for "objective worsening." He opined the cervical and upper back symptoms "were not original complaints, and with no new work-related injury, are more medically likely unrelated to her original DOI."

18. The right shoulder MRI was completed on March 27, 2022. The radiologist opined the findings were "not significantly changed" since the prior MRI.

19. Claimant next saw Dr. Kurz on July 1, 2022. Because the MRI showed no new pathology, Dr. Kurz opined Claimant remained at MMI and "no additional treatment is necessary or reasonable as causally or temporally related to her initial mechanism of

injury." He further opined that treatment for Claimant's nonwork-related cervicothoracic pain and headaches "should continue to be followed privately by her PCP, outside of the WC system."

20. Dr. Nicholas Olsen performed an IME for Respondent on August 8, 2022. Claimant described ongoing neck pain and headaches as her most bothersome symptoms at that time. She rated her shoulder pain as 1/10. Dr. Olsen inquired if Claimant had ever had neck or midback issues before. She related an episode of right trapezius pain in 2020, which resolved after a course of therapy. She said her current symptoms were "nothing like" the episode in 2020. Dr. Olsen told Claimant it was difficult to square her description of symptoms and associated limitations with her low reported pain levels. On examination, Dr. Olsen noted normal range of motion of the right shoulder and neck. Impingement signs were negative. Palpatory examination demonstrated mild tenderness over the biceps tendon and moderate tenderness in the upper trapezius. He also noted mild somatic dysfunction in the midthoracic spine with tenderness along the right side. No trigger points were identified. Dr. Olsen agreed Claimant was at MMI and no additional treatment was warranted for the right shoulder. He further opined that Claimant's cervicothoracic pain and right upper trapezius pain were not work-related. Finally, Olsen opined the situs of any functional impairment from the shoulder injury was distal to the glenohumeral joint and would not represent a whole person impairment.

21. Claimant subsequently pursued additional evaluations and treatment for the right shoulder from her PCP, who referred her to Dr. Derek Purcell, an orthopedic surgeon. She was evaluated by PA Matthew Albrecht in Dr. Purcell's office on September 6, 2022. She described persistent pain and dysfunction in the right shoulder since the work accident on May 11, 2021. She also described right-sided neck and thoracic pain. Impingement signs, O'Brien's test, Speed's test, and Yergason's test were positive. Mr. Albrecht personally reviewed the March 2022 MRI images. He agreed with the radiologist's interpretation of mild supraspinatus tendinosis but also noted moderate tendinopathy of the long head of the biceps tendon. He diagnosed shoulder impingement syndrome and referred Claimant to PT. They discussed other treatment options, including surgery.

22. Dr. Derek Purcell performed right shoulder arthroscopic surgery on September 26, 2022. He confirmed tendinopathy of the long head of the biceps tendon as noted by Mr. Albrecht, for which he performed a biceps tenodesis. He also debrided a degenerative labral tear. Finally, Dr. Purcell performed a subacromial decompression to address "extensive" subacromial bursitis.

23. Dr. Purcell restricted Claimant from work after the surgery. Because Claimant had pursued the surgery outside of her workers' compensation claim, she utilized Employer's procedures regarding nonwork-related leave.

24. Claimant was off work from September 26, 2022, through November 1, 2022, during which time she was in a sling and body wrap. On November 2, she returned to part-time "light duty," and continued in that capacity through March 22, 2023. She

received a combination of wages and short-term disability benefits while on light duty. Claimant returned to full duties at full wages on March 23, 2023.

25. Claimant underwent a Division IME with Dr. John Bissell on December 12, 2022. Dr. Bissell opined the surgery performed by Dr. Purcell was causally related to the work accident. Dr. Bissell determined Claimant was not at MMI inasmuch as she was still recovering from surgery and had not completed post-operative rehabilitation.

26. Respondent filed a General Admission of Liability (GAL) on January 9, 2023, accepting that Claimant was not at MMI. But Respondent denied liability for the surgery as "unauthorized," and denied that Claimant was entitled to any temporary disability caused by the surgery.

27. Post-surgical records from Mr. Albrecht describe Claimant generally "doing well" and making steady improvement.

28. Claimant attended a follow-up DIME with Dr. Bissell on June 6, 2023. Claimant reported ongoing pain in the right shoulder, neck, and mid back. Her shoulder pain was improving. Examination of the shoulder showed tenderness to palpation about the right parascapular region. The last treatment record available to Dr. Bissell, dated March 22, 2023, showed Claimant progressing well and working light duty, with an expected return to full duty shortly thereafter. Dr. Bissell determined Claimant was at MMI as of March 22, 2023. He assigned an 11% upper extremity rating based on 5% for the subacromial decompression and 6% for range of motion, which converts to 7% whole person. Consistent with the Division's Impairment Rating Tips, Dr. Bissell justified the 5% surgical rating because Claimant also had a labral debridement and biceps tenodesis as additional work-related conditions unaccounted for by other methods. Dr. Bissell opined Claimant had no ratable impairment to any other body part, and maintained his belief that the cervical and thoracic myofascial symptoms were pre-existing and unrelated to the industrial injury.

29. Dr. Olsen performed a second IME for Respondent on July 20, 2023. He was "surprised" Claimant had undergone surgery given the minimal 1/10 pain level described in his previous IME. Claimant clarified that her typical shoulder pain before the surgery was 1/10 but it frequently flared to 5/10 or 6/10 and interfered with activities. She reported significant benefit from the surgery. Dr. Olsen's examination showed negative impingement signs and essentially full range of motion. Dr. Olsen opined the surgery was not reasonably needed based on the minimal findings at his prior IME and lack of significant pathology shown on the MRIs. To the extent Dr. Purcell identified any reasons for surgery, Dr. Olsen did not believe they were causally related to the work accident. Dr. Olsen disagreed with Dr. Bissell's impairment rating. He did not think the 5% surgical rating was warranted under the Rating Tips, and he found normal shoulder range of motion.

30. Claimant saw Dr. Miguel Castrejon on September 12, 2023 for an IME at the request of her counsel. Claimant described intermittent pain from the base of the neck, through the shoulder, and extending below the right scapula. Claimant told Dr. Castrejon

she did not recall experiencing any neck or midback pain immediately after the accident, but started experiencing stiffness in the neck and midback within two weeks of the accident. Claimant reported "substantial benefit" from the shoulder surgery, although she still had some residual symptoms and limitations. Physical examination showed tenderness throughout the right upper quadrant, including the cervical paraspinals, trapezius, rhomboids, and right scapula. The proximal biceps tendon was also tender.

31. Dr. Castrejon agreed Claimant was at MMI with permanent impairment to the right shoulder. He assigned a 10% upper extremity rating for the right shoulder, which converts to 6% whole person.[1] Dr. Castrejon agreed with Dr. Bissell that Claimant has no ratable cervical or thoracic impairment under Table 53 of the *AMA Guides*. But Dr. Castrejon was impressed by the voluminous documentation of symptoms and treatment directed to areas proximal to the glenohumeral joint including the right paracervical muscles, trapezius, rhomboids, and scapula. He saw no evidence of any significant pre-injury neck pain, treatment, or functional limitations. As a result, Dr. Castrejon thought Claimant met the criteria set forth in the Impairment Rating Tips for a cervical range of motion rating despite the absence of a Table 53 specific disorder impairment. He calculated an 8% whole person rating based on cervical ROM deficits, which he combined with the 6% shoulder rating for an overall rating of 14% whole person.

32. Dr. Olsen testified at hearing consistent with his reports. He reiterated that the surgery was not warranted given Claimant's minimal symptoms and lack of identified pathology. He dismissed Mr. Albrecht's reading of the MRI and Dr. Purcell's intraoperative findings in favor of the radiologist's reports. He also opined the surgery did not meaningfully improve Claimant's overall surgery, despite her reports to multiple IME physicians that she appreciated substantial benefit from the procedure. He disagreed with Dr. Bissell and Dr. Castrejon that Claimant warranted a rating for the right shoulder. But to the extent that Claimant may be found to have impairment, Dr. Olsen opined it is a purely scheduled impairment that only affects Claimant's arm, and all proximal symptoms are unrelated to the work injury.

33. Dr. Bissell and Dr. Castrejon's opinions regarding Claimant's right shoulder impairment are credible and more persuasive than the contrary opinions offered by Dr. Olsen.

34. Claimant's testimony is generally credible.

35. Claimant proved by a preponderance of the evidence that she suffered functional impairment to her right shoulder not listed on the schedule.

36. Respondent failed to overcome Dr. Bissell's 7% whole person right shoulder rating by clear and convincing evidence.

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[1] Dr. Castrejon used the same methodology as Dr. Bissell to calculate the shoulder rating but obtained slightly different ROM measurements, which accounts for the slight variance in their respective ratings.

37. Claimant failed to overcome Dr. Bissell's determination that she has no ratable impairment to the cervical or thoracic spine by clear and convincing evidence.

38. Claimant proved the September 26, 2022 right shoulder surgery performed by Dr. Purcell was reasonably needed to cure and relieve the effects of her industrial injury.

39. Claimant failed to prove Dr. Purcell is an authorized provider.

40. Claimant proved she is entitled to TTD benefits from September 26, 2022 through November 1, 2022, and TPD benefits from November 2, 2022 through March 21, 2023.

CONCLUSIONS OF LAW

A. Burdens and standards of proof

The parties have raised several interrelated issues regarding permanent impairment. The DIME provided an impairment rating for Claimant's right shoulder, which may reflect whole person or scheduled impairment. Claimant believes she suffered whole person impairment to her shoulder, whereas Respondent believes any impairment is confined to the schedule. Additionally, Claimant argues the DIME erred by failing to include a rating for the cervical spine.

As postured, the issues create split burdens of proof. Additionally, there are preliminary questions regarding which of the DIME's findings are entitled to presumptive weight, and which are evaluated based on a preponderance of the evidence. Regarding the shoulder, the initial consideration is whether it constitutes a scheduled or whole person impairment. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Conversely, scheduled impairment is a question of fact for the ALJ based on a preponderance of the evidence.

Whether a claimant sustained a scheduled or non-scheduled impairment is a threshold question of fact for determination by the ALJ. The heightened burden of proof that attends a DIME rating only applies if the claimant establishes by a preponderance of the evidence that the industrial injury caused functional impairment not found on the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the DIME's rating. *Webb v. Circuit City Stores, Inc*. W.C. No. 4-467-005 (August 16, 2002). Although the DIME's opinions may be relevant to this determination, they are not entitled to any special weight on this threshold issue. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

In light of the foregoing principles, the burdens of proof are allocated as follows: (1) Claimant must prove by a preponderance of the evidence she sustained whole person impairment to the right shoulder; (2) if Claimant has whole person impairment to her shoulder, Respondents must overcome the DIME rating by clear and convincing evidence; (3), if Claimant does not have a whole person impairment, Claimant must prove the proper shoulder rating by a preponderance of the evidence; (4) Claimant must prove

by clear and convincing evidence the DIME erred by not providing a cervical spine rating; (5) if either party overcomes the DIME by clear and convicing evidence in any respect, the proper rating is a factual question based on a preponderance of the evidence.

B. Claimant proved whole person impairment to her right shoulder

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc.*, W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved she suffered a whole person impairment to her right shoulder. Claimant reported pain radiating to her neck and mid-back at the first appointment with Ms. Homberger on May 27, 2021. The record thereafter is replete with reports of symptoms affecting structures proximal to the arm, including the trapezius, rhomboids, and right scapula. These proximal symptoms have interfered with activities such as reaching overhead, reaching behind her back, sleeping, and exercising. The argument that all of Claimant's proximal symptoms and associated limitations are pre-

existing and unrelated to the work accident is unconvincing. Claimant acknowledged prior episodes of neck and trapezius pain, but credibly testified the issues resolved after a short course of therapy. As Dr. Castrejon noted, there is no documentation of neck or midback pain, treatment, or functional limitations immediately before the May 2021 work accident. To the contrary, Claimant was working full time in a physically demanding occupation as a police officer without difficulty, and there is no persuasive reason to think she otherwise would have had these symptoms absent the injury to her right shoulder.

C. Respondent failed to overcome the DIME shoulder rating

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

Respondent failed to overcome Dr. Bissell's 7% whole person right shoulder rating by clear and convincing evidence. Claimant suffered an admitted injury to her shoulder in May 2021, and remained symptomatic nearly two years later. There is no persuasive evidence connecting her ongoing shoulder symptoms to any nonwork-related cause. Claimant received extensive treatment for the shoulder, including eventual surgery. Dr. Bissell determined the surgery was reasonably needed and causally related to the work injury, as did Dr. Castrejon. Both Dr. Bissell and Dr. Castrejon assigned a 5% rating for the subacromial decompression, pursuant to the Division's Rating Tips. The remainder of Dr. Bissell's rating was appropriately based on ROM deficits he personally measured at the DIME. Although Dr. Olsen found normal shoulder ROM during his IME, Dr. Bissell expressed no concern about the validity of the measurements he obtained at the DIME. Dr. Castrejon's similar measurements lend further credence to Dr. Bissell's rating. At most, Dr. Olsen and Dr. Kurz's determinations that Claimant has no impairment are "mere differences of opinion," and do not rise to the level of clear and convincing evidence.

D. Claimant failed to overcome Dr. Bissell's rating

As found, Claimant failed to overcome Dr. Bissell's determination she has no ratable impairment to the cervical or thoracic spine. Claimant's IME agreed no thoracic spine rating is warranted, and there is no opinion in the record to the contrary. Regarding the cervical spine, no treating or evaluating Level II physician has found impairment under Table 53, which is generally a threshold requirement for a spinal rating under the *AMA Guides*. *E.g., Rojahn v. Monaco Rehabilitation*, W.C. No. 4-055-695-02 (October 5, 2017).

Dr. Castrejon acknowledged Claimant does not qualify for a Table 53 rating, but invoked the exception outlined in the Division's Rating Tips that allows an isolated cervical ROM impairment in "unusual cases" involving a "severe" shoulder injury. The language used in the Rating Tips reflects an element of discretion on the part of the rating physician, stating that a rating is "allowed" where the rater believes it can be "well justified." But there does not appear to be any scenario where such a rating is mandatory under the Tips. Claimant failed to prove by clear and convincing evidence that Dr. Bissell erred by declining to assign a cervical ROM rating without a corresponding Table 53 rating.

E. The September 26, 2022 shoulder surgery was reasonably needed to cure and relieve the effects of the admitted injury

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 also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). 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).

Claimant proved the September 26, 2022 right shoulder surgery performed by Dr. Purcell was reasonably needed and causally related to her industrial injury. Claimant credibly explained that her right shoulder was minimally painful at rest, but it repeatedly flared and interfered with her ability to engage in activities. Mr. Albrecht concluded Claimant's clinical presentation and MRI findings were sufficient to justify surgery, and Dr. Purcell obviously agreed. Dr. Bissell and Dr. Castrejon concurred the surgery was reasonably needed and related to the work accident. Intraoperatively, Dr. Purcell observed and treated pathology in the right shoulder that was not fully appreciated by the radiologists who read the MRIs. The surgery ultimately improved Claimant's symptomology and function even though it did not completely resolve the condition.

F. Dr. Purcell is not an authorized provider

Besides showing treatment is reasonably necessary, the claimant must also prove the treatment is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). "Authorization" refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Authorization is distinct from whether treatment is "reasonably needed" within the meaning of § 8-42-101(1)(a). *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Claimant failed to prove Dr. Purcell is an authorized provider. Claimant was referred to Dr. Purcell by her PCP, whom she saw after being put at MMI and released by Dr. Kurz. No authorized provider referred Claimant to her PCP or Dr. Purcell for treatment related to her right shoulder. Admittedly, Dr. Kurz advised Claimant to follow up with her personal physicians for what he considered nonwork-related *cervical and upper back complaints*. But while that might constitute a referral for treatment of the neck and upper back under *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008), it did not authorize Claimant to choose her own physician to treat the right shoulder. Dr. Kurz specifically opined Claimant's right shoulder injury was at MMI and required no additional treatment. That opinion is consistent with the statutory definition of MMI, which is reached "when no additional treatment is reasonably expected to improve the condition." Section 8-40-201(11.5). An ATP's determination of MMI does not entitle a claimant to unilaterally change physicians to pursue additional treatment at the respondents' expense. *E.g.*, Story v. Industrial Claim Appeals Office, 910 P.2d 80 (Colo. App. 1995); *Gosselova v. Vail Resorts*, W.C. No. 4-975-232-02 (December 24, 2018); *Edelen v. BCW Enterprises, LTD*., W.C. No. 4-155-609 (September 20, 1995). Because Dr. Purcell was not authorized, Respondent is not liable for the surgery, notwithstanding that it was otherwise reasonably needed.

G. Claimant proved entitlement to TTD and TPD benefits after surgery

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes them to leave work, and they miss more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). To receive TTD benefits, a claimant must establish a causal connection between a work-related injury and the subsequent wage loss. Section 8-42-103(1)(a). Once commenced, TTD benefits shall continue until one of the terminating events enumerated in § 8-42-105(3), including return to work.

A temporarily partially disabled claimant is entitled to TPD benefits calculated at two-thirds of the difference between the average weekly wage and their earnings during the period of partial disability. Section 8-42-106(1). Entitlement to TPD benefits ends when the claimant reaches MMI. Section 8-42-106(2)(a).

Claimant proved she was disabled by the September 26, 2022 surgery which proximately caused a wage loss. The ALJ credits the opinions of Dr. Purcell, Dr. Bissell, and Dr. Castrejon that the surgery was reasonably needed, and credits Dr. Bissell and Dr. Castrejon that the surgery was causally related to the work injury. The fact that the surgery was unauthorized does not preclude an award of temporary disability benefits. The issue of authorization pertains to liability for treatment, and not whether the treatment was reasonably needed to cure and relieve the effects of an injury. Despite Dr. Purcell's unauthorized status, Respondent is still liable for any disability following the treatment. *E.g., Mennonite Hospital v. Corley*, 476 P.2d 274 (Colo. App. 1970); *Cordova v. Butterball*, W.C. No. 4-755-343 (March 9, 2010).

Claimant was off work from September 26, 2022 through November 1, 2022. She returned to part-time light duty on November 2, 2022, and continued working in that capacity until she reached MMI on March 22, 2023. Therefore, she is entitled to TTD

benefits from September 26, 2022 through November 1, 2022, and TPD benefits from November 2, 2022 through March 21, 2023.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant PPD benefits based on the DIME's 7% whole person rating for the right shoulder.

2. Respondent's request to overcome the DIME's whole person shoulder rating is denied and dismissed.

3. Claimant's request to overcome the DIME regarding spinal impairment is denied and dismissed.

4. Respondent shall pay Claimant TTD benefits from September 26, 2022 through November 1, 2022.

5. Respondent shall pay Claimant TPD benefits from November 2, 2022 through March 21, 2023.

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

7. Claimant's request for payment of treatment provided by Dr. Derek Purcell, including the September 26, 2022 surgery, is denied and dismissed.

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

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

DATED: December 22, 2023

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-228-663-001

ISSUES

I. Whether the claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury on November 30, 2022.

II. Whether the claimant has proven, by a preponderance of the evidence, that he is entitled to medical benefits.

III. Whether the claimant has proven, by a preponderance of the evidence, that he is entitled to temporary disability benefits.

IV. What is the claimant's average weekly wage?

FINDINGS OF FACT

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

1. The claimant is employed as the Senior Vice President of Claim Operations for the employer and has worked for them for about three years.
2. The employer provides property insurance adjusters to insurance companies across the country during catastrophic events, such as hurricanes, floods, hailstorms, tornados; or anytime Insurance carriers do not have adequate field staff to handle their claims – which mostly involve homeowners.
3. Due the unpredictable demand for adjusters – which depends on catastrophes – the employer does not maintain a staff of adjusters waiting for deployment. Instead, the Employer relies on independent adjusters who are recruited and retained when needed. These independent adjusters, or "1099 independent contractors," or contingent workers are the bloodline of the Employer's business. As a result, the need to maintain excellent working relationships with skilled independent adjusters is critical to the overall functioning and profitability of the Employer's business. In essence, the employer must recruit independent adjusters to work for the employer, versus working for a competitor.
4. As the Senior Vice President of Claims, the claimant's position required him to oversee the claims process from the time each claim is assigned by the insurer until the claim is returned to the insurer.
5. The claimant's job description specifically provides that:

> [Claimant], along with the VPs of Claim Operations, assume the responsibility of retaining and growing the firm's existing book of business, actively developing additional client relationships, expanding the firm's trusted network of claims professionals and building a strong

> supporting operation to ensure that [Redacted, hereinafter EL] continues to deliver the highest quality service in the industry. The incumbent is expected to maintain a motivated, engaged and effective workforce across the country…

6. Thus, the claimant was tasked with the engagement, retention, and recruitment of the independent contractor adjustors, which were integral to the employer's business.
7. As credibly testified to by the claimant, all of their claims' adjusters worked as 1099 independent contractors. There is also a significant amount of competition between the multiple firms that contract with independent adjustors for catastrophic claim work. Accordingly, a large part of the claimant's role with the employer was to develop and train existing adjustors as well as retain and recruit new adjustors, for the benefit of the business because the independent adjusters are the bloodline of their business.
8. Claimant's compensation package consists of a base salary, a discretionary bonus, and a performance bonus. The bonus portion of his compensation depends on the performance of the adjusters with whom the employer contracts. Thus, the more productive the adjusters are, the more money the claimant makes, via his bonus pay. As a result, the claimant was incentivized to maintain good working relationships with the independent adjusters – especially the high performing ones - for the overall financial benefit of the company and himself.
9. [Redacted, hereinafter MG] is an independent claims adjuster who had contracted and worked with the employer. MG[Redacted] was a top producing claims adjuster. As a top producing claims adjuster, MG's[Redacted] work helped the claimant meet the employer's financial goals, which in turn had a positive impact on the employer's bottom line as well as the claimant's compensation.
10. Claimant's normal place of business was at his home office in Berthoud, Colorado. Thus, he worked remotely. However, travel was required as a part of his job.
11. Claimant's work schedule was dictated by circumstances, and he was on call 24 hours per day, 7 days per week. When traveling to an event/catastrophe, his workdays could run from morning to night and while working from his home office, his workdays could be a more traditional 9-5.
12. Claimant's co-workers and 1099 independent contractor claims adjustors live across the country and, largely, work remotely as well. Claimant had tried to use remote team-building activities during the pandemic, but that it just did not work the same as in-person team building and bonding activities.
13. Whenever a catastrophic event occurred, the claimant would take advantage of the situation and get as much face-to-face time as possible with his remote employees and 1099 independent claims adjusters. It was during those times, when everyone was displaced from their homes and traveling, that they would spend time in the evenings, eating dinner, connecting, and primarily talking about work. After these catastrophic events, the support team would also make time to come together with team dinners and other events to connect, share stories, get input, and talk shop.

14. The Vice Presidents (VPs), working beneath the claimant were afforded discretion and full authority in setting up team dinners and events and they only needed to consult the claimant if they needed a budget for the event.

15. One of the VPs that reported to the claimant, [Redacted, hereinafter NG], decided to co-host a team dinner with one of the independent adjusters, MG[Redacted]. The team dinner was scheduled for November 30, 2022, and would be held at MG's[Redacted] house. NG[Redacted] told the claimant about the team dinner approximately a month in advance – so the claimant could attend.

16. On November 30, 2022, the claimant left work at his home office in Berthoud, Colorado, and traveled to Lakewood, Colorado. Upon reaching Lakewood, the claimant checked into a hotel, the [Redacted, hereinafter FI], which was located across the street from the employer's corporate office. Claimant traveled to Lakewood so that he could spend time with his team, attend the November 30, 2022, team dinner at MG's[Redacted] house, complete year-end reviews, and attend the Employer's Christmas party on December 2, 2022, where annual bonuses would be announced.

17. From November 30, 2022, until he was finished with the Christmas party and reviews, the claimant intended to stay at the hotel in Lakewood and not return home. This was the same schedule he had the prior year when he also stayed at a hotel during year-end performance reviews, bonuses, and the Christmas party and because it allowed him to maximize his face-to-face time with his team. Thus, the claimant was required to be away from his home for an extended period to effectuate and promote the employer's business interests from November 30 through December 3, 2022.

18. Together with the claimant staying at the hotel, NG[Redacted], the VP that reports to the claimant, and NG's[Redacted] team, which included [Redacted, hereinafter CM], a Vice President, [Redacted, hereinafter AQ], [Redacted, hereinafter BR], and [Redacted, hereinafter JH] - claims managers, were also staying at the FI[Redacted] and arrived on November 30, 2022.

19. The employer has a Company Travel and Entertainment Policy that states hotels, rental cars, and ride share/taxis may all be used by the employees for business purposes and are reimbursable so long as the employee's direct supervisor approves the expense, and the expense is business related.

20. The employer covered Claimant's travel related expenses, including his hotel lodging on November 30, 2022, as they were business-related expenses. Any ride-sharing fees for travel to and from the team dinner at MG's[Redacted] house would also be covered and paid for by the employer as a business expense.

21. As found above, MG[Redacted] was one of the Employer's top revenue-producing independent adjustors. Several months prior, records show that NG[Redacted] had taken MG[Redacted] on an appreciation dinner as a top 5 billing adjuster.

22. As a top 5 billing adjustor for the employer, MG's[Redacted] continued work, as a 1099 contractor, with the employer was integral to maintaining and expanding the business. Moreover, MG's[Redacted] production and quality of work with for the employer had a direct and positive impact on NG[Redacted] and Claimant's year-end bonuses, which were based on reaching company created goals.

23. As stated by the claimant, MG[Redacted] was a very valuable resource to the Employer, stating, “MG’s[Redacted] production, from a quality and cycle/time response time is vital for, for the financial performance that helps us retain our client relations; also give the opportunity for future business…”

24. The claimant had previously spent time with MG[Redacted]. For example, the claimant and MG[Redacted] had shared time together while dealing with the aftermath of Hurricane Ian in October of that year, when they both had been dispatched to Florida.

25. NG[Redacted] had also co-hosted a team dinner at MG’s[Redacted] home the year prior (2021) before the employer’s Christmas party. The claimant explained that NG’s[Redacted] team, when they are all able to physically get-together, schedules team dinners and activities and that it was expected that, on the evening of November 30, 2021, that NG’s[Redacted] team would all attend the team dinner at MG’s[Redacted] home in Thornton, Colorado.

26. The claimant was going to the team dinner at MG’s[Redacted] home as part of his job duties as the Senior Vice President of Claim Operations. The claimant went to the team dinner to maintain his relationship with MG[Redacted] and to continue their business relationship. In other words, the purpose for the claimant attending the team dinner was business development, i.e., retention and recruiting efforts towards MG[Redacted].

27. On November 30, 2022, NG’s[Redacted] team took a rideshare, from the hotel to the team dinner at MG’s[Redacted] home. NG’s[Redacted] flight was delayed, so the claimant waited for him to arrive and rode in his rental car to MG’s[Redacted] home.

28. The cost for all transportation services (ride share and rental car) and hotel stays were reimbursed and covered by the employer as a business-related expense.

29. It was vital and critical for the business of the employer for the claimant and upper-level team members to be at the team dinner that was being co-hosted by NG[Redacted] and being held at MG’s[Redacted] house to maintain and foster the relationship with a top performing adjuster, MG[Redacted].

30. MG’s[Redacted] party was not a “holiday” or “Christmas” party for the employer and their employees. The employer’s Christmas party was scheduled for December 2, 2022. The team dinner at MG’s[Redacted] was a business dinner to further the interests of the employer.

31. The claimant, MG[Redacted], NG[Redacted], CM[Redacted], BR[Redacted], AQ[Redacted], and JH[Redacted] – all members of NG’s[Redacted] team – attended the team dinner. Additionally, [Redacted, hereinafter NB] and [Redacted, hereinafter JR], members of another team who had not all arrived yet, also joined the team dinner on November 30, 2022. Further, all employees in attendance at the team dinner were upper-level managers.

32. During the team dinner, business or “shop talk” occurred, as usual, and NG[Redacted] completed BR’s[Redacted] year-end performance review over the course of the evening. One of the objectives, during this facetime period, was to have performance/year-end reviews, in the time leading up to the Christmas party where individuals received their annual bonus.

33. During the team dinner, the claimant and MG[Redacted] shared discussions about their work experiences, stories, development of future clients, and take-aways from their work year. Thus, they conducted business.

34. During the team dinner, the claimant and MG[Redacted] drank some alcohol, which was common at a team dinner. The drinking was kept at an acceptable and professional level and rideshares, which were paid for by the employer, were important to get everyone back safely to the hotel.

35. It was getting late in the evening, and everyone had meetings the next day, so the team dinner was concluded. Rideshares were summoned. While waiting for their rideshares to arrive, the team gathered at the front of the house and in the garage. The first rideshare arrived and everyone but Claimant, NG[Redacted], NG's[Redacted] wife and BR[Redacted] left in it. While waiting for the second rideshare to arrive, MG[Redacted] asked the claimant if he wanted to go for a quick ride in his UTV/ATV - a Utility Task Vehicle or an All-Terrain Vehicle - that was parked in the garage. The evidence did not establish that there had been any discussions between the Claimant and MG[Redacted] about riding the UTV/ATV; that the claimant had an independent desire to go for a ride in the UTV/ATV; or that the claimant requested to go for a ride in it. It was just a spur of the moment request made by MG[Redacted] of the claimant.

36. Claimant felt obliged to say yes to the ride – since MG[Redacted] was a top producer – and one of the primary reasons the claimant was at the dinner was to foster the relationship with MG[Redacted]. As a result, Claimant said yes to MG's[Redacted] request.

37. Claimant's decision to say yes and take a short ride in MG's[Redacted] UTV/ATV was to further the interests of the business relationship. It was not to engage in a recreational activity for recreational purposes. It was part and parcel of attending the team dinner to maintain and foster a good working relationship with MG[Redacted] for the benefit of the Employer. In other words, it was not established that the claimant intended to engage in a separate recreational activity for his own personal benefit when he got into the UTV/ATV.

38. The claimant also stated that they were in a residential area. As a result, he thought that they would be taking a short ride around the block. At no time did he think MG[Redacted] planned to take him off roading. Moreover, at no time did he think MG[Redacted] would drive in an aggressive and careless manner. As a result, the claimant neither intended, nor agreed, to participate in a dangerous activity in which he would be going off road in a vehicle that would be driven in an aggressive and careless manner.

39. The UTV/ATV is similar to a dune buggy, with two seats, a roll cage, big tires, and half-doors. When he got in the vehicle, the claimant tried to put on the shoulder harness, but it was too small/narrow to fit over him. MG[Redacted] told the claimant he would not need to put on the harness because they were not going far.

40. MG[Redacted] proceeded down the street. But instead of staying on the neighborhood street, as the claimant assumed he would, MG[Redacted] turned onto

a walking path and drove across some railroad tracks and to a field at a middle school. Then, MG[Redacted] started to drive in circles, i.e., doing donuts or cookies. While MG[Redacted] was driving in circles, the tires caught on the frozen ground and the UTV/ATV rolled and the claimant was ejected from the vehicle.

41. The claimant was seriously injured and could not move his arms or legs. He told MG[Redacted] to call 911. The claimant was paralyzed from the neck down and taken via ambulance to North Suburban Hospital.

42. At the hospital, the claimant was diagnosed with C5-C6 fractures and fractures at the L2, L3 and L4 levels and a cervical spinal cord injury.

43. The claimant underwent emergency cervical surgery on December 1, 2022. He remained at North Suburban Hospital until December 12, 2022, when he was released to the care of Craig Hospital.

44. The claimant underwent a second cervical fusion surgery on December 23, 2022, at Swedish Hospital, which is connected to Craig Hospital. The claimant remained in-patient at Craig Hospital until February 8, 2023.

45. The claimant was severely impaired during that time but at some point, he managed to start working very part time from the hospital. He used his PTO to cover his lost time from December 1, 2023, until it was exhausted on February 5, 2023.

46. While the claimant was hospitalized at Craig Hospital, their social workers applied for SSDI benefits on his behalf. Benefits were approved in April 2023 to commence on May 9, 2023. The claimant testified that he still receives those benefits despite telling the Social Security Administration that he had returned to work.

47. The claimant also worked with [Redacted, hereinafter SA], HR representative for the Employer, to apply for short-term disability benefits until April 19, 2023, when the claimant returned to work.

48. The claimant remains employed by the Employer as the Senior Vice President of Claim Operations.

49. SA[Redacted] is the Divisional Chief, People and Culture Officer, for the Employer. She testified that she and Claimant are both senior level employees and peers. She credibly testified that she was familiar with Claimant's job duties, and they required that he go out with other employees. She stated that she was unaware of the co-sponsored team dinner at MG's[Redacted] residence until after the claimant was injured. But there is no indication that she had to authorize the team dinner.

50. SA[Redacted] also testified that she does not schedule nor normally know about team dinners/team events. She credibly testified that both NG[Redacted] and the claimant have autonomy in their positions to schedule team dinners, team building activities, and team meetings, etc. She explained that the expense for ride shares back and forth from team dinners to hotels would fall under the umbrella of approved business-related travel expenses. Thus, NG[Redacted] had the authority to plan and co-host the dinner, and the claimant had the authority to participate and attend the dinner, and both used that authority for the benefit of the employer for business purposes.

51. In 2021, the claimant's total gross pay was $296,570.03. This was comprised of a salary of $147,576.18, an annual bonus of $61,607, a discretionary bonus of $34,807, a moving bonus of $34,188.77, life insurance of $505.56, holiday pay of $5,123.36, and paid time off of $12,762.16.

52. In 2022, the claimant's total earnings were $263,879.50. This was comprised of a salary of $150,269.34, an annual bonus of $41,929, a discretionary bonus of $50,000, floating holiday pay of $657.76, life insurance of $527.24, holiday pay of $4,604.32, and paid time off of $15,891.84.

53. The claimant's 2022 bonuses were based on the performance of the claimant and the company over the entire year and then determined at the end of the year. There is a lack of credible evidence to establish that the claimant's bonuses accrued on a regular basis throughout the year and that the claimant could access and obtain a calculatable portion of his bonus at any time before the end of the year. Thus, the claimant's bonuses did not have a reasonable, present-day, cash equivalent value throughout the year. As a result, the claimant did not establish that he had access to his bonuses on a day-to-day basis or had an immediate expectation or interest in receiving the bonuses under appropriate or reasonable circumstances at any time throughout the year.

54. The claimant's testimony is found to be credible and persuasive and the ALJ has credited his testimony.

Ultimate Findings of Fact

55. The team building dinner at MG's[Redacted] home, co-sponsored by NG[Redacted], was within the guidelines of conducting the employer's business as described by the claimant, SA[Redacted], and contained in the employer's Company and Entertainment Policy. As a result, the business dinner at MG's[Redacted] house was a work event that was in furtherance of the employer's business. The team dinner was neither a recreational event nor a mere social event. Instead, the team dinner had a significant business purpose and was a business event.

56. There is a lack of credible evidence to establish that the claimant went to the team dinner for personal and social reasons – and not work reasons. The team dinner was not an independent holiday party that the claimant attended in order to just boost morale. It was a team dinner in which the primary purpose of the claimant's attendance was to further the business interests of the employer – which was to retain MG[Redacted] as an independent adjuster working for the employer.

57. Since the claimant was away from his home in Berthoud, Colorado, at the time of the team dinner, he was in travel status. Moreover, at the time of the team dinner, which was a business event, the claimant was furthering the business interests of the employer while also in travel status.

58. Because the purpose of the team dinner was to conduct business and further the interests of the employer, the team dinner was not a personal deviation from the claimant's employment obligations. The team dinner was a business obligation that furthered the interests of the employer.

59. While still at the team dinner, the claimant did not embark on a deviation from his employment when he went for a ride with MG[Redacted] in MG's[Redacted] UTV/ATV. After being asked by MG[Redacted] to go for a short ride, the claimant agreed to go for a short ride while waiting for his rideshare to arrive. The decision to accept the offer from MG[Redacted] was inextricably intertwined with the business purpose of the team dinner – which was to support the business relationship with MG[Redacted] – who was a top performing adjuster. This was a business dinner and event that the claimant attended to help ensure MG[Redacted] would continue contracting with the employer – instead of another adjusting company. Attending the event to further the interests of the employer was the claimant's job as the Vice President of Claims. In other words, the claimant was working to retain MG[Redacted] as an adjuster and/or recruit him for future work, which is one of his job duties.

60. The benefit to the employer of the claimant attending the team dinner was beyond the intangible value of team building and increased morale. Attending the team dinner to maintain the relationship with MG[Redacted] was required to further the business interests of the employer.

61. The claimant's decision to go for a ride with MG[Redacted] in his UTV/ATV was not for recreational purposes. There is a lack of credible evidence to establish that the claimant asked to go for a ride in the vehicle, that the claimant had any interest whatsoever in going for a ride in the vehicle, or that the claimant intended the ride to be recreational. Claimant merely acquiesced in MG's[Redacted] request to join him for a ride. As a result, the ride in the UTV/ATV was not a recreational activity, separate and distinct from the team dinner. Thus, the UTV/ATV was not a separate and distinct deviation from employment for recreational purposes or a distinct recreational activity.

62. The claimant's attendance at the team dinner and ride with MG[Redacted] is considered to be within the course, conduct, and scope of his job duties.

63. By going for a ride in the UTV/ATV, the claimant did not agree to engage in a dangerous activity that might be considered a deviation from his employment and sever the relationship between the team dinner and the work related nature of the dinner.

64. Due to his injury, the claimant required medical treatment and obtained medical treatment.

65. Due to his injury, the claimant missed more than three days from work. However, due to the various wages and benefits paid to the claimant after his work injury, the ALJ cannot determine whether temporary disability benefits are payable. Therefore, the issue of temporary disability benefits is reserved.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at

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

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

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

I. Whether the claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury on November 30, 2022.

To be compensable under the Workers' Compensation Act, an injury sustained by an employee must arise out of and in the course of the employee's employment. *See* § 8-41-301(1)(b), (c), C.R.S. 2022; *Price v. Indus. Claim Appeals Off.*, 919 P.2d 207 (Colo. 1996).

Travel Status – Recreational Activity- Deviation

A. Travel Status

An employee who is away from home on business remains under continuous workers' compensation coverage from the time of the departure until the employee returns home. *SkyWest Airlines v. Industrial Comm'n*, 487 P.3d 1267 (Colo. App. 2020); *Silver Eng'g Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973). Under this rule of law, which is commonly referred to as "travel status," the risks associated with the necessities of eating, sleeping, and ministering to personal needs while away from home

are considered incidental to, and within the scope of, the traveling employee's employment. *Id*., *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). The essence of the travel status exception is that when the employer requires the Claimant to travel beyond a fixed location to perform his job duties, the risk of travel becomes the risk of the employment. *Briedenbach v. Black Diamond, Inc*., W.C. No. 4-761-479 (December 30, 2009).

In this case, the claimant lives in Berthoud Colorado, and the employer's office is in Lakewood, Colorado. As found, the claimant mainly works remotely out of his house in Berthoud. Since it was the end of the year, the claimant drove to Lakewood to spend time with his team to complete year-end reviews, attend the November 30, 2022, team dinner at MG's[Redacted] house, and attend the employer's Christmas party on December 2, 2022, where year-end bonuses would be given out to the claimant's team members.

In order to perform all these tasks, in the Metro Denver area, and with his team members, the claimant planned to drive to Lakewood on November 30, 2022, and check in at the FI[Redacted] Hotel, across the street from the Employer's office, in Lakewood, Colorado – as he did the year before – and stay until December 3, 2022, the day after the Christmas party.

On November 30, 2022, the claimant drove to Lakewood and checked in at the hotel so he could attend the team dinner that evening, perform reviews during the days following the team dinner, and then attend the employer's Christmas party. Thus, the claimant was required to be away from his home for an extended period of time to in furtherance of the employer's business. As a result, once the claimant left his home in Berthoud on November 30, 2022, he was in travel status. Thus, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that he was in travel status of November 30, 2022, the day of the accident.

B. Recreational Activity

Under § 8-40-201(8), "employment" does not include "the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." Section 8-40-301(1) similarly provides that the term "employee" excludes any person who, while participating in a recreational activity, is relieved of and is not performing any duties of employment.

In determining whether an event at which an employee was injured was a recreational activity, courts consider the factors first articulated in *City & County of Denver v. Lee*, 450 P.2d 352, 355 (1969). The factors consist of:

i. Whether the activity occurred during working hours;

ii. Whether the activity was on or off the employer's premises;

iii. Whether participation was required;

iv. Whether the employer initiated, organized, sponsored, or financially supported the event; and

v. Whether the employer derived benefit from the event.

See Dover Elevator Co. v. Indus. Claim Appeals Off., 961 P.2d 1141 (Colo. App. 1998) (applying *Lee* and affirming ALJ's determination that injury sustained while bowling during off-premises company party arranged by employer was compensable). In addition, other factors may be present which indicate the employer is sufficiently close to the activity to identify with it and make it incidental to employment. See *Price v. Indus. Claim Appeals Off.*, 919 P.2d 207 (Colo. 1996)

While the first two *Lee* factors are generally given greater weight, *see Price v. Indus. Claim Appeals Off., supra*, compensability may be established even where those factors suggest a recreational activity if there is a strong contrary showing upon application of the other factors. *Dover Elevator Co. v. Indus. Claim Appeals Off., supra; see White v. Indus. Claim Appeals Off.*, 8 P.3d 621 (Colo. App. 2000) (claimant's weightlifting was a recreational activity outside course and scope of his employment, even though it occurred during workday and on employer's premises, where other relevant factors supported ALJ's finding of recreational activity). *See Dynalectron Corp. v. Indus. Comm'n*, 660 P.2d 915 (Colo. App. 1982) (injuries compensable where, although they occurred following off premises dinner held after normal working hours, record showed claimant attended at implied direction of employer and employer received direct benefit from conduct of business at dinner).

i. Whether Team Dinner was a Recreational Activity

First, in this case, the team dinner did not occur during traditional working hours. Second, the activity was not on the employer's premises. Third, while attendance was not mandatory, participation and attendance at the team dinner was required for the claimant to perform the functions of his job. The claimant was Senior Vice President of Claims. In his position, the claimant was required retain adjusters—the bloodline of the employer's business. In order to retain MG[Redacted], a top performing adjuster, the claimant's presence was required at the team dinner. Fourth, the employer initiated the event, through Vice President of Claims, NG[Redacted], co-hosting the event at MG's[Redacted] home and the claimant's attendance at the event. As found, MG[Redacted] and the claimant had the authority to initiate and attend team dinners for the benefit of the employer. Fifth, the employer derived a direct benefit through the claimant's attendance at the event by promoting the business relationship between the employer and MG[Redacted]. In essence, the claimant's attendance at the team dinner is the same as a salesperson attempting to retain a current customer or obtain the business of a new customer. In this case, the claimant was at the team dinner to retain, or recruit on an ongoing basis, MG[Redacted]. Thus, the primary reason the claimant attended the team dinner was to further the business relationship with MG[Redacted] for the benefit of the employer.

Thus, the ALJ finds and concludes that the benefit to the employer is a significant factor in determining whether the team dinner was a recreational activity. In the end, the ALJ finds and concludes that the team dinner was not a recreational activity. The ALJ finds and concludes that the claimant established that his attendance at the team dinner was not a recreational activity, but a business activity to further the interests of the employer. The claimant has therefore established by a preponderance of the evidence that he was within the course and scope of his employment while at the team dinner.

ii. Whether the claimant's agreement to ride in the UTV/ATV was a deviation from his employment.

The Colorado courts have held that if the traveling employee makes a distinct departure on a personal errand or deviation, then the workers' compensation coverage will cease. *Pat's Power Tongs, Inc. v. Miller*, 172 Colo. 541, 474 P.2d 613 (1970); *Wild W. Radio v. Indus. Claim Appeals Off.*, 905 P.2d 6 (Colo. App. 1995); *Phillips Contracting v. Hirst*, 905 P.2d 9 (Colo. App. 1995). When a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *See Phillips, supra.* Whether an injured employee was in travel status or on a personal deviation at the time of his injury is a question of fact the administrative law judge decides. Although the burden of proof is on the employer to show that the employee made a distinct departure from the scope of employment while on travel status, the burden of proof is on the claimant to show a return to the course and scope of employment. *SkyWest Airlines v. Indus. Claim Appeals Off. of Colo., 487 P.3d 1267, 1269.*

In this case, and as found, the claimant was at the team dinner and getting ready to leave when MG[Redacted] asked him whether he wanted to go for a short ride with him in his UTV/ATV. It was not established that there had been a prior discussion between the claimant and MG[Redacted], or a prior plan, to ride the UTV/ATV. Nor was it established that Claimant had an independent desire to go for a ride in the UTV/ATV or that the claimant requested to go for a ride in it. It was just a spur of the moment request made by MG[Redacted], and the claimant said yes, because he felt obligated to say yes. The claimant felt obligated to say yes because the primary reason the claimant was at the team dinner was to foster the relationship with MG[Redacted] for the benefit of the business.

As stated above, the claimant's decision to say yes and take a short ride in MG's[Redacted] UTV/ATV was to further the interests of the business relationship. It was not for the claimant to intentionally engage in a recreational activity for recreational purposes. It was part and parcel of attending the team dinner which was to maintain and foster a good working relationship with MG[Redacted] for the benefit of the employer. In other words, the claimant did not intend to engage in a separate recreational activity for his own personal benefit with MG[Redacted] when he got into the UTV/ATV. The request made by MG[Redacted], to go for a ride, was an extension of the team dinner and thereby inextricably intertwined with, or part of, the team dinner. It was not a deviation from the team dinner.

Moreover, the claimant and MG[Redacted] were in a residential area. As a result, the claimant thought that they would be taking a short ride around the block. At no time did he think MG[Redacted] would take him off roading. Moreover, at no time did he think MG[Redacted] would drive in an aggressive and careless manner. As a result, the claimant neither intended, nor agreed, to participate in a dangerous activity in which he would be going off-road in a vehicle that would be driven in an aggressive and careless manner.

Respondents contend that the facts here are similar to *Silver Eng'g Works, Inc. v. Simmons*, 505 P.2d 966 (Colo. 1973). In *Simmons*, the decedent was on travel status on behalf of his employer on a trip to Mexico. The decedent was in Mexico to assist and be trained in the operation of certain machinery. During a period when the plant was shut down for the Easter weekend, the decedent, and several other employees, drove to a remote beach to swim and fish. The decedent went swimming and met his death by drowning. The Court stated that:

> The traveling employee was capable of departing on a personal errand as any other type of employee, thereby losing the right to compensation benefits from accidents occurring during such departures. The Claimant had stepped aside from his employment and was attending to a matter of personal recreation, which was beyond that necessary to the normal ministration to needs of an employee on a business trip.

Simmons, supra.

The Court also noted that:

> Such an employee is continuous employment, day and night. This does not mean that he cannot step aside from his employment for personal reasons, just as might an ordinary employee…He might rob a bank; he might attend a dance; or he might engage in other activities equally conceivable for his own pleasure and gratification, and ordinarily, none of these acts would be beneficial to his employment." *Id*.

The ALJ does not find *Simmons* to be persuasive and finds it distinguishable from this case. In *Simmons*, the decedent went with co-workers to go swimming and fishing for personal reasons. There was no indication the decedent was pursuing a business purpose by going swimming or fishing. In this case, the claimant was at a business dinner and pursuing business with the person with whom he went with on the UTV/ATV. Thus, riding on the UTV/ATV was inextricably intertwined with the team dinner that was for business purposes.

The respondents seem to contend that any activity that results in an injury, which in isolation, could be considered a recreational activity, or deviation from employment, is not work related. For example, the respondents seem to contend that if the claimant was injured while fishing or hunting, regardless of the connection with a work-related purpose, such activity could not result in a compensable work injury. Such reasoning, however, has been rejected in numerous jurisdictions. Numerous cases have found that injuries while hunting or fishing are compensable when the activity occurs in furtherance of the employer's business.

For example, when an employee is authorized to entertain customers, the employee is considered in the course and scope of employment when injured during a hunting or fishing trip with customers. *See Bechen v. Am. Guar. & Liab. Ins.,* 298 F. Supp. 2d 806 (W.D. Wis. 2003) (employee injured during bear hunting and fishing trip with a customer deemed work related.) As the *Bechen* court aptly noted, sometimes play is work and work is play. *See Becham at* 811. *See also Lewis v. Lowe & Campbell Athletic Goods Co*., 247 S.W.2d 800 (Mo. 1952) (athletic goods salesperson killed in highway

accident while on a hunting trip with customers. The court held that the injury was compensable. The employer recommended such weekend social functions with the customers.); *Employers Mut. Liab. Ins. Co. of Wisc. v. Sanderfer*, 382 S.W.2d 144 (Tex. Ct. App. 1964) (the claimant was injured while hunting. He was trying to promote good-will for his company by associating with potential customers who were at the hunting camp. His employer had suggested and approved this trip. Compensation was awarded.); *Continental Cas. Co. v. Industrial Comm'n*, 132 N.W.2d 584 (1964) (the decedent was on a trip with another employee to acquaint the decedent with the operations of the business. They also went on a hunting trip with a customer. On the return trip, the decedent was killed in an auto accident. The court held that the hunting trip was in the nature of entertaining customers and part of the business. The claim was found compensable.)

The ALJ is cognizant that there are times when an employee will state that an activity was pursued for business purposes, but the facts and circumstances do not support such a finding. For example, if an employee goes hunting with others with whom he does business, merely to have companions, and not to entertain for business purposes, the injury is not work related. *See Aetna Cas. & Sur. Co. v. Indus. Com.*, 255 P.2d 961, 962 (Colo. 1953).

In this case, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that his injury occurred within the course and scope of employment and is compensable. It was not established that claimant was injured during a recreational activity or deviation from his employment.

II. Whether the claimant has proven, by a preponderance of the evidence, that he is entitled to 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 Off.*, 53 P.3d 1192 (Colo. App. 2002).

In this case, the claimant suffered a serious accident on November 30, 2022. There is no dispute that the accident caused the need for medical treatment. As a result, the claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment to cure and relieve him from the effects of his work injury.

III. Whether the claimant has proven, by a preponderance of the evidence, that he is entitled to temporary disability benefits.

To establish an entitlement to temporary disability benefits, the claimant must prove that the industrial injury caused a disability, that he left work as a result of the disability, that he was disabled for more than three regular workdays, and that he suffered an actual wage loss. Section 8-42-103(1)(b), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The period of temporary disability is measured from the day after the employee leaves work as a result of the injury. *See Ralston Purina-Keystone v. Lowry*, 821 P.2d 910 (Colo. App. 1991).

Temporary disability benefits are designed to replace the claimant's actual lost wages during the period he is recovering from the industrial injury. *Broadmoor Hotel v. Industrial Claim Appeals Off.*, 939 P.2d 460 (Colo. App. 1996); *PDM Molding, Inc. v. Stanberg, supra; Mesa Manor v. Indus. Claim Appeals Off.*, 881 P.2d 443 (Colo. App. 1994). We agree with the ALJ that a claimant is not considered "disabled" for purposes of recovering temporary disability benefits if the claimant does not sustain a wage loss from his injury. *See Atencio v. JBQ Allen, Inc*. W.C. No. 4-350-555 (May 19, 2000); *See Matus v. David Matus* W.C. No. 4-740-062 (July 13, 2010)(claimant not entitled to temporary disability benefits where the claimant's business and financial records supported findings that the claimant did not suffer any actual wage loss) ; *Hendricks v. Keebler Co., W.C. No. 4-373-392 (June 11, 1999)* (temporary disability benefits precluded during the time the claimant performed modified duty and earned pre-injury wage.)

Here, the claimant's injury was disabling and caused him to miss more than three days from work. But the claimant testified that the employer continued to pay his wages after his work injury. The claimant also testified that he received various wage replacement benefits, such as short-term disability benefits and social security disability benefits. Moreover, the issue of offsets is unclear.

As a result, based on the current record, the ALJ cannot determine whether the claimant suffered a wage loss and is entitled to temporary disability benefits. Therefore, the ALJ will not rule on the issue of temporary disability benefits at this time but will reserve the matter for future determination.

IV. What is the claimant's average weekly wage?

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

However, section 8-42-102(2), C.R.S. requires the ALJ to base Claimant's AWW on his earnings at the time of the injury. In order for a particular payment to be considered "wages" it must have a "reasonable, present-day, cash equivalent value," and Claimant must have access to the benefit on a day-to-day basis, or an immediate expectation of interest in receiving the benefit under appropriate and reasonable circumstances. *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his 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 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).

Section 8-40-201(19)(a), C.R.S., defines wage as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of injury." Section 8-40-201(19)(b), C.R.S., provides that "wages" shall include the value of certain fringe benefits including health insurance, and the reasonable value of board, rent, housing, and lodging. However, it also states that wages, "shall not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19).

In *Meeker v. Provenant Health Partners*, 929 P.2d 26, the Colorado Court of Appeals developed a test for whether an employer-paid benefit is a wage or enumerated fringe benefit. *Meeker* held that an employer-paid benefit constitutes wages if it has a "reasonable, present-day, cash equivalent value," and the employee has access to the benefit on a "reasonable day-to-day basis," or has "an immediate expectation of interest in receiving the benefit under appropriate, reasonable circumstances." *Id*.

In *Dan Yex v. ABC Supply Company and Ace/ESIS Insurance*, W.C. No. 4-910-373 (May 16, 2014), ICAP relied on the *Meeker* case, and its progeny *Orrell v. Coors Porcelain*, WC No. 4-251-934 (May 22, 1997), and determined that an employee's bonus earned during the employer's busy season was properly excluded from the AWW. The Claimant in *Yex* had injured his back in December 2012 and asserted he received a bonus in April 2012. The ALJ found the employees were awarded bonuses if their branch showed a profit in the previous calendar year. Some years resulted in a bonus and others did not. Under *Meeker*, the ALJ reasoned that the bonus did not have a present-day cash equivalent value, Claimant did not have access to the proceeds of the bonus on a day-to-day basis and did not have an immediate expectation of receiving the bonus. Thus, the bonus was appropriately identified as a fringe benefit not included in the calculation of wages.

As found, the claimant's bonuses were paid at the end of the year based on his performance and the performance of the company. The claimant did not establish that he had access to a specific and calculatable portion of his bonus on a day-to-day basis. The claimant also did not established that he had an immediate expectation of receiving the bonuses under appropriate or reasonable circumstances, at any time of the year.

As a result, the ALJ determines that most reasonable manner in which to calculate the claimant's AWW under the circumstances is to take his annual salary for 2022 of $150,269.34 and divide it by 52 weeks. This results in an AWW of $2,889.80. [1]

ORDER

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

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[1] Whether any other payment set forth in this order or the claimant's wage records should be included in Claimant's AWW is reserved since the record was not fully developed regarding those payments. For example, the parties did not develop the record as to whether the claimant's holiday pay, PTO, or the cost of the claimant's life insurance should be included in his AWW. The only benefit, other than his salary, that was developed to some extent, was his bonus pay.

1. Claimant suffered a compensable injury on November 30, 2022.
2. Respondents shall pay for the claimant's reasonable, necessary, and related medical treatment to cure and relieve him from the effects of his work injury.
3. The issue of temporary disability benefits is reserved for future determination.
4. The Claimant's average weekly wage is $2,889.80, subject to modification for other payments not addressed in this order.
5. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: December 26, 2023

s/ *Glen Goldman*

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-245-164-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits for the period of April 23, 2023 to June 12, 2023.

2. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant worked as an assistant manager for Employer's pawn shop from April 13, 2022 until June 24, 2023. Claimant testified that on February 15, 2023, he went into Employer's warehouse where he tripped and fell on his left side, sustaining a rib fracture. Claimant testified he went to the UC Health emergency department where he was treated and released. Claimant returned to work that day, without restrictions. No medical records from UC Health were offered or admitted into evidence.

2. On February 16, 2023, Claimant's supervisor [Redacted, hereinafter AR], completed a First Report of Injury indicating claimant tripped and fell on his ribs, and received treatment at an emergency room on that date. A body diagram on the First Report of Injury circled only Claimant's left chest area. (Ex. A).

3. Claimant testified that approximately two months later, on the morning of April 22, 2023, he began experiencing numbness from his elbows to his fingers in both arms while at home. Claimant testified he went to the UC Health emergency department, where he underwent an MRI. Claimant further testified he underwent emergency surgery at UC Health on April 22, 2023, on his neck for a C4-5 disc injury. No medical records related to any examination, treatment or evaluation of Claimant's cervical injury were offered or admitted into evidence.

4. Claimant testified that he was off work from April 23, 2023 until returning on June 12, 2023, after recovering from his surgery.

5. Claimant attributes his need for the April 22, 2023 surgery to his work-related fall on February 15, 2023. He testified that he had no neck trauma after February 15, 2023 which would have caused his neck symptoms. Claimant also asserts that his time off from work from April 23, 2023 to June 12, 2023 was the result of his February 15, 2023 injury. In support of his contention, Claimant submitted a May 1, 2023 work excuse from Daniel Norton, PA-C, of Salud Family Health Centers, which requested that Claimant be excused from work from May 24, 2023 to June 18, 2023, due to "recent neck surgery." (Ex. 1). The Salud work-excuse form does not mention a work-related injury.

6. With the exception of the Salud work-excuse form, no medical records of any kind were offered or admitted into evidence.

7. On July 19, 2023, Claimant submitted a Worker's Claim for Compensation which alleged that, in addition to fractured ribs, he was "diagnosed with C5-6 herniated disc which doctors stated related to DOI injury." (Ex. F).

8. On August 11, 2023, Respondents filed a General Admission of Liability admitting for medical benefits only. (Ex. 2).

9. On November 7, 2023, Respondents obtained a report from orthopedic surgeon Quin-Min Chen, M.D., regarding the relatedness of Claimant's cervical surgery to his February 15, 2023 work accident. Dr. Chen was not provided medical records, other than the May 1, 2023 work excuse, and information regarding medications from April 23 to April 26, 2023. Dr. Chen indicated that it would be "highly doubtful that the claimant will require neck surgery for this particular claim, but again, I would know more if I had access to MRI reports and some additional records to detail the thought process as to why the claimant required surgery." (Ex. D)

10. At the time of his injury, Claimant earned $18.25 per hour, plus a commission on sales. Claimant testified that he earned an average of $700 per week in wages, plus $480 per week in commissions. Claimant's testimony regarding his wages earned is not supported by the wage records in evidence.

11. Claimant submitted no wage records reflecting his earnings prior to date of his injury. Claimant's wage records consist of reports of wages from June 4, 2023 to July 1, 2023, and reports of commissions earned from April 1, 2023 to June 30, 2023. Claimant's wage report (Ex. E, p. 13) shows Claimant's "year-to-date" commissions totaled $4,774.95 as of June 30, 2023. Excluding the period of April 23, 2023 through June 12, 2023 - the time Claimant did not work while recovering from surgery – and assuming Claimant had no other time off, Claimant worked a total of 17 3/7 weeks from January 1, 2023 to June 23, 2023. Based on Claimant's submitted wage records, commissions averaged $273.11 per week for the above-period.

12. Respondents submitted a document purporting to set out Claimant's earnings from November 30, 2022 to January 28, 2023. (Ex. E). Exhibit E shows Claimant received commissions and wages totaling $11,008.05 for this 13-week period, including commissions totaling $1,260.35. (Ex. E). Based on Respondents' Exhibit E, Claimant's average weekly wage was calculated at $846.77. The ALJ does not find Respondents' Exhibit E reliable. No credible evidence was admitted indicating the source of the document, or how the information was compiled. Moreover, the document lists four weeks Claimant worked in excess of 40 hours, but the "gross payment" on the document is calculated based on an hourly wage of $18.22, without the inclusion of overtime wages.

13. The ALJ finds credible Claimant's testimony that he earned $700 per week in wages prior to his injury. Based on the available evidence, the ALJ finds that Claimant earned $273.11 per week in commissions at the time of this injury. Claimant's average weekly wage at the time of injury was $973.11.

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 TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD

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

Claimant has failed to establish an entitlement to temporary total disability benefits related to his cervical surgery on April 22, 2023. Claimant was off work from April 23, 2023 to June 12, 2023 to recover from cervical surgery. Claimant has failed to establish that he sustained a cervical injury or that the need for surgery was related to his February 15, 2023 work-injury. Because no medical records were offered or admitted into evidence, the ALJ is unable to determine the nature of Claimant’s cervical injury, or the surgery performed. The lack of medical documentation prevents the ALJ from determining whether Claimant’s treating physicians determined that Claimant’s need for surgery was the result of an injury that occurred in the course of his employment, or due to a condition unrelated to his February 15, 2023 rib injury. Although a compensability determination does not require medical evidence, Claimant offered no cogent or credible explanation as to how his February injury caused a cervical injury that did not manifest until April 22, 2023. The mere fact that Claimant’s neck symptoms began two months after his work injury is insufficient to establish a causal relationship between the two events. Because Claimant has failed to establish that the need for cervical surgery was related to his work injury, he has failed to meet his burden of proving entitlement to temporary total disability benefits for that his loss of earnings from April 23, 2023 to June 12, 2023.

Average Weekly Wage

Section 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's average weekly wage (AWW) based on the earnings at the time of injury as measured by the Claimant’s monthly, weekly, daily, hourly, or other earnings. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called “discretionary exception”. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Indus. v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant’s AWW at the time of injury is not a fair approximation of Claimant’s later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

For the reasons set forth in Findings of Fact 10-13, the ALJ concludes that a fair approximation of Claimant's average weekly wage as of February 15, 2023 was $973.11.

ORDER

It is therefore ordered that:

1. Claimant request for temporary total disability benefits is denied and dismissed.

2. Claimant's average weekly wage as of February 15, 2023 was $973.11.

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: December 26, 2023

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a low back and cervical spine injury in the course and scope of his employment on January 31, 2023.

IF CLAIMANT SUSTAINED A WORK RELATED INJURY, THEN:

II. Whether Claimant proved by a preponderance of the evidence that Claimant was entitled to authorized, reasonably necessary medical benefits that were causally related to the January 31, 2023 work injury.

III. Whether Claimant proved by a preponderance of the evidence that selection of a physician passed to Claimant, who selected Bradley R. Hakim, D.O. at Spine One, Spine & Sport Medical Center.

IV. Whether Claimant proved by a preponderance of the evidence that the cervical surgeries performed by Michael Rauzzino, M.D. on May 25 and 26, 2023 were reasonable, necessary, and related to the January 31, 2023 work injury.

V. Whether Claimant proved by a preponderance of the evidence what his average weekly wage ("AWW") was at the time of the work injury.

VI. Whether Claimant proved by a preponderance of the evidence entitlement to temporary partial disability ("TPD") benefits from February 9, 2023 ongoing until terminated by law.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on March 31, 2023 on the issues of compensability, medical benefits, authorized provider, AWW, and TTD/TPD benefits from February 9, 2023 ongoing. Respondents filed a Response to "Claimant's March 31, 2023 Application for Hearing" on May 1, 2023. No additional issues were listed.

Claimant testified on his own behalf in this matter. Respondents tendered the deposition testimonies of N. Neil Brown, M.D. and Michael Rauzzino, M.D., under Exhibits I and J, respectively.

Respondents indicated that Employer's witness and Claimant's supervisor, who was under subpoena, was unavailable to testify due to a family emergency, and this ALJ authorized the parties to take a post hearing deposition of the witness, which later took place on December 1, 2023. The parties submitted position statements on December 15, 2023.

FINDINGS OF FACT

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

1. Claimant was 60 years old at the time of hearing. Claimant was a service manager for Employer since May 25, 2022, having been hired on November 21, 2019 in a different position. As a service manager, Claimant was required to meet with customers, write up proposals, occasionally move parts and return parts that were ordered, but not needed, for Employer's business of repairing cars. Claimant would generally work a 44 hour week, and in addition to hourly pay of approximately $26.23, was provided with "spiffs" or additional compensation, which were monetary compensation when certain thresholds were reached.

2. Claimant had an extensive pre-injury history of medical treatment to his cervical and lumbar spine. Claimant credibly testified that he had a previous neck surgery at C6-C7 in 2005, and at C5-C7 in 2015. Claimant testified that he had a right-sided lumbar treatment at L4-S1 in 2018.

3. On May 17, 2018 Claimant reported to Lydia Prusinowski, PA-C at the Medical Center of Aurora emergency room (ER), that he had been reaching for a coffee pot and had an acute flare of low back pain. The next records is from September 5, 2021 when Claimant presented to the same ER after he was walking down the stairs and missed the last couple steps, falling and striking his head on a concrete wall, reporting neck pain with no acute findings and a concussion diagnosis, and a right ankle pain with soft tissue swelling and an avulsion fracture of the right ankle. He had full range of motion of the neck but there was no mention of symptoms of the lumbar spine.

4. Claimant was attended by Dr. Bradley Duhon, a neurosurgeon at Front Range Spine, on October 20, 2021 primarily for his lumbar radicular symptoms. Claimant reported bilateral lower extremity radicular pain in a similar distribution in both legs, primarily down the lateral aspect of the thigh, which occasionally traveled down the anterior/posterior aspect of the thigh as well. Claimant had diminished sensation to light touch in the lateral aspect of the left calf and left thigh. Dr. Duhon personally reviewed the MRI of the lumbar spine, which showed surgical decompression and laminotomy defect with a slight central disc protrusion but otherwise he stated that they showed "absolutely no ongoing stenosis at the L4-S1 levels." He ordered a new MRI though and an EMG. There was no mention of the cervical spine during this visit.

5. Claimant had an MRI of the cervical spine performed on March 18, 2020 which noted that showed no herniation or foraminal stenosis of C2-C4 and C7-T1. It showed a tiny osteophyte complex with mild foraminal stenosis with unchanged degenerative disc at C4-5. It showed the spinal fusion at the C5-7 levels with bilateral facet arthrosis which was unchanged. Dr. Robert Leibold specifically noted no changes since March 14, 2019. An MRI of the lumbar spine was performed on November 4, 2021 that showed multiple Schmorl's nodes, small protrusions from T11-12 to L5-S1, mild left lateral recess narrowing at L2-3 and no recurrent protrusions or central canal narrowing at L4-5 or L5-S1. Another MRI was performed on November 22, 2021 which noted a broad based protrusion at the C3-4 and C4-5 levels otherwise no significant issues other than multilevel facet joint arthritis.

6. Although the medical records have many diagnostic tests performed after Claimant's cervical surgery in 2015 and lumbar surgery in 2018, no treatment records were produced after 2018 and prior to Claimant's fall on January 31, 2023 other than the September 5, 2021 fall where Claimant hit his head and the evaluation on October 2021 for the lumbar spine.

7. Claimant was seen on September 9, 2022 at the Belmar emergency Department after he fell against a wall, hitting his head. They took a CT of the head and cervical spine, which showed no acute lesion, and the ACDF[1] C5-C7 without complete osseous fusion across the disc spaces or pseudarthrosis.

8. Claimant credibly testified that he had no physical limitations imposed upon him following this date and was able to carry out his job without difficulties, despite having the occasional headache, neck ache or back ache, which he was able to handle.

9. Claimant credibly testified that on January 31, 2023, he parked in a handicapped spot because the other spots in Employer's parking lot and the [Redacted, hereinafter CA] parking lot adjacent to Employer's premises were all full, and Claimant had a valid handicapped tag from a prior disability. While exiting his vehicle, Claimant slipped on ice, falling, hitting his head, and landing on his low back. A customer approached him, Claimant was able to pick himself up off the ground and entered the building.

10. Claimant immediately reported his injury to his manager, who was his supervisor (hereinafter Supervisor). Claimant was hunched over, holding his right arm and explained what had happened including that he had a large bump on his head and asked her to look at it, which she did not. Claimant was dazed and a little light headed. She pulled out a bottle of roll-on cream and instructed him to put some cream on the areas of pain and return to work. Supervisor confirmed most of this testimony.

11. Claimant was not provided with a list of medical providers when he reported his injury. As his condition worsened, he chose to treat at Spine One, having seen a commercial on television. Supervisor confirmed his testimony. Claimant testified that he had never treated with Spine One prior to the accident on January 31, 2023.

12. Supervisor confirmed that she did not become aware of the procedure to provide a list of four medical providers until another employee was injured and obtained them from [Redacted, hereinafter MR]. She confirmed that Claimant reported the injury and accident to her on the day that it happened but that she did not report the injury to MR[Redacted] until February 14 or February 15, 2023.

13. On February 9, 2023, Claimant reported to Spine One, Spine & Sport Medical Center where he was evaluated by Bradley R. Hakim, D.O., complaining of neck pain following "1/31/2023 slipped on ice walking in to work." Claimant was complaining of stabbing, aching, burning, tingling, numbness. Dr. Hakim took a history of present illness:

> The patient is a 59-year-old male with PMHx C5-7 ACDF, L4-S1 decompressive surgery who presents to the clinic today with neck, right upper extremity, mid back,

[1] ACDF refers to an anterior cervical discectomy and fusion.

low back and bilateral lower extremity pain which began after a slip and fall on 1/31/2023. The patient slipped on ice while walking work.

Neck and right upper extremity pain: The patient describes his pain as 7-10 out of 10 in severity. 85% of the pain is in the neck and 50% and is his right upper extremity. He describes aching to sharp pain in the neck, burning pain with paresthesias in the upper extremity. He does experience subjective extremity weakness on the right. His pain radiates in roughly a C6-8 distribution. Right rotation particularly worsens his symptoms. His sleep is affected. Valsalva is positive. He denies bowel bladder changes. He has a history of C5-7 ACDF in 2015, he did have C6-7 ACDF in 2011 prior to that which was extended. He has not recently tried physical therapy or chiropractic care and his *pain was controlled before the slip and fall*. He does use Advil and CBD cream.

Mid back pain: The patient describes his mid back pain is about 4 out of 10 in severity. This is beneath the scapula roughly around T9. He denies any anterior radiating pain here

Low back and bilateral lower extremity pain: The patient describes his low back pain as 4-6 out of 10 in severity**.** This is in the low back and extends on the left lower extremity in roughly an L5 distribution, and on the right side to the groin. His pain is constant, aching to sharp in quality. There is no position of relief. His sleep is affected. Valsalva is positive. He does have a history of L4-S1 decompressive surgery in 2018. (*Emphasis added.*)

Dr. Hakim provided Claimant a note stating Claimant was to be off work for the following two weeks and "beginning today and ending on 2/23/23." He diagnosed cervical radiculitis, thoracic spondylosis without myelopathy and lumbar radiculitis. He noted that Claimant's pain and symptoms significantly worsened and he began to have radicular type pain after the slip and fall on ice on January 31, 2023. He ordered x-rays, diagnostic imaging, and medications as medically necessary and related to the work injury.

14. Claimant provided the release from work from Spine One to Supervisor after his February 9, 2023 visit. Claimant was not provided a doctor's list from Respondent Employer.

15. On February 14, 2023 there was a MR[Redacted] Triage Incident Report. The initial contact stated Claimant was not present during the call. Supervisor alleged that about 15 days prior to the call Claimant was getting out of his truck, when he slipped on ice and fell. Claimant sought treatment at his primary care doctor and was restricted from work until February 23, 2023. Claimant then called in to complete the report, reporting he had hit his head on the ground and needed further treatment. Claimant reported he had worsening tingling in the lower back, neck, fingers and toes. The nurse advised Claimant to contact the claim adjuster about his follow up care needs.

16. The follow up MR[Redacted] report stated that Claimant was present when the call was made. It reported that Employer was notified of the January 31, 2023 incident on the day of the accident. It specified that Claimant injured his bilateral neck, that there was a referral to a provider that was not in the Employer's designated network. It specifically noted "EE states he prefers to seek treatment with the initial treating provider," and that Claimant would advise them of the physician utilized. No provider is listed on the form.

17. Respondent Employer filed a "First Report of Injury or Illness" on February 15, 2023, indicating that Claimant had notified Employer on January 31, 2023 of Claimant's multiple body injuries from falling after getting out of his truck. It stated that:

> EE not present at time of call. *Supr alleges about 15 days ago EE was getting out of his truck,* not clocked in when EE slipped on ice and fell. *EE sought treatment at his primary care doctor at Spine Doctor* 8500 Pine One 80124, 303-367-2225[2] and EE is restricted from work until 2/23/23. Supr stated that EE had previous injuries to his head. Complete demographic info unavailable at time of call. Caller agrees to have EE call MR[Redacted] Injury Triage for completion of report. Fall or Slip Injury Fall/Slip on Ice or Snow (*Emphasis added.*)

Supervisor completed the FROI noting Claimant was being seen by Spine Doctor in Lone Tree and this ALJ infers that it was "Spine One."

18. On February 16, 2023, Claimant was evaluated by William E. Ballas, PA-C at Spine One. On exam he observed, tenderness to palpation (TTP) of the cervical spine facet joints, increased with facet loading, positive Spurling's, normal strength, an absent deep tendon reflex at the biceps and triceps bilaterally. He was TTP over the thoracic facet joints, especially over the T6-10. Claimant was TTP over the lumbar facet joints, had increased pain with lumbar flexion, EHL,[3] positive straight leg test on the left greater than the right. PA Ballas noted that Claimant had undergone imaging of his cervical spine on February 14, 2023, which Dr. Malisa Lester of Park Meadows Imaging, interpreted as follows:

> C2-3*: Mild disc bulge with foraminal extension, eccentric to the left*. Mild left uncovertebral arthrosis with moderate left and minimal right facet arthrosis. Moderate to severe left foraminal stenosis *with encroachment of the let C3 nerve root*. No significant central or right foraminal stenosis.
>
> C3-4*: Mild to moderate disc bulge with foraminal extension***,** eccentric to the right. Mild to moderate (right greater than left) uncovertebral arthrosis with moderate left facet arthrosis as well as a small right facet joint effusion. Right-sided extra-spinal synovial cyst along the posterior facet joint. Mild ligamentous hypertrophy. Flattening of the ventral thecal sac, without significant central stenosis. Moderate to severe (right greater than left) biforaminal stenosis *with encroachment of the bilateral C4 nerve roots***.**
>
> C4-5: *Mild to moderate disc bulge with foraminal extension, eccentric to the left.* Mild (left greater than right) uncovertebral arthrosis with mild to moderate (left slightly greater than right) bilateral facet arthrosis and trace left facet joint effusion. Mild ligamentous hypertrophy. Flattening of the ventral thecal sac without significant central stenosis. Moderate left and mild to moderate right foraminal stenosis *with encroachment of the bilateral C5 nerve roots* (left greater than right). (*Emphasis Added*.)

PA Ballas' impressions included post-surgical changes, moderate to severe C2-3 and C3-4 biforaminal stenosis with encroachment of the C3 and C4 nerve root, advanced facet

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[2] Spine One's correct address was Spine One, 8500 Park Meadows Drive, Suite 200, Lone Tree, CO 80124; (P) 303-367-2225.

[3] EHL may refer to the Extensor Hallucis Longus muscle, which typically indicates pain radiating into the first metatarsal and great toe.

arthrosis, as well as moderate left and mild right foraminal stenosis of the C4-5 with bilateral encroachment of the C5 nerve root. He continued to assess cervical and lumbar radiculopathy and thoracic spondylosis. He ordered an epidural steroid injection of the cervical spine, and thoracic spine as well as medial branch block for the lumbar spine. PA Ballas provided a work restrictions of no lifting, pushing, pulling, twisting, bending, carrying, or climbing with any weight over 10 lbs.

19. Claimant was evaluated at the emergency room on February 22, 2023 by Dr. Kimberly Moreland with concerns of numbness and tingling in his face. A head and neck CT revealed no evidence of vascular dissection, thrombosis, aneurysm, intracranial hemorrhage, intracranial mass lesion and no other acute findings on exam.

20. On February 23, 2023 PA Ballas reported that Claimant had a prior neck surgery and some degenerative changes but he was doing well until the January 31, 2023 fall, causing some disc protrusions, pain and symptoms. On February 27, 2023 he recommended Claimant continue to be off work through mid-March as Claimant's pain continued to be high and stroke had been ruled out from a visit to the emergency room and exam continued to be consistent with prior evaluations. PA Ballas also referred Claimant for bilateral cervical MBB for diagnostic facet mediated pain and to be evaluated by a Neuro/Spine surgeon.

21. On February 24, 2023, Claimant filed with the State of Colorado a Worker's Claim for Compensation alleging injuries to his "head, neck, middle and lower back affecting arms and legs." Claimant wrote that he had "parked in handicap (have plates) got out of my truck, slipped on ice, falling, hitting my head and landing on my back." He noted that he had multiple bulges in his neck compressing the nerves. Claimant indicated he reported the injuries to Supervisor on January 31, 2023. He provided the name of his physician at Spine One as Dr. Hakim.

22. On March 14, 2023 Respondents filed a Notice of Contest for further investigation of preexisting injury, and review of prior medical records.[4]

23. PA Ballas issued another work restriction report on March 14, 2023 keeping Claimant off work until after his upcoming procedure is done and he is reevaluated. On March 20, 2023 he referred Claimant to neurosurgery and continued off work.

24. Claimant underwent the CMBB with Dr. Hakim on March 17, 2023 with directions to complete a pain log. PA Ballas referred Claimant to Dr. Michael Rauzzino, a neurosurgeon for evaluation on March 20, 2023, noting Claimant had no improvement with the C7-T1 ESI but had improvement from the CMBB at the C2, C3, C4, C7 and C8 levels.

25. Claimant was evaluated by Dr. Rauzzino, the neurosurgeon, and Stephen Ladd, PA-C, on March 28, 2023.[5] He stated that:

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[4] A second Notice of Contests was filed on June 7, 2023 still for investigation of preexisting conditions.

[5] The March 28, 2023 report states that the "rendering provider" was Dr. Rauzzino but the report was authored by PA Ladd. Dr. Rauzzino indicated that he examined Claimant with his PA and the PA wrote the report. This ALJ makes the logical choice to conclude that both providers saw Claimant and that PA Ladd completed the final report.

> It was not until January 2023, when he slipped and fell at work on some ice, I believe, and hit his head, and that he developed increased neck pain with shooting pain down the right arm and some numbness and tingling in his hand, especially with range of motion. He rates the pain around 6/10 to 7/10. It is aggravated by such things as sleeping, lying down, coughing, sneezing, or significant range of motion of his spine. He has had a hard time at work due to this injury and pain. He ultimately went to SpineOne and is getting treatment in the form of an epidural steroid injection, which did not provide any significant relief. In March, he underwent medial branch blocks in the cervical spine with about 85% to 90% relief over a day or so before wearing off. He has not had an ablation rhizotomy as of yet, only medial branch blocks.

PA Ladd reviewed x-ray and MRI of the cervical spine and noted they showed advanced facet arthrosis throughout his upper cervical spine with worsening at C3-C4 with edema within the facet joint and some posterior facet cysts and a possible cleft in the implant at the C5-6 when compared to the C6-7 level. He ordered an additional CT to review the fusion stability and noted that Claimant might benefit from cervical injections.

26. Dr. Rauzzino ordered a CT of the cervical spine, which took place at Park Meadows Imaging on March 30, 2023, which Dr. Lester found unchanged from the MRI of February 14, 2023.

27. On April 17, 2023 Claimant was "quite miserable" and not getting any better with a pain at 7/10 to 8/10 which is dull, stabbing, aching, burning and throbbing in nature, with symptoms radiating to his arms and hands. Following multiple considerations regarding Claimant's options, Dr. Rauzzino recommended an ACDF at the C3-4 and C4-5 levels to take place at Skyridge Medical Center on May 25, 2023. This was documented by Derrick Winckler, PA-C.

28. Claimant had an independent medical evaluation by N. Neil Brown, M.D. at Respondents' request, who issued a report on May 4, 2023. He took a history consistent with Claimant's testimony at hearing including that "he had a large bump on his head and he had pain in his neck and shoulders, into the right arm, minimal into the left arm, his midback, low back, and bilateral legs." Dr. Brown noted Claimant had reported the injuries to his manager and was given ointment but not sent to a provider, so he chose one. On exam he noted an unremarkable neurologic exam except for decreased light sensation in his left lateral thigh. Claimant had difficulty standing up from a sitting position, decreased cervical lordosis, and tenderness in the paraspinal muscles, trapezius muscles and mild spasms. He had painful range of motion, with extension worse than flexion, pins and needles sensation with 30 degrees of flexion of the neck. In the low back Claimant was TTP in the midline. He reviewed the medical records including imaging. He concluded that "aside from the cervicogenic headaches, the malfusion of the previously operated levels at C5-6 and C6-7, the cervical degenerative disc disease and cervical spondylosis are preexisting." He also opined that "[T]his gentleman has had an aggravation of his pre-existing cervical and lumbar degenerative processes," but that the proposed surgery at the C3-4 and C4-5 levels is not medically necessary.

29. On July 1, 2023 Dr. Rauzzino wrote a response to Dr. Brown's report and specifically contested Dr. Brown's positions, noting that:

I have had the opportunity to treat [Claimant] as a patient in our neurosurgery clinic. I am asked to discuss the causality of his need for surgery related to the injury sustained on 01/31/23. I have reviewed imaging and have had the opportunity to review the independent medical evaluation provided by Dr. N. Neil Brown dated 05/04/23.

Dr. Brown noted that he did not have my records available to him to incorporate into his evaluation. This limits the accuracy and effectiveness of his report to a significant degree.

* * *

Dr. Brown is in fact correct about a number of points. He is correct in stating that [Claimant] had significant preexisting cervical degenerative disc disease that in itself was not caused by the accident and existed at the time of the accident. He is also correct in that the patient likely had a pseudoarthrosis at C5-C7 at the time of the accident. Most importantly correct that [Claimant] sustained an injury to the cervical spine and that [Claimant]'s cervical spine conditioned (sic.) had been aggravated by the fall. It is the aggravation of [Claimant]'s pre-existing condition that led for the need for new treatment and eventually surgery.

I disagree with his opinion on the need for the proposed surgery at C3-C4 and C4-C5. Dr. Brown does not provide any information to indicate that [Claimant] was being actively treated for severe neck pain in the period immediately prior to his fall. [Claimant]'s [sic.] was then *asymptomatic* from a treatment standpoint prior to the fall.

* * *

I believe [Claimant]'s case to be relatively straightforward.

[Claimant] has had previous surgery which caused advanced preexisting degeneration at the levels above that surgery.

He was more prone than is the average person to sustain injury in a fall because of his previous surgery.

[Claimant] was not being actively treated for severe neck pain in the period immediately prior to his fall.

The fall is an appropriate mechanism to produce injury to the cervical spine and his preexisting degenerative arthritis was aggravated significantly to the point that he could not be treated non-surgically and required surgical treatment of the symptomatic degenerated discs and facets at C3-C4 and C4-C5 with an anterior/posterior fusion.

* * *

[Claimant] had a fall, his neck became symptomatic, he failed conservative therapy, and he underwent surgery which was an appropriate treatment. At the time of surgery, I had to consider that in addition to the injured discs at C3-C4 and C4-C5, he may have aggravated preexisting pseudarthrosis at C5-C6 and C6-C7; this was also treated at the time of surgery.

30. Respondents took the deposition of IME physician, Dr. Brown on July 7, 2023, a board certified neurosurgeon that has been a Level II accredited physician for the past three years. Dr. Brown agreed that it would be helpful if there were clinical

examinations to document what symptoms Claimant was having, rather than just radiological studies prior to the date of the injury. He noted that the right sided facet joint effusion was not a part of the preexisting condition but could not state whether it was caused by the incident of January 31, 2022. He also enquired regarding pre-injury symptoms and none were documented immediately before the accident other than what he had had years before. Claimant's findings on exam relied on the subjective complaints of the patient during the exam and the comparison to prior records, and tenderness of the facets was a really deep muscle palpation and could be related to the fall.

31. Dr. Brown agreed that the reason to operate was symptoms, and that many people had failed fusions, but did not have symptoms. A neurosurgeon would not operate based on diagnostics alone. It was Dr. Brown's opinion that the restrictions assigned on February 9, 2023 by Bradley R. Hakim, D.O. were appropriate for the symptoms Claimant was complaining of following his injury, and that Claimant had no restrictions prior to February 9, 2023. Dr. Brown also agreed that the restrictions assigned on February 16, 2023 were appropriate. However, Dr. Brown was unable to say "greater than 50%" that the symptoms Claimant was complaining of on February 9, 2023 were related to his fall on January 31, 2023. He questioned whether there was, in fact, an incident, since he did not have anything from employer reporting the incident.

32. Dr. Brown was of the opinion that surgery at C5-C6, C6-C7 was reasonable and necessary, but he was unwilling to give an opinion on the relatedness of that surgery. Further, he was unwilling to give an opinion as to whether the surgery at C3-C4, C4-C5 was reasonable because he stated it was uncommon for Canadian neurosurgeons like himself to proceed with surgery without radicular symptoms, just neck pain, unlike Colorado neurosurgeons that are more aggressive in their treatment plans. Lastly, he questioned why the radiographs in 2021 and 2022 were ordered without having corresponding physician clinical notes. Despite this, he also agreed with Dr. Rauzzino that Claimant was more prone than the average person to sustain an injury in a fall because of his previous surgery and pseudarthrosis because there was stress concentration at the level immediately above and the level immediately below his prior fusion, which were more susceptible to injuries.

33. On August 14, 2023 Dr. Rauzzino kept Claimant under restrictions due to his neck surgery.

34. On September 25, 2023 Respondents took the deposition of Dr. Rauzzino, Claimant's treating provider, a neurosurgeon who performed Claimant's cervical spine surgery and had been Level II accredited for approximately 15 years. Dr. Rauzzino continued to opine, at his deposition, that Claimant had not received treatment for his neck before Claimant's fall, specifically noting as follows:

> Q. You've not been provided with any treatment records, though, relating for treatment on the neck before my client's fall, have you?
>
> A. No. In fact, when he saw Dr. Duhon in 2021 after the fall, Dr. Duhon would have been in a position to discuss cervical symptoms with him. But in that office visit he only discussed with him leg pain. If [Redacted, hereinafter RS] had, you know, significant neck pain that he's sitting – he had the opportunity to visit with a neurosurgeon, who is a doctor who treats

neck and back pain, and yet on that visit there was no mention made of neck pain, there was no request for treatment, there was no request for imaging or anything like that.

So my guess is – or not my guess – my impression of looking at this case is that RS[Redacted] did have some neck pain, and that's not surprising after a two-level fusion and after having some arthritic changes above it.

It's my opinion as a Level II provider that after the fall he developed new, worsening symptoms as a result of the fall that he didn't have prior, and that's what necessitated the additional treatment. And from a causation standpoint, that would be the causality, that were it not for the fall, he wouldn't have the abrupt change in the symptoms because he had the opportunity to seek injections and all those things in the period prior to all of this, but there is no record of him seeing a doctor at SpineOne for other symptoms in 2021, 2022, it was only immediately after he had this new injury that he sought treatment in the form of these injections and required additional treatment and then surgery.

Q. It appears then you have not changed the opinions you set forth in your letter of July 1st, 2023, based on the questioning today?

A. No, sir.

Q. And finally, Doctor, in light of the fact that you're not going to be there at hearing but RS[Redacted] is going to testify that the pain complaints following his fall have now gone away following the surgery you performed, does that anecdotal information support the decision you made to recommend surgery and proceed with the surgeries you performed?

A. Yes.

35. As found, Dr. Rauzzino's opinion is found more credible and persuasive than the contrary opinion of Dr. Brown. As found the diagnostic testing performed following the January 31, 2023 work related accident were significantly different than those performed prior to this date.

36. As found, Claimant's testimony is in direct contradiction to Dr. Brown's findings that the pain was preexisting. There were no medical treatment notes to support that Claimant was receiving active treatment immediately before January 31, 2023, for the lumbar spine or cervical spine, other than the diagnostic testing.

37. As found, Dr. Brown's opinion that Claimant did not suffer an injury, and if he did, that any accident did not result in the need for surgery at C3-C4, C4-C5 is not persuasive, is found not to be reasonable based on all the evidence.

38. As found, following Claimant's February 9, 2023 evaluation, he was assigned a restriction of "be off work for the next 2 weeks beginning today and ending on 2/23/23," which Claimant provided to his supervisor. Supervisor testified she did not ask Claimant if the restrictions were due to his January 31, 2023 injury. As found,

Respondents did not provide Claimant work within his restrictions at any time subsequent to this date until Claimant returned to work for employer.

39. As found, Claimant credibly testified after providing the document to Supervisor, he was not permitted to work, and requested TPD benefits starting on February 9, 2023, as his employer continued to pay him some funds even though he was not working.

40. As found, Claimant's AWW was $2,377.13, based upon his year-to-date earnings the year immediately prior to his injury. Claimant credibly testified that in 2022 he was on a leave of absence for an unrelated concussion injury and did not commence work until May 25, 2022. Claimant provided a W-2 reflecting that he had earned $75,051.37, and that between May 25, 2022 and December 31, 2022, a period of 221 days, his daily rate was $339.59, which results in an AWW of $2,377.13. Respondents maintained that Claimant's hourly pay was $26.23, and did not dispute that he was required to work 44 hours a week, but challenged Claimant's entitlement to include other compensation in the AWW calculation because the other compensation was not guaranteed. However, Respondents provided pay records after February 9, 2023 through June 2023, which reflected that Claimant continued to receive his other compensation on a monthly basis throughout the entire time following his January 31, 2023 injury, even though he was not working. Therefore, this ALJ concluded that Claimant was entitled to the additional compensation despite not working and the fair calculation of Claimant's AWW should include all of Claimant's social security wages.

41. Because Claimant continued to receive other compensation, although he was not working, Claimant was not entitled to TTD benefits, but rather TPD for any week beginning as of the week of February 9, 2023 when he did not earn his AWW of $2,377.13.

42. After he was taken off of work, Claimant was awarded social security benefits in the amount of $2,138.00 per month from approximately February 9, 2023 through approximately August 2023.[6] He was also initially awarded short-term disability benefits at the rate of $327.00 per week, of which some of it was paid back to Employer from Claimant's earnings upon his return to work. However, the exact amount was not clear.[7]

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

CONCLUSIONS OF LAW

A. Generally

[6] There is some uncertainty of whether this was a full seven months. Claimant should provide the documentation of each payment received to Respondents.

[7] If Employer took back approximately $2,574.00 yet Claimant received $327.00 per week for the short-term disability for the full multiple weeks this could very well have exceeded the amount reimbursed and Respondents should get credit for any overpayments, or vice versa.

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

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

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

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

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

B. Compensability

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

A preexisting condition does not preclude a claim for compensation and an injury is compensable if an industrial injury aggravates, accelerates, or combines with the preexisting condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a preexisting condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1959); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the preexisting condition. *Finn v. Industrial* Commission, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the preexisting condition. *Faulkner v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, *supra*; *Allee v. Contractors, Inc.,* 783 P.2d 273 (Colo. 1989); *Eastman Kodak Co. v. Industrial Commission*, 725 P.2d 85 (Colo. App. 1986), overruled on other grounds, *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *Montgomery v. HSS, Inc.*, W.C. No. 4-989-682-01 (August 17, 2016). Compensable medical treatment includes medical evaluations, diagnostic evaluations and medical care.

Causation may be established entirely through circumstantial evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Medical evidence is neither required nor determinative of causation. A claimant's testimony, if credited, may alone constitute substantial evidence to support an ALJ's determination concerning the cause of the claimant's condition. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997);

Apache Corp. v. Industrial Commission, 717 P.2d 1000 (Colo. App. 1986); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

As found, Claimant has credibly and persuasively shown that he slipped and fell on January 31, 2023 while exiting his vehicle at work. He has further shown by a preponderance of the evidence that it is more likely than not that he suffered injuries arising out of and in the course of his employment while exiting his vehicle on the Employer's premises. As found, Claimant's accident directly and proximately caused the injuries to his cervical and lumbar spine which included substantial aggravation of his preexisting condition. Dr. Rauzzino's opinions are persuasive and support the claim that it is more likely than not that Claimant had an aggravation of the underlying degenerative condition of his cervical spine requiring surgical repair. Dr. Hazim's opinions are persuasive that Claimant aggravated his lumbar spine and required further therapy and other treatments, including injections in order to bring him back to baseline.

As found, on February 9, 2023, Dr. Hakim noted neck and low back pain from a slip on ice at work. Dr. Hakim placed Claimant on work restrictions and ordered MRIs. As further found, following the incident and accident of January 31, 2023, PA Ballas noted on February 16, 2023 that Claimant had disc bulges at C3-C4 and C4-C5. As found, Dr. Hakim and PA Ballas credibly and persuasively documented Claimant's increase in physical findings. As found, Claimant credibly and persuasively testified to this increasing symptom of pain in his lumbar spine and limitations in range of motion in his cervical spine triggered by the January 31, 2023 accident and consequently triggered the Claimant's need for medical treatment. As found, Claimant's need for treatment and disability (as Claimant was placed on temporary work restrictions) were the proximate result of the January 31, 2023 work related injury and were not just the natural consequence of the preexisting condition. As concluded, had the injury not occurred Claimant would have likely continued to work without restrictions, Claimant would have likely continued to maintain his symptoms under control without requiring further care. As further concluded, but for the accident of January 31, 2023, Claimant would not have required the treatment currently being recommended. As found, Dr. Rauzzino's opinions are persuasive and support the claim that it is more likely than not that Claimant had an aggravation of the underlying degenerative condition of his cervical spine requiring surgical repair. As found, Dr. Hazim's opinions are persuasive that Claimant aggravated his lumbar spine and required further therapy and other treatments in order to bring him back to baseline. These opinions are more credible and persuasive as well as more convincing than the contrary opinions of Dr. Brown. As found and concluded, Claimant has shown by a preponderance of the evidence that it is more likely than not that Claimant suffered a compensable aggravation of his preexisting condition to his lumbar and cervical spine when he exited his vehicle and slipped on the ice on January 31, 2023.

B. Authorized, Reasonably, Necessary and Related Medical Benefits

Respondents are liable for authorized medical treatment which is reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101(a), C.R.S. (2023); *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including

medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course and scope of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Clam Appeals Office*, *supra at* 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability, but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co*., *supra* at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, *supra*.

The Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio*, *supra* at 716 (Colo. 1994). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for medical treatment. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents provide injured workers with a list of at least four designated treatment providers. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2 additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office*, *supra*; *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom an ATP refers the claimant in the normal progression of authorized treatment or chain of referral. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v.*

Dunagan, *supra*. Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office*, 197 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 6-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation*, WC 5-073-549-001 (ICAO, Mar. 2, 2020).

As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonably necessary and causally related medical benefits for his work related injuries caused by the fall of January 31, 2023, including care for his low back and cervical spine. Supervisor testified that she had notice of the injury on January 31, 2023 when Claimant reported the injury to her and Supervisor later documented that notification on the FROI. Supervisor was Employer's representative and was deemed to know how to supervise the employees that reported to her. There is no record that Respondents provided Claimant a designated provider list within the seven days as required by law. In fact, Supervisor testified that she was not aware of the requirement to provide the four provider list until a little before her testimony, after another employee was injured. Therefore, selection of an authorized treating provided passed to Claimant and Claimant selected Dr. Hakim and Spine One. Claimant was evaluated by Dr. Hakim for acute neck and low back pain on February 9, 2022, and Claimant provided the note from that evaluation to Employer, but Claimant was still not provided with a list of four providers. Claimant then followed up with Spine One on February 15, 2023. Further, Claimant's care from Dr. Rauzzino at Front Range Spine was within the chain of referral, as PA Ballas, Dr. Hakim's PA, and was reasonable, necessary medical care related to the January 31, 2023 work injury. Claimant was never provided an appointment with a designated provider.

Claimant is credible and persuasive in his testimony that Supervisor advised Claimant to continue to treat at Spine One. As found, Supervisor, in effect, advised Claimant to pursue care with his primary care provider ("PCP") at Spine One, which was, in effect, a referral to his PCP. Claimant's Application for Hearing specifically notified Respondents of Respondents' refusal to treat. No other persuasive evidence that Respondents responded to the notice was within the records or evidence provided at hearing. Claimant identified Spine One to be the provider. As further found, the refusal to treat and Respondents' failure to identify a provider that was willing to treat Claimant caused the right of selection to pass to Claimant and Claimant designated Spine One, who is now Claimant's treating provider, together with the providers within the chain of referral including Front Range Spine, Sky Ridge Medical Center and Park Meadows Imaging.

As found, Claimant has proven by a preponderance of the evidence that he was entitled to receive reasonably necessary and causally related medical benefits for his work related injuries caused by the fall of January 31, 2023, including care for his low back and cervical spine. Respondents noted that they had notice of the injury on January 31, 2023 listing the date of their notice on the FROI.

Respondents argued that Claimant's need for surgery, as supported by Dr. Brown's opinion, was from his preexisting conditions, despite the accident of January 31,

2023 (if there was an accident) because it was inevitable due to the arthritic and degenerative process caused by the prior injuries and surgeries, not because of any aggravation caused by any fall. Dr. Brown's opinions are not found persuasive. As explained by Dr. Rauzzino, Claimant's need for surgery was caused by traumatic forces on the preexisting condition. The degenerative spine alone did not cause the need for a cervical fusion. The exponential increase in symptoms is what caused the need for surgery. And this is well supported by Claimant's testimony that while he had some pain and discomfort prior to the January 31, 2023 accident, those symptoms were controlled by some medications, but Claimant was able to carry out his job, which occasionally required him to lift and carry heavy items. As found, following the work injury of January 31, 2023, the pain was not tolerable, the symptoms were frequent and Claimant's range of motion in the cervical spine was limited. All these new symptoms and serious pain were the cause for the need for cervical fusions at C3-C4 and C4-C5 recommended and performed by Dr. Rauzzino on May 25, and 26, 2023. All of these new symptoms aggravated the underlying preexisting condition, and proximally cause the compensable work related injury of January 31, 2023. As found, Claimant has shown by a preponderance of the evidence that it was more likely than not that the cervical fusions were reasonably needed and related to the January 31, 2023 work related injury.

D. Average Weekly Wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine Claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 2007).

Claimant credibly testified that in 2022 he was on a leave of absence for an unrelated concussion injury and did not commence work until May 25, 2022. Claimant provided a W-2 reflecting that he had earned $75,051.37, for earnings between May 25, 2022 and December 31, 2022. This was a period of 221 days, providing a daily rate of $339.59, which resulted in an AWW of $2,377.13.

Respondents maintained that Claimant's hourly pay was $26.23, and did not dispute that he was required to work 44 hours a week, but challenged Claimant's entitlement to other compensation. It was Respondents' position that Claimant's

entitlement to other compensation was not guaranteed. However, Respondents provided pay records after February 9, 2023 through June 2023, which reflected that Claimant continued to receive his other compensation on a monthly basis throughout the entire time following his January 31, 2023 injury, even though he was not working. Therefore, this ALJ concludes that Claimant was entitled to the additional compensation despite not working and the fair calculation of Claimant's AWW should include all of Claimant's social security wages. The fair calculation of Claimant's AWW was $2,377.13 based upon his year-to-date earnings the year immediately prior to his injury.

C. Temporary Disability Benefits

To prove entitlement to temporary disability benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-103(1)(a); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain indemnity benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric,* 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office,* P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic, supra*.

To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Thus, if the injury in part contributes to the wage loss, TPD benefits must continue until one of the elements of Sec. 8-42-106(2), C.R.S, is satisfied. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). Section 8-42-106(2)(a), *supra*, provides that TPD benefits cease when the employee reaches maximum medical improvement.

Following Claimant's February 9, 2023 evaluation, he was assigned work restriction be off work for the next 2 weeks, which Claimant provided to his supervisor. Supervisor testified she did not ask Claimant if the restrictions were due to his January 31, 2023 injury. As found, Respondents did not provide Claimant work within his restrictions at any time subsequent to this date until Claimant returned to work for employer months later. Further, as found, Claimant credibly testified after providing the document to Supervisor, he was not permitted to work, and he requested TPD benefits starting on February 9, 2023 and ongoing. Because Claimant continued to receive other compensation, although he was not working after February 9, 2023, when looking at his wage records, Claimant was not entitled to temporary total disability (TTD) benefits, but

rather TPD based upon any week after February 9, 2023 when he did not earn his AWW of $2,377.13.

After he was taken off of work, Claimant was, awarded short term disability benefits for a period of time though the parties did not provide paperwork showing exact payments. The payments were partially credited back to Employer in the amount of $2,574.00 from Claimant's earnings upon his return to work. However, the exact amount Claimant received was not clear. Claimant was also awarded social security benefits in the amount of $2,138.00 per month from February 9, 2023 until he returned to work, though this again is not clear. Therefore, Claimant proved by a preponderance of the evidence that he was entitled to temporary partial disability benefit beginning February 9, 2023 when his authorized medical provider gave him a work restriction note, which Claimant provided to his Supervisor.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a work related injury to his low back and cervical spine in the course and scope of his employment on January 31, 2023.

2. Respondents shall pay for all authorized reasonably necessary and related medical benefits including the cervical fusions performed by Dr. Rauzzino on May 25, and May 26, 2023, as well as all providers from Spine One as well as all providers within the chain of referral, including Front Range Spine, Sky Ridge Medical Center, Park Meadows Imaging and any other the facility where Claimant was treated within the chain of referral. All payments to providers shall be in accordance with the Colorado Medical Fee Schedule.

3. If Medicare or Medicaid have paid any portion of the medical benefits, Respondents shall reimburse them in accordance with Section 8-42-101(6)(a), C.R.S. Further, if Claimant has paid any funds out of pocket, Respondents shall reimburse Claimant the full amount paid by Claimant, even if more than is required by the fee schedule pursuant to Sec. 8-42-101(6)(b), C.R.S.

4. Claimant's average weekly wage is $2,377.13.

5. Within ten days of this order, the parties shall exchange information regarding the payments of social security benefits and short term disability benefits as well as any credits taken by Employer.

6. Respondents shall pay temporary partial disability benefits from February 9, 2023 and ongoing, until terminated by law, subject to applicable offsets and credits following calculations after the above exchange of information.

7. Claimant has established that some of his short term disability benefits were returned to Employer by withholding Claimant's wages. Respondents shall consider these and any other returned wages in the calculation of benefits. The parties shall calculate the exact amount of indemnity benefits owed considering all offsets and credits.

8. Respondents shall pay Claimant statutory interest in the amount of eight percent (8%) per annum due to Claimant and not paid when due.

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

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

DATED this 27th day of December, 2023.

Digital Signature

By: _____
ELSA MARTINEZ TENREIRO
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-215-083-003

ISSUES

- Did Claimant prove he sustained a compensable injury?
- Is Claimant entitled to medical benefits?
- Did Claimant prove he is entitled to temporary disability benefits?
- What is Claimant's Average Weekly Wage?

FINDINGS OF FACT

1. Claimant was employed as a production truck driver for [Redacted, hereinafter TM]. He worked there for approximately 5 years. He would work 12 hour shifts, four on, four off, rotating schedule. His job consisted of hauling coal from a conveyor belt located in a tight area where he filled a front end loader with the coal and then maneuvered the vehicle in a tight area and deposited the coal at the other end of the pit. Claimant estimated that it would take 3 maneuvers to exit the area where he picked up the coal. Claimant alleges that he sustained a repetitive work injury on June 6, 2022 as the result of operating the coal truck and front end loader.

2. Claimant testified that prior to the coal front end loader, he was on the dirt crew with newer trucks. It was not until after he started driving the coal front end loader that he began having pain in both shoulders.

3. The coal front end loader uses joy stick controls to maneuver the truck around. The joystick on the left moves the vehicle forward and reverse. The two joysticks on his right lifted and tilted the bucket. He also testified that he experienced a rough ride since the vehicle bounced quite a bit as he drove over rough terrain. As he bounced in the vehicle, it would jar both of his shoulders. Claimant would also operate a coal truck and sometimes a bull dozer. The coal truck was a smaller haul truck and they were old trucks. They had an automatic transmission shifter. They were harder to drive that the dirt trucks. A lot of times the power steering wouldn't work. He would have to crank the steering wheel and that would cause his pain in both his shoulders.

4. Sara Nowotny, a vocational evaluator, performed a job demands analysis for the Claimant's job duties on February 21, 2023. This included observing other employees performing the job duties that Claimant did when he had the onset of shoulder pain. She issued a report dated February 24, 2023. In her report, she found that Claimant's job duties did not have risk factors present for the claimant's shoulder diagnoses including vibrations, awkward positions, repetitive activities or forceful and repetitive activities.

5. Claimant continued to work full duty as scheduled on and after June 6, 2023 until August 24, 2023, when he reported the claim to his employer.

MEDICAL EVIDENCE

6. On the day he reported his claimed injury, Claimant sought treatment at Memorial Regional Health Clinic in Craig, Colorado. Physician's assistant Jordan Fisher obtained the following history "[Redacted, hereinafter JT] is a 62 yr male presenting for evaluation of bilateral shoulder pain. The patient is the primary historian. This is a workman's compensation visit. Patient states symptoms started in June. This did not start with a particular incident or injury. Patient works at TM[Redacted] and states he operatives (sic) heavy equipment. He is concerned that repeated movements at work have caused his shoulder pain. States pain is predominantly in the deltoid areas. It is worse in the right shoulder than the left. It has been particularly bad the past couple of days after patient has been driving large trucks where he has to pull very hard on the steering wheel. Also reports he was using a joystick a few weeks ago and this made the pain worse as well". Additionally, the chart indicated that Claimant will be referred to orthopedics for further evaluation.

7. Claimant returned to Memorial Regional Health Clinic on September 1, 2022, and saw Aaron Stewart, D.O. that day. Claimant told Dr. Stewart his bilateral shoulder pain, right worse than left, continued and had worsened over the past month. Dr. Stewart wrote, "The pain is located on his lateral shoulder and is made worse with movement of his arm. He works as a heavy machinery operator and using the joysticks and controllers on the machines has been steadily worsening the pain. He denies radiation of pain, numbness, tingling, or muscle weakness." Claimant's physical exam was interpreted to show, "Decreased RUE AROM in overhead movement. TTP overlying deltoid area, normal muscle strength in flexion, extension, internal/external rotation, pain elicited on R empty can test. TTP overlying L deltoid region." Dr. Stewart did not discuss claimant's job tasks, identify repetitive job activities, obtain a job description, discuss the repetitive injury sections of the Workers' Compensation Treatment Guidelines, or perform a causation analysis. However, he wrote, "Work related pain of b/l shoulders, R worse than left." He thought claimant's December 2021 right biceps tendon tear, "[S]eems unrelated to the pain he is currently having." He thought Claimant had a likely "overuse injury." He referred Claimant to physical therapy, and stated claimant was unable to work from August 24 until October 7, 2022.

8. Claimant began physical therapy on September 19, 2022.

9. Claimant began treatment with Steamboat Orthopedics and Spine on October 26, 2022. He was referred there by Dr. Stewart. An MRI of the right shoulder was performed at the facility on that day. The MRI report showed Moderate right supraspinatus tendinosis with a mostly high-grade articular surface tear of the tendon anteriorly at the insertion with a small superimposed full-thickness component of supraspinatus tendon tear seen on a single image; Mild subscapularis tendinosis; Marked long head biceps tendinosis; Mild AC joint osteoarthritis; and Non-arthrogram findings suspicious for nondisplaced tears in the posterior labrum at the 9:00 position and the superior labrum

just anterior to the biceps anchor.

10. Claimant discussed the MRI that was taken with P.A. Fleming. He performed a cortisone injection to his right shoulder. He also discussed potential surgery to the right shoulder, but noted that any potential surgery would have to occur after he lowered his A1c level, which was at a 9.

11. Dr. Sauerbrey saw claimant on December 13, 2022. Dr. Sauerbrey wrote, "He hurt himself about 6 months ago. He is a coal miner. That history is outlined in the chart. The right shoulder is really the one that it all started with. When he injured his right shoulder, he was having to use his left shoulder more and that became symptomatic." Dr. Sauerbrey saw claimant's biceps tendon rupture in his examination, and said he understood it happened, "[B]ack in January. That was not worked up." He reviewed claimant's right shoulder MRI, and thought the images showed, "There is a high-grade articular surface tear of the supraspinatus tendon with some full-thickness component seen anteriorly. There is tendinosis of the subscapularis. The biceps tendon is obviously ruptured with a remnant tendon there and there is AC joint arthritis." Dr. Sauerbrey also did not perform a causation analysis or assess claimant's shoulder based on the Colorado Workers' Compensation Medical Treatment Guidelines. Dr. Sauerbrey made assumptions about the specifics of claimant's job duties, hours, activities, repetitive activities, whether the shoulders were involved in any repetitive work activities, or how claimant performed his job duties.

12. Dr. Raschbacher testified that he performed an IME on April 27, 2023. He evaluated the Claimant in person and took a history from the Claimant. He also reviewed the medical records provided and specifically reviewed the job demands analysis prepared by Sara Nowotny.

13. After review of the medical records, Claimant's history and Ms. Nowotny's report, Dr. Raschbacher provided a causation analysis. He states, in response to a query from Respondent's counsel "The physical activities described by JT[Redacted] and those activities in the job description are not medically likely to be sufficient to cause anatomic or physiologic injury to the right shoulder or the left shoulder. He had preexisting degenerative disease at both shoulders, clearly not caused by any particular physical activity. He did not have risk factors delineated in the job description or in his own description that would or likely would cause injury to either the left shoulder or the right shoulder, by the rotator cuff or other types of injury. There is simply not a mechanism of injury that would likely cause anatomic injury or disruption, particularly to both shoulders".

CONCLUSIONS OF LAW

A. Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical

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

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); *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). In assessing credibility in this case, I have considered the testimony of the Claimant and the testimony of the other witness presented by both parties.

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).

B. Compensability

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).

Claimant has failed to sustain his burden of proof that his shoulder symptoms are causally related to his work duties with the employer. I have considered Dr. Sauerbrey's opinions as to the causal relationship of the Claimant's shoulders to Claimant's work. However, Dr. Sauerbrey's conclusory opinions are not based on a critical analysis of the facts or Claimant's job duties. I conclude that the job demand analysis performed by Sara Nowotny is credible and persuasive in describing the job duties of Claimant with respect to his work on the coal crew. The analysis does not identify any significant risk factors that would account for the Claimant's shoulder complaints. I also conclude that testimony and written opinions of Dr. Raschbacher are credible and persuasive that the physical activities performed by Claimant would not have been sufficient to cause anatomic or physiologic injury to either shoulder. These opinions as to causation are persuasive since they are based on a consideration of the job demand analysis performed by Sara

Nowotny, as well as the history given Claimant and the available medical records, taken as a whole.

ORDER

It is therefore ordered that:

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

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

DATED: December 27, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-210-684-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on May 19, 2022.

2. Whether Claimant established by a preponderance of the evidence entitlement to reasonable and necessary medical benefits to cure or relieve the effects of an industrial injury, including surgery recommended by Jeffrey Oster, DPM.

STIPULATIONS

1. The parties stipulated that Claimant's average weekly wage is $2,150.00.

FINDINGS OF FACT

1. Claimant has worked for Employer for nearly twenty-four years as an substation journeyman electrician. Claimant's job requires him to maintain electrical service for customers in the Alamosa, Colorado area. Claimant's job duties included responding to electrical service calls, walking, standing, climbing, and driving. Claimant credibly testified that worked 10-12 hours per day, four days per week, with frequent overtime, and that he spent approximately 80 percent of his working hours on his feet. To perform his job duties, including climbing utility poles, Claimant wore lineman's boots, which Claimant described as tight, lace up boots.

2. Claimant testified that on May 19, 2022, he was working for Employer and needed to go to the Employer's service center for training. He parked his truck in the service center parking lot, and exited his truck. After taking a couple of steps, he noticed a sharp pain in his left ankle that he had never experienced before. Claimant testified that the pain was located at the back of his ankle, where the bottom of the Achilles tendon connects to the heel. He testified that his ankle was bruised, swollen, and tender, with a large bump on his heel. Claimant credibly testified that he had no prior issues with his left ankle or heel, and had not had pain in his heel or ankle prior to May 18, 2022.

3. Claimant testified that when the pain did not go away, he notified his supervisor, [Redacted, hereinafter JI], and was advised to contact the company nurse and safety hotline. Claimant contacted the company nurse, and was ultimately given the option to see several different providers. Claimant elected to go to the SLV health Occupational Medicine Clinic.

4. On May 26, 2022, Claimant saw Tasha Alexis, M.D., at the SLV Health Occupational Medicine clinic in Alamosa. Claimant reported he was walking across a

parking lot and started to feel pain in his left ankle. Claimant denied falling, tripping, or rolling his ankle. On examination, Claimant's posterior ankle was tender to palpation, with bruising and redness. Dr. Alexis diagnosed Claimant with an strain of the left Achilles tendon, and referred him to podiatrist Jeffrey Oster, DPM. (Ex. B).

5. Claimant saw Dr. Oster on June 20, 2022. Dr. Oster's examination revealed pain in the posterior lateral aspect of the left heel consistent with Haglund's deformity, and mild hypertrophy over the posterior left heel compared to the right. Dr. Oster considered differential diagnoses of insertional Achilles tendinitis versus Haglund's deformity (a bony growth on the heel bone), and recommended a trial heel lift to help determine the more likely diagnosis. (Ex. 6).

6. Claimant returned to Dr. Oster on July 12, 2022 after using the heel lift for approximately three weeks. Dr. Oster noted the heel lift helped establish that Claimant's symptoms were specific to insertional Achilles tendinitis, and not simple Haglund's deformity. He discussed a surgical procedure to correct his condition, including removal of the Achilles tendon, and resection of the posterior left heel with reattachment. (Ex. 6).

7. At his August 2, 2022, visit with Dr. Oster, Claimant discussed his desire to pursue a partial resection of the heel and transposition of the Achilles tendon, recommended by Dr. Oester. Dr. Oster reiterated that Claimant's condition was specific to insertional Achilles tendonitis. He noted that "[Claimant] correlates with overuse syndrome of the left heel associated with working greater than 20 years on his feet as a lineman." (Ex. 6).

8. On August 22, 2022, Respondents filed a Notice of Contest regarding Claimant's claim, indicating the claim was contested for further investigation. (Ex. G).

9. Claimant returned to Dr. Alexis several times over the following months. Dr. Alexis opined that Claimant's injury was due to prolonged standing and walking while performing his job duties. Claimant reported his condition was progressively worsening, and was aggravated by work activities. (Ex. 5).

10. On December 23, 2022, Claimant filed a second Worker's Claim for Compensation related to the May 19, 2022 incident. In this report, the May 19, 2022 incident was described as follows: "I twisted my foot/ankle while jumping out of my F350 work truck. I felt immediate pain upon landing on the ground." (Ex. 2). The incident description contained in the December 23, 2022 claim form is inconsistent with Claimant's testimony and Claimant's medical records.

11. On March 7, 2023, Dr. Oster responded to correspondent from Respondents regarding the cause of Claimant's condition. In response to the question "is [Claimant's] work incident of 5/19/22 the proximate cause of his current condition?" Dr. Oster checked "NO" and wrote "This is a problem with insidious onset and cannot be specifically relational to one incident." In response to the question "Is [Claimant's] condition as described above, with medical certainty, directly related to his employment?" Dr. Oster checked "No" and wrote "This condition would have occurred regardless of employment type." (Ex. 6).

12. On April 26, 2023, Claimant had an MRI of the left ankle, which showed partial-thickness tearing and tendinosis at the insertion of the Achilles tendon; a cyst-like change at the Haglund's deformity; and other non-symptomatic conditions.[1] (Ex. E).

13. On May 31, 2023, Dr. Alexis documented that she was "closing this claim" and that Claimant was placed at maximum medical improvement (MMI). However, Dr. Alexis also noted that Claimant was not at MMI and that he had not had any meaningful intervention for his left ankle/foot condition. The ALJ infers that Dr. Alexis' MMI determination was not based on Claimant reaching a point of MMI from a medical perspective. (Ex. 5).

14. On October 2, 2023, Claimant underwent an independent medical examination (IME) with Barry Ogin, M.D., at Respondent's request. Dr. Ogin testified at hearing, and was admitted as an expert in physical medicine and rehabilitation, and occupational medicine. Based on his review of medical records and examination of Claimant, Dr. Ogin opined that had a congenital Haglund's deformity, retrocalcaneal bursitis, and Achilles tendinopathy, with MRI evidence of partial-thickness tearing and moderate to severe tendinosis at the distal Achilles insertion. Dr. Ogin opined that Claimant's left foot and ankle condition was not work-related, that the condition occurred insidiously. He testified that wearing tight work boots, walking, and standing can cause symptoms in the Achilles area, because the Achilles tendon runs over the Haglund's deformity. However, these activities would not have caused Haglund's deformity itself.

15. Dr. Ogin agreed that the surgery recommended by Dr. Oster is reasonable and necessary, but does not believe Claimant's condition is causally related to his employment, and would have occurred regardless of employment. Dr. Ogin opined that Claimant did not sustain a specific traumatic injury to his Achilles, and that while walking across a parking lot, Claimant's underlying intrinsic heel pathology became symptomatic. He further noted that after the initial onset of pain, Claimant continued to report pain in the posterior heel, which became significant after a full day of work, and upon standing in the morning. He noted this was consistent with Achilles tendinopathy.

16. Dr. Ogin opined that the development of Claimant's condition was not due to occupational activities because "simply walking and getting out of a truck would be considered an activity of daily living." Dr. Ogin's opinion regarding the legal compensability of Claimant's claim, rather than medical causation, is not within his expertise, and is of no evidentiary value.

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*

[1] Respondents' expert, Dr. Ogin credibly testified that the remaining findings on the MRI did not contribute to Claimant's current condition.

§ 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, 050719 WC 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*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

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). 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 arising out of the course of his employment with Employer. Specifically, the conditions of Claimant's employment, including walking in lineman's boots, combined with Claimant's pre-existing Haglund's deformity to aggravate his Achilles tendon, resulting in insertional tendonitis that manifested on May 19, 2022, while walking to the service center for training. Claimant had a pre-existing, asymptomatic Haglund's deformity in his left heel. Dr. Ogin testified that wearing tight boots, walking, and standing can cause Achilles symptoms in the heel due to the presence of a Haglund's deformity. Claimant's symptoms did not merely "occur" at work, they were caused by his work activity. At the time of his injury, Claimant was in the course of his employment with Employer, and was walking from his truck to the service center for training. Getting from his vehicle to the service center for training is sufficiently related to Claimant's work-related functions to be considered part of his service to Employer. The ALJ does not find credible Dr. Ogin's testimony or Dr. Oster's opinion that Claimant would have developed the same condition regardless of his employment.

Claimant credibly testified that before May 19, 2022, he had no pain or medical issues with his left ankle/heel area, and no credible evidence was admitted suggesting otherwise. Claimant's testimony that his ankle was bruised, swollen, and tender after the May 19, 2022 incident is confirmed by Dr. Alexis' objective findings during her May 26,

2022 examination. The presence of swelling, bruising, and tenderness is indicative of an injury to Claimant's heel or ankle. Based on these symptoms, Claimant sought and received medical treatment, which he would not have received but for his employment.

MEDICAL TREATMENT

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

Because Claimant has established a compensable injury, Claimant has also established an entitlement to authorized medical treatment that his reasonable and necessary to cure or relieve the effects of his injury. Based on Dr. Oster's surgical recommendation, and Dr. Ogin agreement that such treatment is reasonable and necessary, Claimant's request for authorization of surgery is granted.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his left heel (insertional tendonitis of the Achilles tendon) arising out of the course of his employment on May 19, 2022.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

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

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

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

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 27, 2023

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